

**OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**  
**AND**  
**REPORT**

**TO THE**  
**GOVERNOR OF VIRGINIA**

*From July 1, 1936, to June 30, 1937*

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**RICHMOND:**  
**DIVISION OF PURCHASE AND PRINTING**  
**1937**



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DIVISION OF PURCHASE AND PRINTING  
1937



# Letter of Transmittal

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COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY-GENERAL,  
RICHMOND, VA., July 1, 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 the annual report and opinions of the Attorney General. Pursuant to the statute, I have accompanied my report with only such official opinions of the office as would seem to be of general interest, or helpful in promoting uniformity in the construction of the laws of the State.

In addition to the opinions included in this report and the suits pending and disposed of as shown therein, the Attorney General has held numerous conferences with public officers and others relating to the business of the State and its various departments and agencies, and has responded to many inquiries for information from State and Federal agencies and the general public.

During the past fiscal year there has been collected through this office for the Division of Motor Vehicles the sum of \$8,944.01 upon undisputed claims consisting chiefly of taxes upon motor fuel. There have also been conducted for the Director of the Division of Motor Vehicles twenty-seven hearings held in different parts of the State.

There were instituted through this office and local attorneys one hundred and seventy-four condemnation cases in the various circuit courts of the Commonwealth for the Highway Commissioner to acquire rights of ways during this period. The titles to several hundred tracts of land have been examined, and abstracts and reports thereof passed on by this office.

For the Alcoholic Beverage Control Board, hearings have been held in connection with the application for three hundred and ninety-five licenses and proceedings for the revocation of one hundred and ninety-five. Assistance also has been rendered from time to time to attorneys for the Commonwealth in trial court proceedings pertaining to the alcoholic beverage control act.

Approximately forty applications for refunds of entrance fees paid by foreign corporations are now pending before the State Corporation Commission awaiting final determination of the case of *Atlantic Refining Company v. Commonwealth* pending in the Supreme Court of the United States.

There have also been many miscellaneous proceedings, such as escheats, settlement of old tax claims and judgments, adjustments of controversies with departments of the Federal Government, attendance at extradition hearings and hearings before the State Corporation Commission, consultations with the Governor, State Treasurer, Comptroller and investment bankers in connection with the refunding of the Virginia Century Bond Issue, and other kindred matters.

Respectfully submitted,

ABRAM P. STAPLES,  
*Attorney General.*

**Personnel of the Office**  
(Postoffice address Richmond)

NAME	COUNTY	OFFICIAL TITLE
ABRAM P. STAPLES.....	Roanoke city.....	Attorney General
EDWIN H. GIBSON.....	Culpeper.....	Assistant
W. W. Martin.....	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.....	1934-1936

\*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, and was elected November 2, 1937, for a term of four years.

### Cases Decided in the Supreme Court of Appeals of Virginia.

1. *Bell, Norfleet v. Commonwealth*. From Circuit Court of Nansemond County. Affirmed.
2. *Bottoms, Sam v. Commonwealth*. From Circuit Court of Brunswick County. Seduction. Reversed.
3. *Brownley, Warren L. v. Commonwealth*. From Circuit Court of Mathews County. ABC Act. Error confessed.
4. *Campbell, Carl v. Commonwealth*. From Corporation Court of city of Bristol. ABC Act. Reversed.
5. *Clark, Cephas v. Commonwealth*. From Circuit Court of Carroll County. Assault. Affirmed.
6. *Commonwealth of Virginia v. Whiting Oil Company, Inc.*, Hustings Court of City of Roanoke. Garage license. Decided for the Commonwealth.
7. *Davidson, G. C. v. Commonwealth*. From Circuit Court of Wythe County. Murder. Affirmed.
8. *Falden, Robert Cornelius v. Commonwealth*—No. 1795. From Corporation Court of city of Danville. Conspiracy to rob. Reversed.
9. *Falden, Robert Cornelius v. Commonwealth*—No. 1796. From Corporation Court of city of Danville. Conspiracy to rob. Reversed.
10. *Farewell, Posey H. v. Commonwealth*. From Circuit Court of Tazewell County. Bigamy. Affirmed.
11. *Hagy, A. R. v. Commonwealth*. From Circuit Court of Buchanan County. Petty larceny. Reversed.
12. *Huffman, Sylvian E. v. Commonwealth*. From Circuit Court of Augusta County. Murder. Affirmed.
13. *Hutzler, Ray v. Commonwealth*. From Circuit Court of Frederick County. ABC Act. Error confessed.
14. *Ingle, Glenn v. Commonwealth*. From Circuit Court of Washington County. Larceny. Dismissed.
15. *Johnson, Richard v. Commonwealth*. From Corporation Court of City of Newport News. ABC Act. Reversed.
16. *Kennedy, Roy v. Commonwealth*. From Corporation Court of City of Norfolk. ABC Act. Reversed.
17. *Langhorne, William H., et als., Trustees, and others v. The Sinking Fund Commissioners of Virginia*. Petition for writ of mandamus. Century bonds. Petition refused.
18. *Longman, Samuel v. Commonwealth*. From Corporation Court of City of Norfolk. Receiving stolen goods. Affirmed.
19. *Maxwell, Edith v. Commonwealth*. From Circuit Court of Wise County. Murder. Reversed.
20. *Morgan, James M. v. Commonwealth*. From Corporation Court, Part Two, of the city of Norfolk. Vagrancy. Affirmed.
21. *Mosby, Willie v. Commonwealth*. From Circuit Court of Campbell County. Murder. Affirmed.
22. *Nelson, J. W., Jr. v. Commonwealth*. From Circuit Court of Mathews County. Murder. Affirmed.
23. *Pamplin, Eugene v. Commonwealth*—No. 1. From Corporation Court of city of Radford. Violation of section 4551 of the Code. Affirmed.
24. *Pamplin, Eugene v. Commonwealth*—No. 2. From Corporation Court of city of Radford. Violation of section 4551 of the Code. Affirmed.
25. *Powell, Gordon H. No. 1 v. Commonwealth*. From Corporation Court of city of Danville. Forgery. Reversed.
26. *Prichard, A. M. v. State Highway Commissioner (of Virginia)*. From Circuit Court of Augusta County. Condemnation proceedings. Affirmed.
27. *Robertson, F. A. v. Commonwealth*. From Corporation Court of city of Lynchburg. Manufacturing ice cream without a permit. Reversed.
28. *Rohanna, George and Charles Riddick v. Commonwealth*. From Corporation Court, Part Two, city of Norfolk. Peace Bond. Reversed.

29. *Smith, Rosa v. Commonwealth.* From Circuit Court of Tazewell County. Murder. Reversed.
30. *Trout, Wilbur F. v. Commonwealth.* From Circuit Court of Warren County. Manslaughter. Affirmed.
31. *Wolfe, Douglas v. Commonwealth.* From Circuit Court of Smyth county. Larceny. Reversed.
32. *Zimmerman, Leslie v. Commonwealth.* From Circuit Court of Bedford county. Murder. Affirmed.

#### **Cases Pending in the Supreme Court of Appeals of Virginia.**

1. *Cole, Robert E. v. Commonwealth.* From Hustings Court of City of Richmond. Employment agency license.
2. *McCarron, Joseph P., Executor, et al. v. Commonwealth.* From Corporation Court of City of Lynchburg. ABC Act.
3. *Parker, Hubert and Eddie Williams v. Commonwealth.* From Corporation Court of City of Bristol. ABC Act.
4. *Rainey, Lloyd William v. Commonwealth.* From Corporation Court of City of Norfolk, No. 2. Attempt to rape.
5. *Ryan, Mary T. v. Commonwealth.* Circuit Court of Nelson County. Income tax.
6. *Virginia Electric and Power Co. v. Commonwealth.* State Corporation Commission. Franchise tax.
7. *Watterman, Cam. v. Commonwealth.* From Circuit Court of Russell County. Malicious shooting.

#### **Cases Pending in the Supreme Court of the United States.**

1. *Atlantic Refining Co. v. Commonwealth.* Entrance fee of foreign corporation. Set down for reargument.
2. *Highland Farms Dairy, Incorporated, and Luther W. High v. J. P. Agnew, Chairman; Kone Brugh and T. R. Snavely, as Members of the Milk Commission of the Commonwealth of Virginia.* From the District Court of the United States for the Eastern District of Virginia. Constitutionality of Virginia Milk Act.

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

1. *Bank of Chincoteague v. Commonwealth.* Circuit Court of Accomac County. Tax on bank stock. Settled.
2. *Branch, Blythe v. Commonwealth.* Chancery Court City of Richmond. Income tax.
3. *Branch, Phyllis v. Commonwealth.* Chancery Court City of Richmond. Income tax.
4. *Bryant, James v. Commonwealth.* Corporation Court City of Lynchburg. Operators' license law. Judgment for defendant.
5. *Bryant, Wm. J. v. Commonwealth.* Circuit Court of Chesterfield County. Operators' license law. Dismissed.
6. *Commonwealth v. Continental Oil Company.* Circuit Court of the City of Richmond. Motor Fuel tax. Settled and Dismissed.
7. *Commonwealth v. First National Bank.* Circuit Court of the City of Richmond. Motor vehicle law. Settled.
8. *Commonwealth v. F. C. Lens, Jr.* Circuit Court of the City of Richmond.
9. *Commonwealth v. James Gilliam.* Circuit Court of Wise County. Motor vehicle license tax. Judgment for defendant. Writ of error refused.
10. *Commonwealth v. Meehan, Edward A.* Circuit Court of the City of Richmond. Notice of motion for judgment.
11. *Commonwealth v. Sam'l and Louis Miller.* Circuit Court of the City of Richmond.

12. *Commonwealth v. Edward T. Haynes, Committee of H. Stewart Jones and American Surety Company of New York.* Circuit Court of the City of Richmond. Settled.
13. *Commonwealth v. Pure Oil Co.* Circuit Court of the City of Richmond. Motor fuel tax. Settled and dismissed.
14. *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.
15. *Commonwealth, Ex. Rel. State Highway Commissioner of Virginia v. John F. Proffitt, et als.* Circuit Court of Nelson County. Suit for recapture of Front Street, Lovings-ton, Virginia.
16. *Commonwealth, at the relation of State Highway Commissioner v. Claude Ratliff.* Circuit Court of Buchanan County. Suit for mandatory injunction to require landowner to remove obstructions from highway. Injunction granted.
17. *City of Petersburg v. Virginia State College for Negroes.* Hustings Court City of Petersburg. Real estate tax.
18. *Davis, Marion v. D. A. Stover, et als.* Circuit Court of Dickenson County. Action for damages against employees of Highway Department. Judgment for defendants in lower court. Writ of error applied for by defendants.
19. *Farmers and Merchants Bank of New Church v. Commonwealth.* Circuit Court of Accomac County. Tax on bank stock. Settled.
20. *Fishburn's Estate, Callie L. v. Commonwealth.* Court of Law and Chancery City of Roanoke. Inheritance tax.
21. *Flynn, Nora Langhorne v. Commonwealth.* Chancery Court of City of Richmond. Income tax.
22. *Garrenton, C. W. v. Commonwealth.* Circuit Court of Norfolk County. Judgment for Commonwealth.
23. *Gibbs, Greene B. H. v. Commonwealth.* Circuit Court City of Richmond. Suit for damages to real estate.
24. *Gibson, Irene L. v. Commonwealth.* Chancery Court City of Richmond. Income tax.
25. *Gillespie, M. R. v. Jas. Cain, and Commonwealth of Virginia, Co-defendant.* Circuit Court of Amherst County. Judgment in garnishment proceedings against Co-defendant.
26. *Gilpin, Carl v. Commonwealth.* Circuit Court Washington County. Operators' license law. Dismissed.
27. *Greyvan Lines, Incorporated v. Commonwealth.* Circuit Court City of Richmond. Motor vehicle license tax. Settlement made and dismissed.
28. *Hyman, A. A. v. H. G. Shirley, Highway Commissioner.* Circuit Court City of Richmond. Suit in equity.
29. *Huff-Cook Mutual Burial Association v. Commonwealth.* State Corporation Commission. License tax.
30. *Hughes, J. Aubrey, Adm. C. T. A. of the Estate of Sallie J. Clements, deceased v. Commonwealth of Virginia, et al.* Chancery Court of the City of Richmond. Distribution of wrongful death damages in absence of heirs-at-law. Holding in favor of residuary legatee.
31. *Jones, James Albert v. Jno. Q. Rhodes, Jr., Director.* Circuit Court Elizabeth City County. Operators' license law. Judgment for Commonwealth.
32. *Lambert, H. R. v. Commonwealth.* Corporation Court City of Norfolk. Operators' license law. Judgment for Commonwealth.
33. *LaPrad, J. M. v. Commonwealth.* Circuit Court City of Richmond. Action for damages. Settled.
34. *Miller, Craig v. Commonwealth.* Hustings Court City of Richmond. Judgment for plaintiff.
35. *New Amsterdam Casualty Co. v. Jim Frank, et al.* Circuit Court of Richmond. Chancery suit involving distribution of funds due insolvent road contractor. Settled.
36. *Oriental Restaurant v. Commonwealth.* Corporation Court No. 1 City of Norfolk. Merchant's license. Settled.

37. *Phipps, A. M. v. D. A. Stover, et als.* Circuit Court of Dickenson County. Action for damages against employees of Highway Department. Judgment for defendants in lower court. Writ of error applied for by plaintiff.
38. *Ragland, C. A. v. Commonwealth.* Circuit Court City of Richmond. Action for alleged breach of contract.
39. *Ruffin, Geo. W. v. H. G. Shirley, State Highway Commissioner, et al.* Circuit Court Nansemond County. Application for injunction.
40. *Seaboard Air Line Railway Co. v. Commonwealth, et als.* (2 cases) State Corporation Commission. Tax on physical properties.
41. *Somma, Charles A. v. Commonwealth.* Circuit Court City of Richmond. Petition for declaratory judgment involving "Bank Night". Petition denied.
42. *Shortridge, Vicy v. H. G. Shirley, State Highway Commissioner, and Capt. A. Hardy.* Circuit Court of Buchanan County. Suit to enjoin Highway Commissioner, et al. from using right of way. Application for injunction dismissed.
43. *Starkweather, C. E. v. Commonwealth.* Circuit Court City of Richmond. Action for alleged breach of contract. Settled.
44. *State-Planters Bank and Trust Co. v. Commonwealth.* Circuit Court City of Richmond. Tax on bank stock.
45. *Stroebel, G. F. v. Jno. Q. Rhodes, Jr., Director.* Corporation Court of the City of Norfolk. Operators' license law. Judgment for Commonwealth.
46. *State Corporation Commission v. American Bank and Trust Company.* Circuit Court of the City of Richmond.
47. *State Corporation Commission v. Lloyds Insurance Company and A. B. Gathright, Treasurer.* Circuit Court of the City of Richmond.
48. *State Corporation Commission v. National Benefit Life Ins. Co. and A. B. Gathright, Treasurer.* Circuit Court of City of Richmond.
49. *Trinkle, J. E. v. Commonwealth.* Circuit Court City of Richmond. Action for alleged breach of contract.
50. *Virginia Electric and Power Company v. Commonwealth.* State Corporation Commission. Franchise tax on motor bus receipts.
51. *Virginia Lincoln Furniture Co. v. Rouse, et als.* Circuit Court City of Richmond. Attacking the validity of State Unemployment Compensation Act.
52. *Virginia Public Service Company v. Commonwealth.* State Corporation Commission. Franchise tax.
53. *Wilborn v. John G. Saunders, City Sargeant.* Circuit Court of the City of Richmond. Habeas Corpus challenging the validity of a conditional pardon. Judgment in favor of Commonwealth.
54. *Wilkins, Julia C. v. Commonwealth.* Circuit Court City of Richmond. Income tax.
55. *Willard, Belle L., Ex. of Estate of Jos. E. Willard v. Commonwealth.* Circuit Court of Fairfax County. Inheritance tax.

# OPINIONS

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## ACCOUNTANTS—Persons Holding Certificates of Other States Issued Without Examination.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 22, 1937.

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

MY DEAR MR. LEACH:

I am in receipt of your letter of March 20, which for purposes of reply I quote in full:

"This Board has under consideration an application from a citizen of this State, who holds a certificate of certified public accountant issued by another State, for the issuance to him of a Virginia certificate of certified public accountant by reciprocity, that is, by waiver of examination.

"It may be assumed that the applicant possesses the qualifications stated in section 567 of the Code of Virginia other than the passing of the examination provided therein, and that the State which issued a certificate of certified public accountant to the applicant extends similar privileges to certified public accountants of this State.

"Under the C. P. A. law of the other State, the original Board was authorized to grant certificates of certified public accountant without examination to practicing public accountants who met certain requirements and who applied therefor within one year after the passage of the act. The applicant met the requirements of the original Board and was granted a certificate of certified public accountant without formal examination.

"A question has arisen as to whether or not under the Virginia C. P. A. law as amended and re-enacted by the General Assembly in 1928 this Board has the legal right to waive the examination and grant a certificate of certified public accountant to an applicant who obtained his certificate without taking a formal examination.

"Section 569 of the Code of Virginia provides that the Board may waive the examination and issue a certificate of certified public accountant to any person who possesses the other qualifications stated in section 567, and who is the holder of a certificate of certified public accountant issued under the laws of another State which extends similar privileges to certified public accountants of this State, provided the requirements for such certificate in the State which granted it to the applicant are, in the opinion of the Board equivalent to those herein required."

"The point has been made that, whereas the original Virginia C. P. A. law provided for the granting of certificates of certified public accountant without examination to accountants who met certain requirements at the time of the passage of the Act, no such provision was included in the 1928 Act. Consequently, the requirements of our present law include the passing of an examination. Therefore, it has been argued, since the requirements of the other State at the time a certificate was granted to the applicant provided for the waiver of an examination under certain conditions, such requirements are not equivalent to those provided in our present law, and we are, therefore, precluded from issuing him a certificate of certified public accountant.

"On the other hand, it may be argued that the view stated above is too narrow and technical, and was not the intention of the framers of the Act. It would appear that the purpose of the provision was to restrict the issuance of such certificates to applicants from States whose standards are substantially as high as those of this State. Furthermore, section 569 gives the Board discretion in judging the standards of other States, for it states that the requirements of the other State shall be, 'in the opinion of the board, equivalent to those herein required'.

"In view of the question that has arisen as to the proper interpretation of section 569 of the Code of Virginia, your opinion is requested as to whether or not this Board under that section could legally waive the examination and issue a certificate of certified public accountant to the holder of a certificate of certified public accountant of another State issued to him under the conditions stated hereinbefore."

I am of the opinion that the view expressed in next to the last paragraph of your letter is the correct one. The other State to which you refer does not now grant certificates without examination, since this method of granting certificates was limited to a year. I note from your letter that Virginia also granted certificates without examination when its law was first enacted. The situation is, therefore, that the first law of the other State was substantially similar to the first law of Virginia, and the law of the other State in effect is now substantially similar to the Virginia law.

If the other provisions of the statute are met by the applicant to whom you refer, there seems to be no valid reason for penalizing him because he happens to have qualified during the year when no examination was required in the other State.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**AGRICULTURE AND IMMIGRATION—Bang's Disease—Quarantine—Enforcement.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 16, 1937.*

DR. H. C. GIVENS,  
*State Veterinarian,*  
*Richmond, Virginia.*

DEAR DR. GIVENS:

In a personal interview with you at the Attorney General's office, you submitted a letter from Honorable R. Turner Jones, Attorney for the Commonwealth of Highland county, Virginia, in which he calls your attention to the fact that a number of citizens of Highland county are objecting very seriously to the importation into that county of cattle from untested herds for Bang's disease and from counties which have not adopted the uniform Bang's disease test, and in which Mr. Jones says that it is the duty of the Highland county officers to protect the herds in that county which have been tested.

You call attention to the regulation adopted by the Department of Agriculture and Immigration of Virginia on February 25, 1937, in which, after reciting the very large number of counties in which official tests for Bang's disease have been made, it is recited that Bang's disease has been found to exist in a number of counties. The regulation prohibits the shipment of cattle from counties in which the disease has been found by the board to exist into counties in which official tests have been made.

You ask the opinion of this office as to the status of the regulation and the steps which should be taken to carry out the quarantine established by the Board.

There are three sections contained in chapter 81 of the Acts of 1930, under either of which I am of the opinion that the resolution of the board may have been legally adopted.

Section 909 of chapter 81 of the Acts of 1930 provides :

"It shall be the duty of the said board, upon receipt of reliable information of the existence among domestic animals or poultry of the State of any malignant or contagious disease, to cause the State veterinarian to go at once to the place where such disease is alleged to exist and make a careful examination of the animals or poultry believed to be affected with such disease, and ascertain, if possible, what, if any, disease exists among the live stock or poultry reported to be affected, and whether the same is contagious or infectious; and if said disease is found to be of malignant, contagious or infectious character they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. \* \* \*"

Section 907 gives to the State Board of Agriculture and Immigration blanket authority and provides :

"It shall be the duty of the State board of agriculture and immigration to protect domestic animals, including poultry. \* \* \*"

Section 920 classes Bang's abortion disease as of a contagious and infectious nature, and authorizes the State Board of Agriculture and Immigration and its authorized veterinarian to take such measures as to them may seem necessary to eradicate and prevent the spread of such disease.

There are two sections dealing with the punishment of offenders against the statute law and for violations or evasions of the rules and regulations adopted by the board.

Section 917 provides for the punishment of persons who, knowing animals to be infected with Bang's disease, permit such animals to run at large, or keep them with other animals not affected by or exposed to such disease, or who shall ship, drive, sell, trade or give away such diseased animals, or who shall move or drive domestic animals in violation of any direction, rule, regulation or order of the State Board of Agriculture and Immigration establishing and regulating live stock or poultry quarantine. This section makes any such law or rule violator guilty of a misdemeanor and provides for punishment by a fine of not less than \$10 nor more than \$100 for each of such exposed or diseased animals.

Section 919 is a blanket provision covering the case of a person who shall violate, disregard, evade, or attempt to violate, disregard, or evade any of the provisions of law, or any of the rules, regulations, orders or directions of the State Board of Agriculture and Immigration establishing and governing quarantine. This section makes any such law or rule violator guilty of a misdemeanor and provides for punishment by a fine of not less than \$10 nor more than \$100.

It would seem that the regulation adopted by the State Board of Agriculture and Immigration is legal, binding and effective, and under its provisions, I suggest that you consult with the Commonwealth's attorney and the enforcement officers of Highland county.

I might also call your attention to the fact that section 914 of the Acts of 1930 authorizes the board of supervisors of each county to quarantine against any other county in the State, on account of any contagious or infectious disease, under the supervision of the State Board of Agriculture and Immigration or its veterinarian. If the board of supervisors undertakes to establish a quarantine, I suggest that the attention of the attorney for the Commonwealth be called to the provisions of section 2743 of the Code as to public notice of such proposed action and the effective date of an ordinance of the local board.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**AGRICULTURE AND IMMIGRATION—Department of—Expenditure for Investigation of Freight Rates.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 5, 1937.*

HON. L. T. BERRY, *Secretary,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

DEAR MR. BERRY:

I am in receipt of your letter of April 2, in which you desire my opinion as to the authority of the State Board of Agriculture to expend \$100 of available funds in cooperation with other interested groups, in the preparation and presentation of evidence before the Interstate Commerce Commission in opposition to the increase in freight rates sought by the carriers, affecting certain agricultural commodities.

It seems to me that section 1253 of the Code, authorizing the Division of Markets to investigate "unfair rates in the transportation of agricultural products", is broad enough to justify this expenditure.

Of course, you are familiar with section 374a of the Code providing, among other things, that no special counsel shall be employed by any State department, except upon recommendation of the Attorney General. However, I assume that in this case the expenditure is not to be made for the employment of special counsel, but for the investigation and assembling of special data.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**AGRICULTURE AND IMMIGRATION—Fertilizer—Labels.**

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

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

DEAR MR. KOINER:

Complying with your request for my opinion upon the question whether or not, under the provisions of section 1111 of the Code, fertilizer dealers are prohibited from attaching to a fertilizer container, which has been sold, information as to the chemical constituents of the fertilizer.

This section provides that certain items, and no others, shall be branded or stamped on the container. The third item consists of the following words: "Guaranteed analysis." It is my opinion that under this item "Guaranteed analysis," the person offering the fertilizer for sale is permitted to brand or stamp on the container, or affix to the same, any chemical constituent of the fertilizer provided he is willing to guarantee the correctness of same.

You have submitted to me a card which contains the heading "Open Formula Fertilizers," which undertakes to analyze the number of pounds of various ingredients going to make up a ton, or two thousand pounds, of fertilizer. I think the contents of this analysis are proper to be contained on the card to be affixed to the fertilizer container. However, I do not think the words "open formula" are properly descriptive of the statutory requirements. This should be designated as "guaranteed analysis."

The card submitted also has a heading "Guaranteed Analysis" above the nitrogen, phosphoric acid and available potash contents. I think this is incorrect, as the statutory requirements are that this information shall be affixed to the package in addition to the guaranteed analysis. It is my opinion that the information contained on the card under the heading "Open Formula" is in fact a guaranteed analysis of the chemical content of the fertilizers.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**AGRICULTURE AND IMMIGRATION—Peanut Pickers—Licenses and Reports Required of.**

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

MR. J. H. MEEK, *Director,*  
*Division of Markets,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

DEAR MR. MEEK:

I have your letter of September 18, in which you quote from a letter received by you from Edward F. Gillette, County Agent, Suffolk, Virginia, asking certain questions arising under chapter 401 of the Acts of 1936 (Acts 1936, page 750), relating to the licensing of persons engaged in peanut picking by hand or with a machine.

Mr. Gillette first says:

"While conferring with our Commissioner of Revenue (Nansemond County) the question arose about picker operators who live and pay taxes in North Carolina and pick peanuts in Virginia. My interpretation of our Virginia law is that every picker operator that picks peanuts in Virginia, regardless of the legal residence of the operator and regardless of where the picker is listed for taxes, shall secure a Virginia peanut picker operator's license and then conform to all rules, regulations, etc. connected therewith."

Unquestionably the act applies to non-residents of Virginia engaged in picking peanuts in Virginia, as described in the act. In fact, section 1 of the act expressly provides that the license shall be secured by a non-resident.

Mr. Gillette next says:

"In case of one picker operator picking peanuts in more than one county, I would think that he would be required to secure license in only one county, but make a report to the Commissioner of Revenue in each and every county in which he picked peanuts."

I agree with his interpretation of the nature of the reports to be made. The reports are obviously for statistical purposes, and it is the intention of the act that a report should be made for each county in which the peanut picker operates. So far as the license is concerned, the act expressly provides:

"A license in one county shall be sufficient to allow the person to operate in any county of the State."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**AGRICULTURE AND IMMIGRATION—State Board of—Powers with Reference to State Lime Grinding Plant.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 16, 1936.*

LAWRENCE T. BERRY, ESQUIRE,  
*Secretary to the State Board of Agriculture,  
Richmond, Virginia.*

DEAR MR. BERRY:

I have your letter of September 22, enclosing copy of a proposed contract to be executed between the Chesapeake and Ohio Railway Company and the Board of Agriculture and Immigration in connection with the State Lime Grinding Plant near Staunton, and requesting the opinion of this office as to the board's power to enter into such a contract.

The contract in question provides for the maintenance of a side track connecting the State Lime Grinding Plant with the main line of the Chesapeake and Ohio Railway Company, and under its terms the board is made responsible for any damages sustained by railroad cars or equipment while being handled by employees of the board.

The effect of this contract would be to impose upon the Commonwealth an obligation essentially in the nature of a liability for the torts of its agents. I am unable to find in the statutes from which the board derives its powers in connection with the Lime Grinding Plant (sections 1267-1270 of the Code) any clear authority to this end; certainly there is no express provision authorizing the board to assume on behalf of the State a liability in tort.

It is therefore the opinion of this office that the board's authority to execute the proposed contract is quite doubtful, and that unless further evidence of such authority can be pointed out to us we should not be justified in approving the execution of this contract.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL—Confiscation of Automobiles—Duty of Commonwealth's Attorney Where Car Apparently Stolen.**

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

HONORABLE W. R. BROADDUS, JR.,  
*Attorney for the Commonwealth,  
Martinsville, Virginia.*

MY DEAR MR. BROADDUS:

I am in receipt of your letter of September 4, in which you state that a 1936 Ford coach, which was being used in the illegal transportation of 150 gallons of illegal liquor, was seized by an officer in the city of Martinsville. You state in effect that from the information which you have it is very possible, and indeed probable, that the car was stolen in Winston-Salem, North Carolina, and that the car was not registered in the State of Virginia.

You ask if I desire you to file information against the car, with the possibility of it being released as a stolen car and the State being required to pay the costs including an order of publication in a newspaper.

I am of the opinion that subsection (d) of section 38a of the Alcoholic Beverage Control Act, as amended in 1936 (Acts 1936, page 430), makes it manda-

tory upon the attorney for the Commonwealth to file an information against this seized property. It is quite possible that the car will be released as a stolen car, but, in view of the language of the aforesaid section, I doubt whether you have any discretion in the matter.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL—Confiscation of Automobile Engaged  
in Unlawful Transportation.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 16, 1936.*

HON. JOHN D. WHITE,  
*Commonwealth's Attorney,  
Staunton, Virginia.*

DEAR MR. WHITE:

I have your letter of the 15th instant, requesting my opinion upon whether or not section 38-A of the Alcoholic Beverage Control Act (Acts 1936, p. 429) is intended to provide for the confiscation of automobiles carrying legal liquor in quantities in excess of one gallon, without a permit from the Alcoholic Beverage Control Board.

The section referred to expressly provides for the search and seizure of any automobile in which alcoholic beverages are being illegally transported in amounts in excess of one quart.

Section 49-A (Acts 1936, p. 434) prohibits the transportation within, into or through the State of Virginia of alcoholic beverages of the kind to which you refer in quantities in excess of one gallon, except in accordance with regulations of said Board.

It is my opinion that the transportation of the sixteen gallons of liquor purchased from one of the State stores, without any permit from the Board and in violation of the regulations of the Board, constitutes a violation of section 49-A and brings the vehicle, therefore, clearly within the purpose of section 38-A to provide for its confiscation.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL LAWS—Confiscations Under—Compensation of Officers.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 2, 1937.*

HONORABLE W. P. PARSONS,  
*Attorney for the Commonwealth,  
Wytheville, Virginia.*

MY DEAR MR. PARSONS:

I am in receipt of your letter of February 26, from which I quote as follows:

"Where an automobile has been seized for illegal transportation of ardent spirits in violation of the Alcoholic Beverage Control Act, and the court has

entered an order forfeiting the car and directing the sheriff to make sale of same, and the sheriff has sold the automobile in accordance with the order of the court, I wish you would please advise, in taxing the costs incident to the seizure, forfeiture, and sale of the car, what fee should be taxed for Commonwealth's Attorney for representing the Commonwealth in information proceedings, and also what fee should be taxed for the sheriff seizing the car, and what commissions would be due the sheriff for the sale of the car."

Section 4675 (38a) of the Code, in subsection (1), plainly contemplates that the expenses of the sale, including the commissions, shall be taxed as costs. Subsection (j) provides that these costs shall be paid out of the proceeds of the sale and the residue paid into the literary fund. However, I can find no statute prescribing what the fees or commissions shall be in such cases. In my opinion, therefore, it is proper to invoke section 4960 of the Code, which provides that "when in a criminal case an officer or any other person renders any other service, for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable \* \* \*." As a suggestion as reasonable compensation, I refer to the commissions allowed a sheriff for making a sale under a levy, as contained in section 3487 of the Code.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL—Employees of—Whether Affected by  
Federal Social Security Act.**

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

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

GENTLEMEN:

This is in reply to your request for my opinion as to whether or not employees of the Alcoholic Beverage Control Board come within the provisions of the act of Congress, known as the Social Security Act, in so far as same imposes a payroll tax upon employers and employees.

Section 907 of the said act provides that "The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except— \* \* \* (6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions; \* \* \*."

Section 3, subsection (a) of the Virginia Alcoholic Control law provides as follows:

"There is hereby created as a department of the Commonwealth of Virginia the Department of Alcoholic Beverage Control. The said department shall consist of the Virginia Alcoholic Beverage Control Board and the officers, agents and employees of the Board."

It is my opinion that the employees of the Board are, by the foregoing provisions, constituted a part of this department of the Commonwealth of Virginia, and are expressly excluded from the terms and provisions of the act of Congress above referred to.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL LAW—Exchanges of Merchandise—  
Powers of Board with Respect to.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 2, 1936.

HONORABLE R. McC. BULLINGTON, *Chairman,*  
*Alcoholic Beverage Control Board,*  
*Richmond, Virginia.*

DEAR COLONEL BULLINGTON:

I have your letter of July 2, which is as follows:

"Pursuant to my letter of May twenty-seventh and referring to the conference Mr. Frazier, Senator Miller and I had with you on Tuesday.

"It is my understanding that any merchandise which we might have on hand from time to time that does not prove readily salable, it will be perfectly proper for us to trade or exchange same for merchandise that does move with any concern with whom we are doing business.

"It is also my understanding that the quantity of confiscated liquors we have on hand, which cannot be sold through our stores due to its age and other reasons, can be exchanged or traded for merchandise that can be handled in our stores.

"Any credit on this exchange or trade we might receive on such confiscated liquors shall be credited to the Literary Fund, less the necessary expense involved in transporting and putting the goods in proper condition for such exchange.

"I believe the above covers our understanding and if so, will appreciate your acknowledgment of this letter."

I beg to advise that the foregoing is a correct statement, in my opinion, relating to the authority and power of the Board with respect to the transactions referred to.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,

*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL LAW—Licenses—Beer Sales in Shenandoah Park Area.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 13, 1937.

HONORABLE HUNTER MILLER,  
*Member Alcoholic Beverage Control Board,*  
*Richmond, Virginia.*

DEAR SIR:

Replying to your letter of the 10th instant, it is my opinion that the sale of beer in the Shenandoah National Park area occupies the same legal status as in the Government Military and Naval Reservations.

In connection with the sale of beer at the Chamberlain Hotel, I am informed by the United States District Attorney, Mr. Hutcheson, that Judge Way of the United States District Court of the Eastern District of Virginia, held in a criminal proceedings brought against the operators of the hotel that it was necessary for the hotel to have a State beer license, and comply with the State Alcoholic

Beverage Control law. I am also informed that the operators of the hotel were fined in said court for selling beer without this license.

Relying therefore upon the authority of Judge Way's decision, it is my opinion that the licensees in the Shenandoah National Park must comply with the regulations of the Board.

I will call your attention to the fact that the failure to comply with such regulations would not be a violation of the State laws, but would be a violation of the Federal statutes which provide that the commission of any act upon the Government reservation, which would be a crime if committed in the State outside of the Government reservation, shall be deemed to be a Federal crime.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

P. S. Since dictating the foregoing, it has just occurred to me that in the statute ceding jurisdiction to the United States [Code Section 585 (58)], it is provided that the jurisdiction ceded shall not vest in the United States until through proper officers it notifies the Governor that the United States assumes police jurisdiction over the lands. This has not been done, but a bill will shortly be introduced in Congress authorizing such notification. Until this is done, it is my opinion the State retains jurisdiction over the park lands, and what I have written above will then become applicable.

A. P. S.

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**ALCOHOLIC BEVERAGE CONTROL ACT—Licensees Under As Subject to Sunday Laws; Id.—Powers of Board—Rules and Regulations As to Sunday Sales.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 1, 1937.*

ALCOHOLIC BEVERAGE CONTROL BOARD,  
*Richmond, Virginia.*

GENTLEMEN :

I have before me your request for my official opinion upon the questions hereinafter set out.

First. Does the license granted by the Board to a licensee to sell wine or beer confer the right on such licensee to sell same in violation of State laws in relation to working or laboring on Sunday?

In my opinion the licensee is granted the privilege of selling wine and beer only in conformity with other State laws not in conflict with the alcoholic beverage control act. The Sunday laws above referred to are not, in my opinion, in any way in conflict therewith, and the licensee must obey same.

Second. Does the alcoholic beverage control act confer on the Board the power to adopt regulations prohibiting the sale by its licensees of wine and beer on Sunday?

Section 5 of said act empowers the Board to make such reasonable regulations as the Board shall deem necessary to carry out the provisions of the act. In my opinion this section clearly confers the power to prescribe by regulations the time or times when wine and beer may be sold, including the prohibition of such sales on Sunday.

Third. Does the Board possess the power to prohibit the sale on Sunday of wine and beer in one or more counties, cities or towns of the State without prohibiting same in all counties, cities and towns?

The section above referred to, section 5 of the act, expressly provides that

"nothing in this act contained shall require such regulations to be uniform in their application" It is, therefore, my opinion that the regulations of the Board may prohibit the sale on Sunday of wine and beer in such counties, cities and towns as the Board deems necessary to carry out the purposes of the alcoholic beverage control act without extending such prohibition to other counties, cities or towns where, in the opinion of the Board, such prohibition should not be made effective.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL LAW—Local Option—Participation of  
City in County Election.**

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

HONORABLE CARL C. GILLESPIE,  
*Commonwealth's Attorney,  
Tazewell, Virginia.*

DEAR MR. GILLESPIE:

I have your letter of July 3, in which you request the opinion of this office as to whether the town of Bluefield may participate in a local option election held for Tazewell county during a year in which the town has held an election to the office of treasurer.

It has previously been held by this office that towns having a population of more than nine hundred are to be treated as entities entirely distinct from the counties in which they are located for purposes of the local option law; that in no event may such a town join with the county in a local option election.

It is therefore the opinion of this office that the town of Bluefield is not entitled to participate in the Tazewell county local option election.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL LAW—Referendum—Towns—Selection  
of Election Officials.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 24, 1937.*

HONORABLE THOMAS W. BLACKSTONE,  
*Secretary of Electoral Board,  
Accomac, Virginia.*

MY DEAR MR. BLACKSTONE:

I am in receipt of your letter of March 18, in which you ask if the same officers must hold or conduct both the regular town election in June and the special election to be held on April 16.

In my letter of March 13 I refer to section 2995 of the Code, providing that the electoral board of a county shall not less than fifteen days before any town election therein appoint one registrar and three judges of election for each voting precinct. It is true that section 148 of the Code contemplates that the judges of

election shall serve for a term of one year. However, inasmuch as section 2995 refers specifically to elections in towns, and section 148 deals with elections in cities and counties, I am of opinion that it would be better to comply with the provisions of section 2995. Of course, there is nothing to prevent the same officers from being appointed to hold both elections.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL LAW—Referendum Selecting Election Officials.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 13, 1937.*

HONORABLE THOMAS W. BLACKSTONE,  
*Secretary of Electoral Board,*  
*Accomac, Virginia.*

DEAR MR. BLACKSTONE:

I am in receipt of your letter of March 8 and 9, in reference to the ballots to be used, the appointment of judges and, in general, the conduct of the special election to be held in the town of Chinoteague, Accomac county, Virginia, on April 16, 1937.

The appointment of judges, clerks and registrars of election is partly covered by section 84 of the Virginia Election Laws, which provides:

“\* \* \* Each electoral board shall appoint the judges, clerks, and registrars of election for its city or county, including the towns therein; and in appointing judges of election, representation, as far as possible, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes.  
\* \* \*”

In your letter of March 8, you correctly quote from subsection (b) of section 30 of the Alcoholic Beverage Control Act, which, as to the holding of the election referred to, reads:

“The regular election officers of the county, city or town at the time designated in the order authorizing the vote shall open the polls \* \* \* and conduct the election in such manner as is provided by law in other elections in so far as the same is applicable. \* \* \*”

I am of the opinion that the provision as to the appointment of judges and clerks for the election to be held in the town of Chincoteague on April 16, 1937, is covered by section 2995 of the Code, found on page 90 of the pamphlet styled “Virginia Election Laws.” This section provides:

“The electoral board of the county within which such town or the greater part thereof is situated, shall, not less than fifteen days before any town election therein, appoint one registrar and three judges of election for each voting precinct, which judges shall also act as commissioners of election. \* \* \*”

It is, therefore, my understanding of the law that the Electoral Board of Accomac county should appoint three judges of election for the town of Chincoteague and one registrar, and that the three judges shall conduct the election.

I do not think that it is obligatory on the electoral board to appoint as the

Republican judge the person selected by the Republican member of such board. The provision as to the appointment of the Republican member is contained in section 148 of the Code. That section, so far as applicable to the appointment of such member, after stating that each of the judges shall be able to read and write, provides:

"\* \* \* whenever the local party authorities of the party casting the next highest number of votes at the last preceding general election shall nominate for any voting place five qualified voters who are members of that party and qualified to act as judges of election, it shall be the duty of the electoral board to appoint one of such persons to serve as judge of election at such voting place for the term prescribed by law; provided, however, that such nominations shall be communicated to the electoral board at least ten days prior to the time prescribed by law for the appointment of judges of election. \* \* \*

There is no law against, or providing for, the appointment of a person as judge of the coming April election who acted last fall as judge of the regular November election. Therefore, it is entirely up to the electoral board to appoint such persons as it may choose, subject to the provisions of law already quoted.

The electoral board may, in its discretion, appoint one, two or three former judges of election, or it may drop all three. There is no law restricting the discretion of the electoral board in this respect.

I have examined the copy of the official ballot which you enclosed and find that it is most accurate in submitting to the voters of the town of Chincoteague the questions that your circuit court has authority to submit to the voters at the special election to be held on April 16, 1937.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

#### **ALCOHOLIC BEVERAGE CONTROL—Referendum—When Necessary.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 13, 1936.*

ALCOHOLIC BEVERAGE CONTROL BOARD,

*Richmond, Virginia.*

GENTLEMEN:

This is in reply to your letter of August 13, 1936, requesting an opinion from this office on the question whether or not a petition for a referendum, under section 30 of the alcoholic beverage control law, shall ask that a referendum be held on both questions embraced in said section 30, namely, first, with respect to the sale of beer and wine, and second, with respect to the sale of alcoholic beverages other than beer and wine. You state that you desire this opinion for use in connection with the discharge of the duties of the Board with respect to the location of alcoholic beverage control stores.

Section 30 of said Act above referred to provides as follows:

"Upon a petition of the qualified voters \* \* \* asking that a referendum be held on the questions (first) shall the sale of beer and wine be permitted in the said county, city, or town, and (second) shall the sale of alcoholic beverages, other than beer and wine, be permitted in the said county, city, or town, the court, or the judge thereof in vacation, shall by order entered of record require the regular election officials of the county, city, or town, on the date fixed in the order, to open the polls and take the sense of the qualified voters of the county, city, or town, on the questions submitted as herein provided. \* \* \*."

The said section 30 also prescribes the ballot which shall be used, which is in the following language:

"On the ballot used shall be printed the following:

"First. Shall the sale of beer and wine (containing more than three and two-tenths per centum of alcohol by weight) be permitted in.....?"

Yes

No

(Strike out one)

"Second. Shall the sale of alcoholic beverages other than beer and wine, be permitted in.....?"

Yes

No

(Strike out one)."

It seems clear that the language above quoted contemplates that, in any referendum under said section 30, both questions shall be submitted to the qualified voters. Not only is the language mandatory that the petition shall ask for a referendum of both questions, but the form of ballot prescribed is equally mandatory that it shall contain a submission to the qualified voters of both questions.

It is, therefore, my opinion that any petition for a referendum under said section 30, in order to comply with the said section, must ask that a referendum be held on both the first and second questions set out in said section 30, and that, in the event the court or judge in vacation shall order a referendum, the ballot used in the referendum election must comply with the provisions of said section 30 and submit to the qualified voters both questions as therein provided.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL LAW—Referendum—Who May Vote—  
Elections—Voters—Capitation Taxes—New Residents.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 12, 1937.*

HONORABLE R. NORMAN MASON,  
*Attorney for the Commonwealth,  
Accomac, Virginia.*

MY DEAR MR. MASON:

I am in receipt of your letter of April 12, regarding a special election to be held in the town of Chincoteague on April 16 for the purpose of deciding if the sale of beer and wine shall be permitted in the said town. I find that I have already answered most of your questions in letters to other officials of the town or county, so I will simply summarize my views herein.

I have already held that in such an election only residents of the town involved would be eligible to vote.

As you indicate, section 83 of the Code, in effect, provides that the persons qualified to vote at the last preceding regular November election shall be eligible to vote in this special election, and, therefore, I am of the opinion that reference to the November list may be had.

You also inquire whether a person who left the town or State prior to April 16, and never expects to return, can vote in this special election. If the legal residence of such a person in a town has actually been abandoned before April 16 and

another legal residence established somewhere else, I am of the opinion that such a person may not vote in this election.

In reply to your last question, I am of the opinion that the person who actually moved into the State after January 1, 1936, is not required to pay the 1936 capitation tax, inasmuch as such a person is not liable under the law to this tax. You will recall that the Constitution provides that the capitation taxes assessed or assessable against such person for the three years next preceding the election in which he offers to register shall be paid. In the case that you present the 1936 capitation tax is neither assessed nor assessable.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL—Sale of Wine and Beer on Sunday—  
Legality of and Municipality's Power to Regulate.**

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

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

DEAR MR. CRANK:

I have your letter of October 16, in which you ask two questions with reference to the Alcoholic Beverage Control Act.

Your first question is whether a person licensed by the board is subject to prosecution for a violation of section 4570 of the Code, prohibiting a person from laboring at his trade or calling, or employing his servants in such labor, on Sunday. This section contains an exception in case of work of necessity or charity.

As to what constitutes a work of necessity or charity, our courts have held that this is a question of fact to be passed upon by the jury. See cases cited in volume 9, Digest of Virginia and West Virginia Reports, pages 376-381.

I do not think that the fact a person is licensed by the board would have any effect upon the question of a violation of the above section.

Your second question relates to the authority of a town council to pass an ordinance prohibiting the sale of beer and wine on Sunday by a person licensed by the board.

Section 24 of the Alcoholic Beverage Control Act vests the board with authority to prescribe, by regulations, between what hours and on what days wines and beers shall *not* be sold by persons licensed under the provision of the Act. Section 65 of the Act expressly prohibits any county, city or town from enacting any ordinance or resolution regulating or prohibiting the sale of alcoholic beverages in Virginia.

It is my opinion, therefore, that a town council does not have authority to enact an ordinance prohibiting or regulating the sale of such beverages.

Sincerely yours ,

ABRAM P. STAPLES,  
*Attorney General.*

**APPROPRIATIONS—Confederate Memorial Fund—Purchase of Flags.**

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

HONORABLE JNO. H. JOHNSON, *Pension Clerk,*  
*State Comptroller's Office,*  
*Richmond, Virginia.*

DEAR MR. JOHNSON:

I have your letter of December 29, in which you request my opinion as to whether or not monies appropriated by chapter 208, page 353, of the Acts of the General Assembly of 1936, may properly be used for the purchase of large flags.

The purposes for which this money may be expended are provided for in the acts embracing the care of cemeteries and graves of Confederate soldiers and sailors, and the erection and care of markers and monuments to their memory. As you will observe, this language is very vague, and the amendment in 1936 enlarged the objects for which the money could be expended.

It seems to me that the use of a large flag in a cemetery of this type is not an inappropriate method of caring for the cemetery.

The right of the organizations and associations to use the money for the flags would seem to me to depend upon the use to which the flags are primarily dedicated. If they are used to decorate the cemetery on appropriate occasions, it seems to me the expenditure should be allowed.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**APPROPRIATIONS—Transfer of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 17, 1937.*

HONORABLE E. GRIFFITH DODSON,  
*Clerk of the House of Delegates,*  
*Richmond, Virginia.*

DEAR MR. DODSON:

Replying to your letter of April 14, you are advised that it is my opinion that, under the provisions of section 46 of the 1936 Appropriation Act appearing at page 975 of the Acts of 1936, the Governor of Virginia has authority to transfer out of the appropriation of \$18,925, appearing at page 820 of said acts, and out of the appropriation of \$75,000, appearing at page 26 of the Acts of the Extra Session of 1936, the sum of \$2,500 to be expended by the Clerk of the Senate and the Clerk of the House of Delegates for the purpose of making additional repairs to the electrical voting systems of the House and Senate.

This transfer can be made, however, only upon the request of the heads of the legislative departments, the Lieutenant Governor and the Speaker of the House of Delegates.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**APPROPRIATIONS—When Payable.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 16, 1936.*

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

DEAR MR. COMBS:

This is in reply to your request for my opinion upon whether or not an appropriation of \$50, included in the Appropriation Act for 1934 for the benefit of the Confederate Memorial Association of the County of Lancaster, which was not paid due to the death of the treasurer of that association, may now be paid.

Section 186 of the Constitution provides that no 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.

This provision has uniformly been construed as limiting the time within which any appropriation may be paid, and, since this time has expired, I do not see how it can be paid now. I would suggest a special act of the General Assembly re-appropriating this money.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**AUTOMOBILES—"Chauffeur"—What Constitutes.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 3, 1936.*

HON. L. W. WOOD,  
*Commonwealth's Attorney,*  
*Charlottesville, Virginia.*

MY DEAR MR. WOOD:

I wish to acknowledge your letter of August 28 relative to the application of the term "chauffeur" to that class of motor vehicle operators who are engaged in the sale and delivery of goods and merchandise.

By section 1 (a) of the Virginia Operators' and Chauffeurs' License Act, the word "chauffeur", insofar as it applies to the present case, is defined as follows:

"Chauffeur: Every person employed for the principal purpose of operating a motor vehicle \* \* \*".

According to the above definition, it would appear to necessarily follow that the test to be applied to the class of cases mentioned in your letter would be to determine as a question of fact whether such operators are employed for the principal purpose of operating a motor vehicle, or whether they are employed for the principal purpose of selling merchandise and the operation of the motor vehicle is merely incidental to such employment.

I am not aware of any distinction having been drawn in this respect between the drivers of one class of vehicles and another by either departmental ruling or decision.

With my kind personal regards, I am

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**AUTOMOBILES—Operators' Licenses—Effect of Commitment to State Hospital as Inebriate or Drug Addict.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 17, 1936.*

DR. J. S. DEJARNETTE, *Superintendent,*  
*Western State Hospital,*  
*Staunton, Virginia.*

DEAR DR. DEJARNETTE:

I have your letter of the 15th instant, inquiring as to the laws relating to the driving of automobiles by committed inebriates and drug addicts prior to receiving a final discharge from the Western State Hospital.

The answer to your question would depend upon whether or not the person has already been issued an operator's license under section 5 of the Motor Vehicle Operator's License and Liability law. If he has not been issued such a license, subsection (d) of section 5 provides that no such license shall be issued to any applicant who has previously been adjudged insane, an idiot, imbecile, epileptic or feeble-minded, unless he has been restored to competency by decree of the court or released from the hospital upon the superintendent's certificate that he is competent. Subsection (c) of said section provides that no such license shall be issued to any person who has been determined by the Motor Vehicle Division to be a habitual drunkard or addicted to the use of narcotic drugs.

If, however, an operator's license has already been issued to said person prior to his commitment to your institution, section 18 provides that the Motor Vehicle Division may after due hearing, upon not less than five days' notice in writing, suspend or revoke such license, if such a person is a habitual drunkard or is addicted to the use of narcotic drugs, or is afflicted with mental or physical infirmities or disabilities rendering it unsafe for such person to drive a motor vehicle upon the highways.

If there are any cases in your institution where a license has already been issued and you desire to revoke same, you should communicate with Honorable John Q. Rhodes, Director of Division of Motor Vehicles, at Richmond.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BAIL—Cash Deposit—Who May Receive.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 7, 1937.*

HONORABLE KELLEY DOVE,  
*Justice of the Peace,*  
*R. F. D. 1,*  
*Alexandria, Virginia.*

MY DEAR MR. DOVE:

I am in receipt of your letter of April 3, in which you ask if a justice of the peace may take cash security in a case where a person is admitted to bail by him.

I call your attention to section 4973a of the Code (Michie's Code, 1936), which authorizes an officer admitting a person to bail to allow the individual to give his personal recognizance accompanied by a cash deposit. However, the statute further provides that the deposit of cash shall be made with the clerk of the circuit court or corporation court, upon which the clerk shall give a certifi-

cate thereof, and, when this certificate is delivered to the officer admitting the person to bail, he may then be ordered to be released.

You will note, therefore, from this section that the justice of the peace may not accept the deposit, but that it must be made with the clerk of the circuit or corporation court.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BAIL BONDS—Appeal—Necessity for New Bond.**

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

HON. W. V. BIRCHFIELD,  
*Trial Justice of Smyth County,  
Marion, Virginia.*

MY DEAR MR. BIRCHFIELD:

I am in receipt of your letter of January 12, in which you state that in a criminal case a trial justice takes a bond, the condition thereof being that the accused appear before the trial justice on a named date.

You then inquire whether, when the person giving the bond is convicted by the trial justice and appeals, a new bond should be given for his appearance in the circuit court.

Where the condition of the bond is as you state, I am of opinion that a new bond should be required. However, it seems to me that the provisions of section 4973 are certainly broad enough and, in fact, contemplate that the condition of the original bond shall be that the party giving it shall answer for the offense charged not only in the trial justice court, but that the bond shall remain in effect until the charge is finally disposed of by the circuit court.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**BANKING—Validity of Certain Agreement with Federal Deposit Insurance Corporation.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 13, 1937.*

HONORABLE WILLIAM MEADE FLETCHER, *Commissioner,*  
*State Corporation Commission,*  
*Richmond, Virginia.*

DEAR JUDGE FLETCHER:

I have your letter of May 11, enclosing correspondence between Honorable M. E. Bristow, Commissioner of Insurance and Banking, and Mr. Francis C. Brown, Counsel for the Federal Deposit Insurance Corporation. You request an opinion from this office in reply to the questions set out in Mr. Brown's letter.

It appears that the Farmers and Merchants Trust Bank of Cape Charles, Virginia, will apply to the Federal Deposit Insurance Corporation for a loan

somewhat in excess of its paid up capital and surplus, proposing to give as collateral a pledge of certain "slow" assets, and to authorize the Federal Corporation to supervise the liquidation of this collateral. It further appears that this loan is being negotiated to facilitate the establishment, in the immediate future, of a new bank at Cape Charles, to which the old bank will transfer all its assets in consideration of the assumption by the new bank of all the debts of the old.

The legal questions on which Mr. Brown wishes my opinion will be set forth and answered *seriatim*.

1. As to the right of the old bank to borrow such a sum on the terms indicated:

Express authority to borrow money for such a "temporary purpose" as contemplated here, and to pledge assets for the purpose, subject to the approval of the State Corporation Commission, is conferred by Virginia Code (Michie 1936), section 4149(49). In my opinion, the right to pledge assets undoubtedly includes the right to make the pledge effective by providing that the lender may supervise the liquidation of the pledged assets.

It is my opinion, therefore, that the present bank is authorized to borrow such a sum on the terms contemplated.

2. As to the right of the bank to pledge assets of the nature and to the extent proposed:

This point is covered by what has been said in reply to question 1.

3. As to the right of the old bank to transfer acceptable assets and business to another institution in consideration of the assumption of liabilities:

Virginia Code (Michie 1936), section 3820a, in my opinion, is amply sufficient to authorize such a sale.

4. As to the statutory limitations imposed on foreclosures or liquidation of the collateral pledged by the bank under those circumstances:

There is no statutory limitation on the right of the lender, under such an agreement, to foreclose his lien on or liquidate the collateral so pledged.

As to the time within which liens represented by the various securities pledged may be enforced, section 5827 of the Code (Michie 1936) is controlling. This section provides that the liens of all mortgages, deeds of trust and reservations of title (conditional sales) must be enforced within twenty years after the maturity of the obligation secured.

Attention is further called to section 4149(52c) of the Code, which bars the claims of all creditors who, upon the liquidation of an insolvent bank, fail to present their claims within six months after publication of notice to do so.

5. As to the procedure to be followed in borrowing such sum on such security and in transferring the old bank's assets as proposed:

First, the procedure in negotiating the loan; except for the provision requiring written approval from the State Corporation Commission,—section 4149(49) of the Code,—and the requirement that such loan and pledge be authorized by a resolution of the Board of Directors entered on the minutes of the borrowing bank according to rules, regulations and forms to be prescribed by the chief examiner of banks, the statutes do not prescribe any particular procedure in such cases, it being only necessary to comply with the charter and by-law provisions of the borrowing bank.

Second, the procedure in transferring the old bank's assets: such sale may be effected by any procedure permitted by the charter and by-laws of the corporation, provided only that there first be obtained *either* the written consent of the holders of two-thirds the stock—both voting and non-voting—*or* a vote approving such sale at a stockholders' meeting as provided in section 3820a of the Code.

As to the authorities affecting these questions:

All the authorities deemed pertinent have been cited in discussing the above questions.

Mr. Brown's letter further requests copies of any opinions of this office germane to the questions discussed. I find no such opinions in the reports of the Attorney General.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**BLIND PERSONS—State Commission—Acquisition of Concessions in Public Buildings.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 17, 1937.

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

DEAR MR. WATTS:

I am in receipt of your letter of May 14, in which you state that the Virginia Commission for the Blind desires to acquire news stand concessions in public buildings of the cities and counties. You inquire whether there is any law which would prohibit the establishing of such news stands in these buildings.

I know of no law which prohibits such an enterprise. Generally speaking, the control of county and city buildings is in the hands of the boards of supervisors of counties, and councils or other administrative departments of the cities. It will be necessary therefore, I should think, for you to take the matter up with the proper authorities of the counties and cities in which you desire to establish such news stands.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARDS OF SUPERVISORS—Compensation and Remuneration of Members, Chairman.**

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

HONORABLE JOSEPH H. POFF,  
*Attorney for the Commonwealth,*  
*Floyd, Virginia.*

MY DEAR MR. POFF:

I am in receipt of your letter of August 25, in which you state:

"In your opinion, under the 1936 Acts of Assembly, fixing compensation and mileage of members of boards of supervisors of counties, is the chairman entitled to extra compensation for meetings with the local board of health? Also is he entitled to mileage for attending the meetings with the local board of health and the extra day required for him to sign the warrants and records of the regular meetings of the board of supervisors?"

Under section 2769 of the Code as amended in 1936 (Acts 1936, page 525) the total amount to be allowed as compensation for the entire membership of the board of supervisors is to be fixed by the judge of the court of the county. Certain limitations as to the total amount of compensation are prescribed in the statute which are not here material. The statute further provides that the annual salary covers services in attending meetings of the board "and in discharging the duties imposed by law upon him", that is, upon each supervisor. Again, the amended section provides that the annual compensation to be allowed each member shall be determined by dividing the total amount allowed the entire board by the number of supervisors in the county.

In my opinion, the amended section 2769 contemplates that the salary paid to each member of the board of supervisors is full compensation for discharging the duties imposed upon him by law, and I do not think, therefore, that the chairman would be entitled to extra compensation for attending meetings of the local board of health, nor do I think that the statute intends that the chairman shall receive any extra compensation for signing the warrants and records of meetings of the board, both of these duties being imposed upon him by law.

As to the allowance of mileage to the chairman of the board of supervisors for attending meetings of the local board of health, I am in some doubt. The section provides that each member of the board of supervisors shall be allowed five cents a mile for attending meetings of the board. Strictly construed, of course, this means meetings of the board of supervisors. However, I do not think that the chairman of the board of supervisors, as a member of the local board of health, could reasonably be expected to attend these meetings at his own expense, and I, therefore, am of opinion that under general authority of the board it would be proper for it to allow the chairman mileage for attendance upon such meetings.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARDS OF SUPERVISORS—Disbursements of Funds—Contribution to Land Terracing Association.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 6, 1935.*

HONORABLE A. S. HARRISON, JR.,  
*Attorney for the Commonwealth,  
Lawrenceville, Virginia.*

DEAR MR. HARRISON:

I have before me your letter of August 3, in which you state the following:

"The Board of Supervisors of Brunswick County desire to make an appropriation of \$800 to the Brunswick County Terracing Association, Inc., to be used by the association in purchasing a terracing machine and tractor.

"This association is a non-profit corporation, organized by the farmers in Brunswick County to purchase and operate a terracing machine in the county. Any profits made by the association are retained and used to further the purposes of the organization. It now appears that, unless they can secure this financial assistance from the Board of Supervisors, the terracing unit, and an operator furnished through V. P. I. will be lost to the county.

"The farmers in the county, the Board of Supervisors, and our local farm agent, think that such a terracing unit is greatly needed in the county.

"The question involved is whether or not this expenditure, or appropriation to the association by the Board of Supervisors, can be made under the provisions of Section 2734 of the Code of Virginia, which allows boards to 'apply and expend annually, a sum not exceeding \$1000 for the purpose of promoting agriculture in said county.'"

I concur in your view that the board of supervisors has authority to make this expenditure if, in the opinion of the board, same will result in promoting agriculture in the county.

With my best wishes, I am

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARDS OF SUPERVISORS—Disbursement of Public Funds in Payment of  
“Moral Obligations”—Duty to Plead Statute of Limitation.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *August 8, 1936.*

HONORABLE F. C. BEDINGER,  
*Commonwealth's Attorney,  
Boydton, Virginia.*

DEAR MR. BEDINGER:

This will acknowledge receipt of your letter of August 5.

You state that Honorable W. R. Beales, who was sheriff of Mecklenburg County for a period of thirty-five years, mistakenly collected only \$1 per meeting for attending each of the twelve meetings of the Board of Supervisors in each of the last sixteen years—only half of the compensation fixed by law, and that he has presented his claim against the Board for \$192 on this account. You request the opinion of this office as to whether the Board of Supervisors is legally bound to plead the statute of limitations as a bar to Mr. Beales' claim.

Your request presents the question of whether the Board's payment of a claim against which there is a valid legal defense constitutes a gift or an application of public funds to a non-public purpose.

I find no Virginia precedent bearing upon this question and no cases from other jurisdictions dealing specifically with counties. The question is, however, a comparatively familiar one in the law of municipal corporations proper—that is, cities and towns. The great weight of authority is to the effect that the governing body of a municipal corporation may properly recognize and satisfy out of municipal funds claims based on “moral obligations” though not legally enforceable. *Friend v. Gilbert*, 108 Mass. 408; *Bailey v. Philadelphia*, 167 Pa. St. 569, 31 Atl. 925; *Clough v. Verette*, 79 N. H. 356, 109 Atl. 78.

The reasoning of the New Hampshire court in *Clough v. Verette* seems especially applicable. This was a taxpayer's suit to enjoin a city council from returning a contractor's deposit made to secure the performance of his contract when the latter had repudiated his contract on the ground that his bid was submitted under a mistake. Holding that the city council might, if it saw fit, recognize the contractor's claim, the court said (109 Atl. at p. 79):

“\* \* \* the city is not legally bound to take advantage of (the contractor's) error. Apparently the city lost nothing except an opportunity to secure its improvements for less than their cost. Upon trial (the contractor's) claim, if not legally recoverable against the city, may prove meritorious and present a situation in which the city's retention of the money would be merely claiming the advantage of a technicality which honorable men would hesitate to take. A municipal corporation in the absence of peremptory statute is not obliged to place itself in this position. A meritorious consideration will authorize a payment by such corporation of a claim not legally enforceable.”

It would seem that the principles thus applied to cities are equally applicable to counties.

It is, therefore, the opinion of this office that it is within the discretion of the Mecklenburg Board of Supervisors to recognize and pay that portion of Mr. Beales' claim which is barred by the statute of limitations, or so much thereof as the Board may see fit.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

**BOARDS OF SUPERVISORS—Employment of Counsel.**

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

HONORABLE HAROLD M. RATCLIFFE,  
*Attorney for the Commonwealth,  
Travelers Building,  
Richmond, Virginia.*

DEAR MR. RATCLIFFE:

You request my opinion upon the question of the authority of the board of supervisors to employ counsel for the purpose of furnishing advice and legal opinions to the board with respect to a controversy which has arisen between the board of supervisors and the clerk of the circuit court of the county relating to the fixing of the compensation of the deputies and assistants in the office of said clerk, and the power of appointment of such deputies and assistants.

It is my opinion that, under the provisions of section 2728 of the Code as construed by the Supreme Court of Appeals of Virginia in the case of the *County of Campbell v. Howard*, 133 Va. 19, the board of supervisors has the power to employ counsel for such purposes.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARDS OF SUPERVISORS—Fixing Compensation of County Officers—  
Deputy Sheriffs.**

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

HON. JOHN H. COLE,  
*Commonwealth's Attorney,  
Sussex County,  
Stony Creek, Virginia.*

DEAR MR. COLE:

I have your letter of the 26th instant, in which you request my opinion as to the authority of the board of supervisors to make monthly allowances, as salaries, to deputy sheriffs.

This office had occasion sometime ago to consider this question and reached the conclusion that the board of supervisors does not possess this authority. The deputy sheriff is legally the employee of the sheriff and not of the county. It was suggested at that time, however, that, if the maximum allowance permitted by law has not been made to the sheriff, and if the sheriff should acquiesce therein, the county could increase the sheriff's allowance and he in turn could increase the salaries of his deputies. I think, however, that an increase effected in this manner should be approved by the State Compensation Board.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARDS OF SUPERVISORS—Payment of Salaries to Officers—Deputy Sheriffs.**

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

HONORABLE BERNARD MAHON,  
*Commonwealth's Attorney,*  
*Bowling Green, Virginia.*

DEAR MR. MAHON:

This is in reply to your letter of the 7th instant, requesting my opinion upon the question whether the board of supervisors of Caroline County has authority to pay a salary to a deputy sheriff, provided the combined salary of the sheriff and deputy do not exceed the maximum amount allowed by law for the salary of the sheriff in Caroline County.

The deputy sheriff is an officer appointed and employed by the sheriff and his compensation is a matter of private contract with the sheriff. See 8 Michie Digest, page 937, section 25.

It is my opinion, therefore, that the board of supervisors does not possess the authority to pay a salary directly to the deputy sheriff. However, if it is agreeable to the sheriff, it would seem that his salary might be increased by the amount it is desired to pay to the deputy sheriff and the sheriff could in turn pay the same to the deputy.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARDS OF SUPERVISORS—Purchase of Building for County Offices—Procedure.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 7, 1937.*

HONORABLE W. R. BROADDUS, JR.,  
*Attorney for the Commonwealth,*  
*Martinsville, Virginia.*

MY DEAR MR. BROADDUS:

I have your letter of May 25, in which you state that the Board of Supervisors of Henry County has been considering the purchase of property adjoining the Court House. You state that this property has a building on it that can be remodeled and used for offices to house a number of county officials who are now using privately rented offices because there is not sufficient space in the Court House to provide for them. You state that the property can be purchased for one-fourth cash and the balance in one, two and three years, and that there are sufficient funds in hand in the general fund to pay the cash payment and the regular levy will take care of the annual payments. You state that you are of opinion that such a purchase as you describe would not constitute a loan such as is provided for in section 2738 of the Code, and ask for my opinion.

I concur in your view. It is plain that the county is not erecting a Court House, a clerk's office, or a jail, or a poor house.

You then say:

"At the April meeting of the Board a motion was made that the property be purchased and the Board voted unanimously to purchase the property. However, contract has not been consummated and the matter is still

in abeyance. At the May meeting of the Board a motion was made to rescind the former action and to consider the proposed purchase for an additional thirty days. Upon motion there were three voting for and three against. The Code provides that action by the Board shall be by a majority vote. Since the Board had previously passed a resolution to the effect that the property should be purchased, it would appear to me that it would be necessary for a majority of the members of the Board to vote for the new motion to rescind the purchase motion in order for the new and last motion to carry."

Assuming that no contract or agreement was entered into pursuant to the first action of the Board, in my opinion the situation you present is covered by section 2717 of the Code.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARDS OF SUPERVISORS—Roads—Power to Disburse Funds for Maintenance of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 25, 1936.*

HONORABLE B. D. PEACHY,  
*Attorney for the Commonwealth,  
Williamsburg, Virginia.*

MY DEAR MR. PEACHY:

This is to acknowledge receipt of your letter of September 22, requesting my opinion as to the power of the board of supervisors of your county to spend money for the maintenance of a public road.

Your attention is invited to section 8 of chapter 415 of the Acts of 1932, as amended by the Acts of 1934, page 215, in which it is stated:

"The local road authorities shall, however, continue to have the powers now vested in them for the establishment of new roads in their respective counties, to become parts of the secondary system of State highways within such counties; \* \* \*."

Reading the whole act, it would seem that the maintenance, construction and control of the roads formerly classified as county roads are now vested in the State Highway Department. Section 8, as quoted above, sets forth the only exception thereto, and it would seem that the power of the board of supervisors would now be limited to the status of *new* roads. I am, therefore, of opinion that the board of supervisors would have no authority to spend money for the improvement of a public road.

You state in your letter that this particular road has not been taken into the secondary system. I call your attention to section 1 of the said act, which states that the secondary system of State highways shall consist of all the public roads in the several counties as of March 1, 1932; hence, if the road in question was a public road as of that date and has not been since abandoned, it would be, as a matter of law, a part of the secondary system and under the control of the Highway Department. Whether or not the Department sees fit to improve and maintain the same is a question of policy and not of law.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**BONDS—Counties—Necessity for Referendum—County as Guarantor on School Bonds.**

## COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 3, 1936.*

DR. SIDNEY B. HALL,

*Superintendent of Public Instruction,  
Richmond, Virginia.*

DEAR DR. HALL:

This is in reply to your letter of September 3, in which you request my opinion upon the constitutional validity of a certain provision contained in section 4, of chapter 52, page 54 of the Acts of the General Assembly for the year 1930, which provision is as follows:

"The bonds issued under this provision of this act, to fund or refund the bonded indebtedness of any school district in said county, shall contain the following recital:

"This bond is issued for school indebtedness in.....district, but the full faith and credit of the entire county of.....are hereby pledged for its payment."

The question which arises from your inquiry is whether or not a pledging of the full faith and credit of the entire county for the payment of bonds issued to refund the district school indebtedness is in violation of section 115-a of the Constitution, which prohibits the contracting of any debt by or on behalf of the county unless the question of contracting such debt be submitted to the qualified voters of the county for their approval or disapproval.

In the case of *Bourne v. Board of Supervisors*, 161 Va. 678, an almost identical question was considered, construing the provisions of section 1560-j of the Code which contained a requirement that, in bonds issued by a sanitary district for the financing of a public improvement, there shall be written or printed a sentence as follows:

"These bonds are issued for the construction and operation of a public .....system in.....sanitary district, but the full faith and credit of the entire county of.....is hereby pledged for their payment."

The Supreme Court of Appeals in said case held that the effect of the execution of the bond, containing the above quoted provision, is to render primarily liable for the payment of the bond the sanitary district, and that the position occupied by the county, as a whole, was that of guarantor. The court held that this was not a violation of section 115-a of the State Constitution.

It is my opinion that the application of this principle to the statute that you refer to leads to the conclusion that the provision hereinabove quoted from section 4 of the said 1930 Act is not unconstitutional, and that the effect of a bond issued to refund a district indebtedness is to render the district primarily liable and the county secondarily liable as guarantor.

In my opinion, it would be well to cite this case under the above statute in the codification of your school laws in your new school code.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

**BONDS—Literary Fund Loans—Interest—When Compounded.**

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

HONORABLE SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
State Board of Education,  
Richmond, Virginia.*

DEAR DR. HALL:

This is to acknowledge receipt of your letter of September 23, in which you ask to be advised as to whether interest is properly chargeable upon accrued and unpaid interest on Literary fund loans from the date the interest becomes due and payable.

If, as I understand it to be true, obligations for the payment of Literary fund loans are bonds without interest bearing coupons attached, unpaid interest due on such loans does not bear interest.

However, the obligor in an interest bearing bond may at the time or after the interest becomes due, in consideration of forbearance on the part of the creditor, agree to pay interest on interest then due.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**BONDS—Special Agent—Comptroller—By Whom Premiums Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 31, 1936.*

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

DEAR MR. COMBS:

I am in receipt of your letter of July 29, in which you ask whether or not the premium on the bond of Mr. Geddes H. Winston, Special Agent, for the years 1934 and 1935 is to be paid by the State or by Mr. Winston. You advise me that up until 1933 the State paid the premiums on the bonds of these Special Agents, but that since that time the Agents have been required to pay the premiums themselves.

I know of no provision of law that requires the payment by the State of the premium on a bond of this character, and, unless in the agreement between you and Mr. Winston it was stipulated that the Commonwealth should pay the premium on his bond, I am of opinion that he should pay it.

I am returning the enclosures contained in your letter.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**BUREAU OF INSURANCE AND BANKING—Inspection of Records of.**

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

HONORABLE M. E. BRISTOW, *Commissioner,*  
*Bureau of Insurance and Banking,*  
*Richmond, Virginia.*

DEAR MR. BRISTOW:

This is in reply to your letters of November 9 and 13, in which you request my opinion upon the question of your authority to allow a holder of shares of the capital stock of a small loan corporation to inspect the annual report required of such small loan companies. You have transmitted with your last letter a copy of the form on which such reports are required to be made.

The primary purpose of the report is that the Commissioner may be satisfied that the business is being conducted in accordance with the requirements of the statutes relating to same. The information contained in the report is very similar to the information required to be published by State banks showing the general status of the banks' assets and liabilities. In addition thereto, this report requires the information as to the expenses of conducting the business and the earnings derived therefrom. It also goes into considerable detail as to the loans made and security taken therefor.

The statute authorizing the Commissioner of Insurance and Banking to require the filing of this report is silent as to whether or not the same shall be open to public inspection. The general rule is that all reports filed under such circumstances are not considered as public records, nor are same generally open to public inspection. The question whether, in any particular case, inspection should be allowed is dependent upon the nature of the information contained in the report, the purpose for which the filing of same is required, and the object for which they are inspected. Of course, reports of this nature are not open to public inspection to satisfy idle curiosity.

It is my opinion that the information contained in this report is not of such a confidential nature as would make it a violation of any public policy of the State to allow its inspection by a person having a legitimate interest therein. I am further of the opinion that a shareholder of such a small loan company has such a legitimate interest therein as to authorize you, in your discretion, to permit him to inspect the report of the company in which he is a shareholder.

This opinion is to be understood, however, as confined entirely to this particular report, and to cases where the request for inspection is made by a shareholder of the company whose report is sought to be inspected.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CITIES AND TOWNS—Bonds—Requirements as to Referendum.**

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

HONORABLE W. R. BROADDUS, JR.,  
*Commonwealth's Attorney,*  
*Martinsville, Virginia.*

DEAR MR. BROADDUS:

Replying to your letter of December 4, in which you request the opinion of this office as to the authority of the town of Ridgeway to issue certain water-

works bonds without a referendum, this is to confirm your opinion that no such power exists.

I find nothing in the town charter, or in any amendment thereto, which seems to effect the question.

General laws on the subject, as contained in sections 123 and 127 of the Constitution and in chapter 122 of the Code, seem to contemplate only two types of municipal bond issues: (1) bonds for the financing of revenue producing projects, not intended to be counted within the municipal indebtedness in determining its debt limitations; and (2) all other bonds, whether for revenue producing projects or not. In issuing either class of bonds, it seems clear that a popular referendum is required by section 3082 of the Code, though only in case such bonds are not to be included within the otherwise authorized indebtedness of the town is it necessary that the proceeds be used for a revenue producing project, and that the ordinance pursuant to which the referendum is held should recite these facts.

It is therefore the opinion of this office that the proposed issue may properly be floated only through the procedure outlined in Code sections 3082 and following.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**CITIES AND TOWNS—Officers of—Justices of the Peace as.**

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

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

DEAR GOVERNOR PEERY: .

I have your letter of November 21, requesting my opinion upon the matter hereinafter set out.

Section 2703 of the Code of Virginia contains the following provision:

"Every city and town officer, except members of the police and fire departments, shall, at the time of his election or appointment, have resided one year next preceding his election or appointment in such city and town."

The last two paragraphs of section 34 of the Charter of the city of Harrisonburg is as follows:

"The council may also appoint, by a majority of all the members thereof, by a recorded ye and nay vote, a city justice of the peace, who shall hold office for a term of four years, and his term of office shall begin on the first day of January, succeeding his election by the council.

"Said city justice of the peace shall have jurisdiction, concurrent with the mayor of the city, to try all violations of ordinances of the city; including violations of ordinances imposing a license tax and for the non-payment thereof, and inflict such punishment and impose such fines as may be prescribed for violation of the same by the ordinances of the city; and in all criminal cases occurring within the city, such city justice shall exercise all the powers and authority of a justice of the peace of the county of Rockingham, and be entitled to the fees in such cases by law allowed to justices of the peace. (See Acts of Assembly, 1932, page 591)."

The question presented is whether or not the city justice of the peace, provided for by the foregoing charter provisions, is a "city officer" within the above quoted provisions of section 2703 of the Code.

It will be noted that the charter, in referring to the justice of the peace, states that he "shall hold office for a term of four years, and his term of office shall begin on the first day of January, succeeding his election by the council."

This officer is also given jurisdiction to try violations of city ordinances, and the general jurisdiction of a justice of the peace of the county of Rockingham with respect to crimes committed within the city of Harrisonburg.

It is my opinion, therefore, that the city justice of the peace is clearly an officer within the meaning of the statute, and that he is not a member of the police or fire departments of said city so as to bring this officer within the exception contained in section 2703.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CITIES AND TOWNS—Ordinances—Petit Larceny.**

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

HONORABLE J. CALLAWAY BROWN,  
*Trial Justice,*  
*Bedford, Virginia.*

DEAR MR. BROWN:

I have your letter of September 16, requesting the opinion of this office as to whether or not the town of Bedford may pass an ordinance making petty larceny an offense against the town punishable in the mayor's court.

The general rule as to the power of a municipal corporation to prohibit, by ordinance, acts already made crimes against the State is stated substantially as follows: municipal corporations, acting under general charter provisions as to preserving peace, protecting property, etc., may prohibit acts which are also prohibited by State law if, and only if, some peculiar local evil may be attributed to such acts. 3 McQuillin, *Municipal Corporations* (2nd Ed. 1928), section 923; 2 Dillon, *Municipal Corporations* (5th Ed. 1911), section 632.

While the application of this rule is traditionally difficult and in many cases uncertain, it seems clear that under this rule a municipal corporation is not authorized to prohibit the offense of petty larceny, in the absence of some express charter or other statutory authority. Certainly I can conceive of no respect in which it may be said that the suppression of petty larceny is a peculiarly local problem.

I find nothing in the charter of the town of Bedford expressly extending its powers in this particular, and it is therefore the opinion of this office that the town is without authority to pass an ordinance such as the one to which you refer.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Deputies—Signing Warrants.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 25, 1936.*

HONORABLE GEORGE G. TYLER, *Clerk,*  
*Circuit Court of Prince William County,*  
*Manassas, Virginia.*

MY DEAR MR. TYLER:

I am in receipt of your letter of November 20, in which you state that it has been the practice in Prince William county for a number of years for one

of your deputies to keep the minutes of the meetings of the board of supervisors and to sign all warrants duly audited and ordered by the said board, as follows: "Geo. G. Tyler, Clerk, by his Deputy, L. Ledman."

You desire to know whether it is lawful for the deputy to sign warrants as above, or whether the clerk should individually sign them.

I call your attention to section 2701 of the Code, which provides in effect that the deputy clerk of a court "may discharge any of the official duties of their (his) principal during his continuance in office, unless it be some duty the performance of which a deputy is expressly forbidden by law."

Sections 2724 and 2724a of the Code also plainly indicate that it is contemplated that a deputy clerk may have authority to sign warrants, and I have been able to find no statute prohibiting a deputy from signing the instruments mentioned by you, and I am, therefore, of opinion that he may do so.

If the clerk authorizes the deputy to sign warrants, as suggested by you, I am of opinion that it is lawful for him to do so, although in my opinion, in view of the statutes to which I have referred, it would be a better practice for either the clerk to sign the warrants or the deputy to sign them in his own capacity as deputy rather than for them to be signed by the method suggested in your letter.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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#### **CLERKS—Duties and Compensation—Preparing County Budget.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 13, 1937.*

HON. S. J. THOMPSON,  
*Commonwealth's Attorney,*  
*Rustburg, Virginia.*

MY DEAR MR. THOMPSON:

I am in receipt of your letter of April 7, stating that the clerk of the circuit court of Campbell County, and as such, clerk of the Board of Supervisors, has submitted a bill of \$50 to the Board for preparing the annual county budget. You desire to know whether the Board of Supervisors should pay this bill.

The duties of the clerk of the Board of Supervisors are prescribed by section 2770(a) of the Code. I do not think that the language fixing these duties is broad enough to include preparation of the county budget. By section 2577(1) the duty of preparing the county budget is placed upon the Board of Supervisors. I presume, therefore, that what the clerk has actually done is to prepare a tentative budget for final approval by the Board. Inasmuch as this duty is not placed upon the clerk by statute, I am of the opinion that the Board could have validly contracted with the clerk for his services in this connection. If such a contract was made, I am of the opinion that the bill should be paid. If, on the other hand, the clerk simply got up the figures for the Board on his own responsibility and without having been requested by the Board so to do, I am of the opinion that the Board could not be required to pay the bill but may within its discretion do so.

I am aware of the fact that the salary of the clerk for his services to the Board of Supervisors, as clerk of the Board, is fixed by section 2772(a) of the Code. However, inasmuch as the work in question does not seem to be required of the clerk by statute, I do not think that this section prevents the Board from paying the clerk for additional services. Ordinarily I would say that the Board could require the clerk to perform such service in connection with the duties of the Board as it saw fit, but, inasmuch as the statute has attempted to prescribe the duties of the clerk and the Board has not, by resolution, made this work a

part of his duty as clerk of the Board, this provision would seem not to apply in this particular case.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**CLERKS—Fees—Entering Certificate of Costs Where Justice Acquits.**

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

HONORABLE S. C. DAY, JR.,  
*Assistant Comptroller,  
Commonwealth of Virginia,  
Richmond, Virginia.*

DEAR MR. DAY:

This is in reply to your letter of October 8, in which you request my opinion as to whether or not the clerk of the court is entitled to receive a fee of twenty-five cents, payable out of the public treasury, for entering a certificate, as provided in section 2552 of the Code, in cases where the trial justice acquits the person accused of the commission of a crime.

Section 2550 provides that the trial justices shall certify to the respective clerks of the courts the amount of every fine and costs in every case before him. It also provides as follows:

“When he acquits the accused he shall certify the costs of the trial and to whom due; and if he rendered judgment against the prosecutor for costs, he shall so state.”

The question is whether or not, when the clerk certifies these facts in the case of acquittal, it is one of the certificates referred to in section 2552, for which the clerk is entitled to a fee of twenty-five cents.

Section 2552 uses this language, “The clerk shall enter all such certificates in a suitable book; \* \* \*”

It is my opinion that the clerk is required to enter in said book the certificate from the trial justice in cases of acquittal, as well as in cases of conviction, and that he is entitled to the said fee of twenty-five cents in all cases where certificates are entered by him.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**CLERKS—Fees—Local Taxes Collected by Delinquent Tax Collector.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 4, 1937.*

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

MY DEAR MR. RICHMOND:

This is in reply to your letter of June 3.

You desire to know whether the clerk of the circuit court is, under section 406 of the Tax Code of Virginia, entitled to a commission of five per cent on

delinquent real estate taxes collected by a delinquent tax collector. You state that the delinquent tax collector is employed by the board of supervisors and compensated by a commission of ten per cent of the taxes that he collects. You further state that none of the collections passes through the clerk's hands, but that the delinquent tax collector makes his settlement with the treasurer. In short, from your letter, the clerk has nothing whatsoever to do with the collection of these taxes and they do not even pass through his office under the arrangement entered into in your county.

I have heretofore ruled that, under section 406 of the Tax Code, the clerk of the circuit court is entitled to the commissions prescribed in that section. However, it is to be observed that section 406 refers to commissions on "taxes and other money belonging to the Commonwealth collected by him (the clerk)."

In the case you put, the money collected does not belong to the Commonwealth, being local taxes, and is not collected by the clerk. I am, therefore, of opinion that, under section 406, the clerk of the circuit court is not entitled to a commission on the taxes collected as described by you.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Recordation—Federal Farm Credit Lien Book.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 13, 1937.*

HONORABLE GEORGE G. TYLER, *Clerk,*  
*Circuit Court of Prince William County,*  
*Manassas, Virginia.*

MY DEAR MR. TYLER:

I am in receipt of your letter of August 12, in which you refer to chapter 336 of the Acts of Assembly 1936, and ask if the recordation of the deeds of trust given pursuant to the Act in the "Miscellaneous Liens Book" instead of the "Federal Farm Credit Lien Book" provided for in the Act would be a substantial compliance with the Act.

Section 5 of the Act specifically requires that the clerk shall docket these instruments in a well-bound book to be known as the "Federal Farm Credit Lien Book" and index the same therein.

In my opinion, this provision of the Act must be complied with. The effect of recording these instruments as you suggest would be to nullify a specific requirement of the Act.

I appreciate your situation, but I do not see how any other construction can be placed on the statute.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Reports of Marriages to Bureau of Vital Statistics—When Made.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 31, 1936.*

HONORABLE J. N. BOSANG, *Clerk,*  
*Circuit Court of Pulaski County,*  
*Pulaski, Virginia.*

MY DEAR MR. BOSANG:

I am in receipt of your letter of July 23, in which you refer to section 5333

of the Code, as amended in 1936 (Acts 1936, page 542) and especially to the following sentence in the amended section:

"The clerks of the court in which such final order of adoption is entered shall report to the State Bureau of Vital Statistics on forms provided by the Bureau for this purpose for final adoption of a child under this chapter and include same with the monthly report of marriages and divorces to the Bureau."

You then ask:

"Does the amendment of 1936 referred to in Dr. Plecker's circular letter require the duplicate marriage license and the monthly reports referred to therein, and the return thereof by the Minister within five days?"

While the draftsmen of the amendment apparently assumed that clerks made monthly reports of marriages to the State Bureau of Vital Statistics, I do not think that the quoted language standing alone, as a matter of law, can be said to alter the plain provision of section 5096 of the Code, requiring an annual report of marriages by the clerks of courts. My information is, confirmed by the enclosures in your letter, that the Bureau of Vital Statistics has requested the clerks to file monthly reports of marriages, and that a large majority of the clerks are complying with this request. While the law requiring an annual report is clear, there is nothing to prohibit the filing of the monthly reports as requested by the Bureau of Vital Statistics.

Nor do I find anything in the amended section which changes the provision of section 5074 of the Code, requiring ministers celebrating marriages to make their returns to the clerk within five days after the celebration of the marriages, section 5074 requiring this return within thirty days.

As to the forms to be used for application for marriage license, the license itself and the certificate in connection therewith, I call your attention to section 5095, which says that the Bureau of Vital Statistics shall furnish the clerks "with all forms and instructions which it may deem necessary or proper for carrying the provisions of this chapter into effect." In view of this provision, I am of opinion that the forms prescribed by the Bureau of Vital Statistics, so long as not in conflict with law, should be used. Certainly this would tend to secure uniformity.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**COMMONWEALTH'S ATTORNEYS—Compensation—Certain Special Services to County, etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 25, 1937.*

HONORABLE R. PAGE MORTON,  
*Attorney for the Commonwealth,  
Charlotte Court House, Virginia.*

MY DEAR MR. MORTON:

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

"I have recently substituted as trustee in a certain deed of trust in which the county of Charlotte is beneficiary. The Board of Supervisors directed me as Commonwealth's Attorney to have myself substituted as trustee and make sale of the property, the trustee having resigned the trust.

"I would like to know whether I should receive the usual commissions allowed a trustee in such sales, and the other fees in connection with it. It

is my idea that this is not a duty of mine, as Commonwealth's Attorney, to sell this property as trustee, because anyone might be appointed trustee to make this sale, and that I should receive the commissions. The other fees would seem to be in the same category."

I am in accord with your view that the sale of this property is not your duty as an Attorney for the Commonwealth, but as trustee in the deed of trust. Therefore, I agree with you that you are entitled to the commissions and fees prescribed by law for making a sale of the property.

You also ask if you may receive compensation from the County School Board for writing deeds, preparing orders for the sale of real estate, and other legal work in connection with the board.

Section 676 of the Code vests in the County School Board the management of all school property and funds. The same section authorizes the board to employ counsel and to provide and direct the payment of reasonable attorneys' fees. In view of these provisions of this section, I am of opinion that the County School Board may employ counsel and direct the payment of reasonable fees to him. Inasmuch as it is generally recognized that the Attorney for the Commonwealth is permitted to practice as an attorney independent of his office, I know of no reason why the School Board may not employ the Attorney for the Commonwealth just as it may employ any other attorney. In this connection, I call your attention to the last sentence of section 662 of the Code, making it the duty of the Commonwealth's Attorney to act for the Board in proceedings under that section. Where the Commonwealth's Attorney is so acting under the duty imposed upon him by law, I am of opinion that it would be improper for him to be paid a fee.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COMMONWEALTH'S ATTORNEYS—Compensation—Bringing Suits for Subjecting Delinquent Land.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 25, 1936.

HONORABLE B. D. PEACHY,  
*Attorney for the Commonwealth,*  
*Williamsburg, Virginia.*

MY DEAR MR. PEACHY:

I am in receipt of your letter of July 23, asking if it is proper for the board of supervisors to pay you a reasonable fee in connection with suits brought for the purpose of subjecting real estate to the payment of delinquent taxes.

It seems to me your question is determined by whether or not it is the duty of the Attorney for the Commonwealth to bring such actions. I call your attention to section 403 of the Tax Code of Virginia, which provides in effect that the Attorney for the Commonwealth shall bring proceedings for the collection of delinquent taxes at the request of the treasurer of the county or city, or the Department of Taxation or the Attorney General. In view of this requirement of the statute, I think it is only fair to assume that the Legislature considered that bringing suits for the collection of delinquent taxes was one of the duties of the office of the Attorney for the Commonwealth. Therefore, it follows that in my opinion it would be improper for the board of supervisors to pay the Attorney for the Commonwealth any additional compensation for this work.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**COMMONWEALTH'S ATTORNEYS—Compensation—Certain Special Services; Id., Commission on Forfeiture of Bail Bond.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 28, 1937.*

HONORABLE CHAS. F. HARRISON,  
*Attorney for the Commonwealth,*  
*Leesburg, Virginia.*

MY DEAR MR. HARRISON:

I am in receipt of your letter of April 16, in which you state that the school board of your county desires to pay you a fee for services rendered in connection with the proceedings instituted against the school trustee electoral board and the county school board. You ask whether the fact that you are the attorney for the Commonwealth would prevent you from accepting this fee.

This office has heretofore ruled that if the county school board desires to employ an attorney to represent it, as the board is authorized to do, there is nothing to prevent the selection of the attorney for the Commonwealth, and the payment to him of such a fee as may be agreed upon. The only exception to this rule is where the attorney for the Commonwealth performs services for the board which he is required by statute to perform, such as the services called for in section 662 of the Code. However, I understand that the services which you have rendered for the board are not such as you are required by statute to render, and I, therefore, know of no reason why you should not accept a fee.

Your second question relates to your right to accept the commission provided by section 3505 of the Code for collecting a forfeited bail bond.

Section 1 of the Compensation Act of 1934 (Acts of 1934, page 733) provides in part that "On and after the first day of July, nineteen hundred and thirty-four, the attorney for the Commonwealth for each county and city shall be paid a salary for his services and the fee system as a method of compensating such officers shall be abolished."

It is true that this section does not in terms mention "commissions", but you will note it provides that this officer shall be paid a salary for his services. I think a reasonable construction of this act is that the attorney for the Commonwealth shall be paid a salary for all services he is required by law to perform, and that the spirit of the act includes commissions such as the one in question.

My opinion is, therefore, that the acceptance of this commission will be contrary to the intent of the General Assembly in adopting the salary as the method of compensating the attorney for the Commonwealth.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COMMONWEALTH'S ATTORNEYS—Duties and Compensation—Negotiating Loan from United States.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 7, 1937.*

HONORABLE LAWRENCE W. DOUGLAS,  
*Attorney for the Commonwealth,*  
*Arlington, Virginia.*

MY DEAR MR. DOUGLAS:

I am in receipt of your letter of April 6, in which you inquire if the county school board of Arlington may allow the attorney for the Commonwealth compensation for the reasonable value of his services in connection with securing a

grant from the United States Government for the construction of public schools in Arlington county, including examination of titles to parcels of land acquired by the board.

Where the statutes make it the duty of the Commonwealth's attorney to act for the school board, no fee should be paid by him by such board for such services. An illustration of this is contained in the services performed by the attorney for the Commonwealth under the provisions of section 662 of the Code. However, there is no statute making it the duty of the Commonwealth's attorney to render the services described by you, and I know of no reason why reasonable compensation for these services may not be agreed upon between you and the board and paid by the board. Section 676 of the Code plainly contemplates that the board may employ counsel and provide for the payment of reasonable attorney's fees, and section 2709 specifically provides for compensation for services of counsel employed under the authority of that section.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**CONSTABLES—Issuance of Process to—Where May Be Executed.**

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

HONORABLE C. W. DAVIS,  
*Trial Justice,*  
*Courtland, Virginia.*

DEAR MR. DAVIS:

This is in response to your request for the opinion of this office as to whether process in a case before a trial justice may be directed to a constable and executed by him anywhere in his county regardless of the limits of his magisterial district.

Virginia Code (Michie, 1930), section 4987-f, added to the Code by chapter 385 of the Acts of 1936, provides that in civil actions before trial justices the warrant or notice of motion "may be directed to a constable, sheriff or sergeant of any county or city wherein the defendant resides or may be found."

Virginia Code, section 6041, provides that a notice of motion may be served by any sheriff, sergeant or constable to whom it is directed "in his county or city", and section 6062 provides that any summons or scire facias may be executed by the same person and in a like manner.

I have carefully examined the statutes and decisions on this subject and find nothing to limit the broad language of the sections referred to. The early case of *M'Neale v. Governor*, 3 Gratt, 286, to which you call my attention was decided under a provision in chapter 84 of the Code of 1819 expressly prohibiting constables from executing process outside of their respective districts. This provision has not been in effect since the enactment of the Code of 1849.

It is, therefore, the opinion of this office that a constable to whom process is directed may execute the same anywhere within his county.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**CONSTABLES—Service of Process—Territorial Jurisdiction.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 4, 1937.*

HON. C. P. DOWDY, *Constable,*  
*R. F. D. No. 1, Box 74,*  
*Salem, Virginia.*

DEAR MR. DOWDY:

I am in receipt of your letter of April 28, in which you ask if a constable may serve "a paper" anywhere in his county. You state that you are the only constable in Roanoke County.

While the duties of a constable are not prescribed by any particular statute, I am of the opinion that any summons or scire facias may be served by a constable anywhere in his county. This seems to be the clear intent of sections 6062 and 6041 of the code. I cannot go so far as to say that any "paper" may be served by a constable anywhere in his county for the reason that in some cases a particular method of service may be prescribed by statute.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**CORONERS—Fees—Collection Where Claims Refused.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 28, 1937.*

DR. J. BURTON NOWLIN,  
*City Coroner,*  
*811 Church Street,*  
*Lynchburg, Virginia.*

DEAR DR. NOWLIN:

I have your letter of April 27, in which you advise that you have held inquests in certain cases, made up your bill therefor and presented it to the judge of the corporation court for his approval and his order directing the board of supervisors to pay the account. You further state that on presenting the court order to the board of supervisors of the county of which the deceased was a resident, the said board has in several cases refused payment.

You ask if in cases of this sort the bill may be sent to the State Comptroller for payment, that officer to charge the same back to the county responsible. In reply I beg to advise that there is no authority for such action. In this connection I refer you to sections 2759 to 2765 of the Virginia Code relating to claims against counties. If the State Comptroller should take the action which you suggest, he would, in effect, be passing upon the merits of the claim against the county, and there is no statute giving the Comptroller this authority.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**COSTS—Arresting Officer's Fee in Cases of Motor Vehicle Law Offenses—Taxability of.**

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

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

DEAR MR. McNEIL:

This is in reply to your letter of August 28.

You ask my opinion on the following :

"Under section 8 of the Motor Vehicle Code of Virginia, it is provided that no county or local arresting officer shall be permitted to receive any fee resulting from the conviction of an offender under the Motor Vehicle Code of Virginia.

"The question on which I wish to ask your opinion is this: 'Should the fee for the arresting officer be taxed in the court costs and paid into the State Treasury as costs due the Commonwealth of Virginia or should there be no fee taxed for the arresting officer?' "

My view is that the provision of section 8 to which you refer only has the effect of prohibiting payment of fees to arresting officers, and has no bearing on the taxing of these fees as costs. In other words, I think all proper costs provided by law should be taxed, and such fees as the officers are prohibited from receiving by section 8 should be paid into the treasury.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **COSTS—Coroners' Proceedings—How Paid.**

##### COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 12, 1936.*

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

MY DEAR MR. WILLIAMS :

I am in receipt of your letter of August 6, in which you make the following inquiry :

"I would appreciate very much the opinion from your office as to the manner in which expenses created under Section 4810 of the Code of 1930 may be met, such as payment to the stenographer for taking the evidence, attendance of witnesses, and other expenses necessary in investigating the cause of violent deaths."

I call your attention to section 4814 of the Code, which provides in effect that, if the deceased is a stranger, the expenses 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. This section further provides that no such expense shall be paid until allowed by the court of the coroner's County or Corporation. In brief, it seems to me that the information you desire is contained in section 4814 of the Code.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **COSTS—Criminal Cases—Taxing of—Costs of Venire and Fees of Defendant's Witnesses.**

##### COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 26, 1936.*

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

MY DEAR MR. McLEMORE :

I am in receipt of your letter of September 23, in which you ask if in making up the statement of costs in criminal cases under section 4964 the clerk should

include the amount paid the jurors (or the proportionate part thereof if the same jury tried more than one case on the same day) where the case is decided against the defendant and judgment is entered for fine and costs, or costs where there is no fine.

Section 4964 provides that the clerk of the court in which the accused is convicted shall "make up a statement of all the expenses incident to the prosecution \* \* \*." The amount paid jurors is unquestionably an expense of the prosecution, and I am of opinion that this amount or the proportionate part should be taxed as a part of the costs to be paid by the defendant.

You also ask if the amount due witnesses summoned on behalf of the defendant should be taxed as a part of the costs.

I am of opinion that fees and mileage of defendant's witnesses should not be so taxed, since they are not expenses incident to the prosecution and, as you state do not have to be paid by the Commonwealth.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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#### **COSTS—Criminal Cases—Taxing Costs of Venire.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 30, 1936.*

MR. M. H. WILLIS,  
*Clerk of Corporation Court,  
Fredericksburg, Virginia.*

DEAR MR. WILLIS:

I have your letter of September 29, in which you make the following request:

"Will you please give me your opinion as to whether or not it is proper to charge, as a part of the cost of trial, the Jury."

The statute, Virginia Code (Michie 1936) section 4964, merely provides that the clerk shall tax against a convicted defendant "all the expenses incident to the prosecution." Our courts have consistently held that the purpose and intent of this statute is to exact from the wrongdoer full reimbursement of the expense to which he has put the State.

Under this section, as construed by the Court of Appeals, this office has repeatedly ruled that a convicted defendant should be taxed with whatever amount has had to be expended in assembling and compensating jurors for the trial of his case. Thus, where a single venire is used for the trial of several cases, the costs of assembling the panel should be so apportioned as to assess against each unsuccessful litigant that proportionate part of the entire costs which may properly be said to have been incurred as an incident to the trial of his case. This apportionment, of course, cannot always be made with mathematical exactness, and it is the opinion of this office that the statute confers on the clerk a considerable discretion in determining what amount may be properly assessed against an accused as "expenses incident to the prosecution."

In addition to his share of the cost of assembling the venire, the convicted defendant should, of course, be taxed with the jurors' attendance fees for the time actually spent on the trial of his case.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**COSTS—Maintenance of Prisoners Convicted under Ordinance—By Whom Paid.**

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

HONORABLE PAUL W. CROCKETT,  
*Attorney for the Commonwealth,  
Yorktown, Virginia.*

MY DEAR MR. CROCKETT:

I am in receipt of your letter of August 10, in which you call my attention to chapter 425 of the Acts of Assembly 1936, relating to the passage of ordinances by certain political subdivisions prohibiting driving while drunk. You then ask if the governmental subdivisions which enact ordinances in accordance with this Act are chargeable with jail fees and maintenance of prisoners, etc.

Of course, where any person is convicted under a local ordinance, the State is not liable for this expense. See section 3510 of the Code. The law specifically provides for certain allowances to jailors, and, inasmuch as the prisoner is confined in jail for a violation of a local ordinance, I am of opinion that the costs of maintenance of such a prisoner must be borne by the locality under whose ordinance he was tried and convicted.

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

**COSTS—Ordinance Cases—Fees for Summoning Witnesses.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 7, 1937.*

HONORABLE ROBERT B. DAVIS,  
*Police Justice,  
Bristol, Virginia.*

MY DEAR JUDGE DAVIS:

Again referring to your letter of May 10, in which you raise the following question:

"Will you kindly advise the writer whether or not in taxing costs in police court the fee provided for in the Code for summoning witnesses may be charged against the defendant. Of course, I do not mean by that that the officer is to get any portion of this, but that this may be taxed against the defendant along with other costs accruing to the city."

The language above quoted obviously refers to cases involving violations of city ordinances where the witnesses are summoned by a police officer of the city.

I do not think that section 3508 of the Code, prescribing fees for a sheriff, sergeant or constable, applies in such cases, inasmuch as this section relates to fees of these officers for summoning witnesses in cases of violations of State law. Nor have I been able to find a State statute providing fees for summoning witnesses in cases of violation of local ordinances. In the absence of a State law on the subject, I am of opinion that the authority for these fees must be found in your charter or in an ordinance enacted pursuant thereto.

With best wishes, I am

Very sincerely yours,  
ABRAM P. STAPLES,  
*Attorney General.*

**COSTS—Sheriffs—Transportation of Convict to Penitentiary After Sentence.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 16, 1936.*

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

DEAR GOVERNOR PEERY:

This is in response to your request for an opinion upon the propriety of the action of the Comptroller's office in declining to pay a bill in the sum of \$57.64 rendered by the sheriff of Wythe County for services in conveying Henry Bausell and Bernace Bausell to the State Penitentiary pursuant to the order of the Circuit Court of Wythe County.

Section 4960 of the Code authorizes the court in which a criminal case is tried to allow reasonable compensation to a sheriff for doing any act in the service of the criminal case for which no other compensation is provided. The services rendered here, however, were rendered after the determination of the case and I do not believe could be said to be rendered in the case.

Section 4948 of the Code specifically provides that persons sentenced by the court to confinement in the penitentiary shall be transported to the penitentiary by a penitentiary guard and placed in the hands of the superintendent of the penitentiary. This section, 4948, seems to me to fully cover the statutory provisions on the subject of transporting prisoners to the penitentiary and I can find no authority whatever for compensation being paid by the State for transportation in any other way or under any other authority than that of the superintendent of the penitentiary.

Under the facts set out in Judge Sutherland's letter, this certainly appears to be a hard case. I know of no relief provided for under the existing laws, though it may be at the next session of the General Assembly a special relief bill might be enacted compensating and reimbursing the sheriffs.

I am returning herewith the correspondence which you sent me.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COSTS—Transportation of Accused to State Hospital for Observation—How Fixed and by Whom Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 23, 1936.*

HON. W. N. HANNAH,  
*Commonwealth's Attorney.*  
*Palmyra, Virginia.*

DEAR MR. HANNAH:

This will acknowledge receipt of your letter of September 21.

You state that one Rawleigh Searcy, while awaiting trial on criminal charges in your county, was committed to a State hospital for the insane for observation and determination of his mental condition; that he was taken to the hospital by the sheriff of your county and that some question has arisen as to whether the sheriff's expenses incident to this transportation should be paid by the State, county, or the hospital in question. You request the opinion of this office on this question.

I am of the opinion that the expenses should be borne by the State. The provisions of chapter 46 of the Code (Michie, 1936) requiring certain of the ex-

penses of transporting insane persons to State hospitals to be paid by the county of commitment and by the hospital, are apparently confined to cases of regular commitments and would not seem to apply where the patient is committed merely for temporary observation. This being so, and since the statute (Code sec. 4909) providing for such temporary commitments makes no provision for paying expenses of transportation, it seems clear that the officer in question should be reimbursed out of the State treasury under the provisions of Code section 4960 relating to miscellaneous costs in criminal cases not otherwise provided for.

Under section 4960 the court may allow the sheriff such remuneration as it sees fit for "any other service, for which no specific compensation is provided." It is therefore the opinion of this office that the sheriff in the case to which you refer should be paid out of the State treasury such sum as may be allowed by the court to cover his expenses.

In your letter you also ask whether the transporting officer should be paid mileage or "actual expenses." Under my view of the law as set out above, the amount to be paid would depend entirely on the allowance made by the court. I am informed, however, by the Comptroller's office that it is customary to allow officers in such cases their actual expenses for transporting patients by railroad and eight cents per mile where the prisoner is carried in the officer's own automobile.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

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**COSTS—Where Defendant Is Charged With Felony and Convicted of Misdemeanor Only—Cost of Assembling, Etc., Venire.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 20, 1936.

HONORABLE G. C. ALDERSON,  
*Clerk of Circuit Court,*  
*Hopewell, Virginia.*

DEAR MR. ALDERSON:

I have your letter of July 10, in which you request the opinion of this office on each of the following two questions:

1. Where an accused is indicted for a felony, but convicted of some lesser crime, a misdemeanor, charged in the indictment, may the costs of the prosecution be assessed against him?

2. In assessing against an accused the Commonwealth's costs, should the clerk include the cost of assembling the entire *venire* or only the cost of empanelling the twelve jurors who actually served?

It is the opinion of this office that your first question must be answered in the affirmative. The statute, Virginia Code (Michie, 1930), section 4964, merely provides that the whole costs of a prosecution shall be assessed against the accused if he is "convicted." Our courts have consistently held that the purpose and spirit of this statute is to exact from the wrongdoer reimbursement of the expense to which he has put the State. Under this view of the law, it would certainly seem to make no difference that the accused had been charged with a greater crime than the one of which he is convicted.

The case of *Hardy and Curry v. Commonwealth*, 17 Gratt. (58 Va.) 592, would seem to be strong authority for a contrary view. I call your attention, however, to the case of *Canada v. Commonwealth*, 22 Gratt. (63 Va.) 899, in which the Court of Appeals affirmed a judgment convicting the defendant of a misdemeanor under an indictment for a felony and charging against him, as the opinion expressly states, the costs of the prosecution. See Judge Moncure's opinion in that case, 22 Gratt. at page 911.

While the court did not expressly overrule *Hardy's Case*, we believe that the square holding in *Canada's Case* necessarily had that effect.

Your second question cannot, we think, be answered categorically. The statute, referred to above, merely provides that the convicted defendant shall be charged with "all the expenses incident to the prosecution." The application of the general terms used in this statute to each particular case is, in our opinion, a matter primarily for your own determination. In a case in which it is necessary to summon a whole venire for the trial of one criminal case, it seems clear that the costs of assembling the entire venire should be assessed against a defendant. However, where a venire is summoned and used for the trial of a number of cases, you should so apportion the costs as to assess against each unsuccessful litigant that proportionate part of the entire costs which might properly be said to have been incurred as an incident to the trial of his case.

As already stated, however, it is the opinion of this office that the statute imposes on the clerk a considerable discretion in determining the amount which may properly be assessed against an accused as "expenses incident to the prosecution."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**COUNTIES—Appropriations—Promotion of Agriculture.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 24, 1937.

HONORABLE M. B. BOOKER,  
*Attorney for the Commonwealth,*  
*Halifax, Virginia.*

MY DEAR MR. BOOKER:

I am in receipt of your letter of March 18, calling my attention to sections 924 and 2734 of the Code, the first section authorizing boards of supervisors to appropriate out of county funds such sums as the board may deem proper for the support of demonstration work in co-operation with the Virginia Polytechnic Institute, such sums to be used for paying the salary and expenses of a county agent. The second section authorizes the boards of supervisors to appropriate out of the general county levy annually a sum not exceeding \$1,000 for the purpose of promoting agriculture.

My opinion is desired on the question whether section 2734 limits section 924, so that the total that may be appropriated by the board of supervisors for both the county agent and promoting agriculture shall not exceed \$1,000.

I have had occasion in the past to express an opinion on this question and have held that the two sections are independent of each other, the result being that the board may not only make an appropriation for the demonstration work, but may also expend not exceeding \$1,000 for the promotion of agriculture in other respects. The two Acts from which these sections of the Code are taken were passed at the same session of the General Assembly and, in my opinion, this is a case where the rule should be invoked that, where two Acts dealing with the same general subject are passed at the same session of the Legislature, effect as far as possible should be given to the provisions of each Act. If this rule is not applied in this case, then the result is that section 2734 of the Code is practically a nullity.

In my opinion, the board of supervisors only has authority to expend \$1,000 for the purpose of purchasing the terracing machine, in view of section 2734 of the Code.

For your information, I am enclosing a copy of a letter I wrote to Mr. J. D. Wysor, County Agent, Christianburg, Virginia, under date of February 15, 1937,

dealing with the county agent, and copy of another letter under date of August 6, 1936, to Honorable A. S. Harrison, Jr., Attorney for the Commonwealth of Brunswick County, on the subject of the purchase of a terracing machine.

The question presented is a very close one and not at all free from doubt. Section 924, having been enacted after section 2734, however, I believe it should be considered as impliedly repealing any inconsistency contained in section 2734.

With my best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—Appropriations—Contribution to Erection of Tuberculosis Hospital.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 27, 1937.*

HONORABLE R. A. EDWARDS,  
*Clerk,*

*Isle of Wight, Virginia.*

DEAR MR. EDWARDS:

I am in receipt of your letter of January 22, in which you ask if the board of supervisors of your county have the authority to make an appropriation towards the erection of a hospital for the tubercular in your section, with the understanding that the county would have the right to admit patients to said hospital from time to time. You further state that the hospital will be built with private funds, and will be operated with money collected from the patients as well as an expected appropriation from the State.

While it is probably true that such an institution would be of benefit to the taxpayers of the county, I am exceedingly doubtful of the authority of the board of supervisors to make an appropriation for this purpose.

Section 1506 of the Code provides that the board of supervisors may appropriate money to help maintain indigent persons suffering from tuberculosis at any of the State sanatoriums. I, also, find that sections 1507 to 1514 authorize, under prescribed circumstances, the erection of a tuberculosis sanatorium by the county.

In view of the fact that the general law seems to prescribe specifically how the counties may aid the tubercular and erect sanatoriums, I am of opinion that these provisions exclude such an appropriation as you suggest.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—Appropriations for Promotion of Agriculture—Limitation.**

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

MR. J. D. WYSOR, *County Agent,*  
*Christiansburg, Virginia.*

MY DEAR MR. WYSOR:

I am in receipt of your letter of February 13, in which you refer to sections 924 and 2734 of the Code, the first section authorizing boards of supervisors to appropriate money for administration work, and the second authorizing the Boards to appropriate a sum not exceeding \$1,000 for the purpose of promoting agriculture in the counties.

I am of opinion that these two sections are entirely independent of each other and that the appropriation made under section 924 is not to be charged against the appropriation authorized by section 2734.

You next inquire what subjects or things are included in the language of section 2734 authorizing the appropriation of \$1,000 "for the purpose of promoting agriculture in said county."

I am sure you will understand that it will be impossible for me to attempt to list the various things that may be done to promote agriculture. If you desire to know whether any particular activity is embraced within this language, I shall be glad to attempt to advise you.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COUNTIES—Boards of Supervisors—Compensation—Special Committee Work,  
Etc.**

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

HONORABLE R. A. BICKERS,  
*Attorney for the Commonwealth,  
Culpeper, Virginia.*

DEAR MR. BICKERS:

I am in receipt of your letter of December 3, in which you ask for my construction of section 2769 of the Code of Virginia, as amended in 1936 (Acts 1936, page 525), as applied to the following facts:

"The members of the Board of Supervisors receive a salary as fixed by the judge, and in addition their mileage for attending the meetings. The question has arisen quite frequently when the Chairman of the Board will appoint committees to attend to certain affairs of the county—probably repairing some of the county's buildings or other outside duties—does their salary cover this work or is their salary confined to attending the meetings and such duties as they can and do perform at said meetings relative to the affairs of the county.

"It has long been the custom of the Board here and I understand in numerous other counties that such committees are allowed a reasonable fee and mileage in performing their duties as committeemen when appointed by the Board, and the Board feels they are still entitled to same."

I have recently had an occasion to render an opinion on this statute to Honorable Joseph H. Poff, Attorney for the Commonwealth, Floyd, Virginia, and I enclose for your information a copy of that opinion from which you will see that it is my view that the salary paid to each member of the board of supervisors is in full compensation for discharging the duties imposed upon him by law.

Your letter further seems to raise the question as to whether or not, where members of the board render services for the county which are not required of them by law, such members may be compensated therefor. It seems to me that, if any agreement was made to compensate a member or members of the board of supervisors for services not required by law, such agreement would be contrary to the provisions of section 2707 of the Code, to which I invite your attention.

With my best wishes, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—Boards of Supervisors—Power to Construct Private Sewer for Industrial Plant to Encourage Location in County.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 11, 1937.*

HONORABLE JOHN D. WHITE,  
*Attorney for the Commonwealth,  
Staunton, Virginia.*

DEAR MR. WHITE:

I have your letter of March 6, and am of the opinion that the board of supervisors of Rockingham county cannot appropriate public funds to aid a private manufacturing company, even though such company's activity will improve the general welfare of the county in which its plant is located.

Your letter indicates that the sewer, which the company wishes the county to build or pay for, is purely a private sewer for their own exclusive use and is not the type which might be classified as a public sewer under section 2757 of the Code of Virginia (1936), nor would it be a part of the county sewage disposal system.

The authorization of the board of supervisors to provide for the "general welfare" under section 2743 of the Code of Virginia (1936) will not cover this case, for section 185 of the Constitution of Virginia provides in part:

*"Neither the credit of the State, nor of any county, or town, shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation \* \* \* for the purpose of aiding in the construction or maintenance of its work; \* \* \*"*

Section 189 of the Constitution of Virginia seems to spell out the only inducement which the public authorities of a county can offer a private manufacturer for establishing his plant within the county. Section 189 provides:

*"The General Assembly may, by general law, authorize the governing bodies of cities, towns and counties to exempt manufacturing establishments and works of internal improvement from local taxation for a period not exceeding five years, as an inducement to their location."*

The authorities clearly support this holding. Cases where municipal corporations have been denied this power are in point here. You will notice that towns are classified along with the counties in section 185 of the Constitution, *supra*, and it is also true that counties are "municipal corporations" in the sense that they are bodies politic exercising certain functions of local government. The general rule is found in 19 R. C. L. 710, section 20, which reads:

*"Cases have occasionally arisen in which citizens of a town, anxious to induce manufacturing enterprises to locate their structures within its limits on account of the enhancement of the property of the community that it is expected will follow, have obtained authority from the legislature to grant the promoters of the corporation financial aid from the funds of the town on condition that they will establish their enterprise within the limits of the town. It is well settled, however, that it is not within the power of a constitutional government to expend the public funds in order to enable an individual to cultivate his land or to carry on his business to better advantage, on account of the incidental enhancement of the property of the community that will result from his success, and that his fields are large or his business extensive does not affect the character of his enterprise. It is still private and not public. It is accordingly held that a municipal corporation cannot constitutionally be authorized by the legislature to expend its funds in behalf of a private manufacturing enterprise. It can make no difference in what form the aid is sought to be given. If the municipality issues its bonds for the desired amount and turns them over to the favored manufacturer, as the*

bonds must be met by taxation when they become due, the act which authorizes their issue necessarily has provided for taxation for a private purpose, and the bonds are absolutely void. A statute authorizing a municipality to subscribe to the stock of a manufacturing corporation is equally objectionable, and it has even been held that the remission of a tax by a vote of a town is in substance and effect the same as a gift, and that a statute authorizing it is void. The only exception to this rule is found in the case of mills run by water power which are obliged by law to serve all who may desire to patronize them, at reasonable rates fixed by public authority. \* \* \*

See: 16 Am. St. Rep. 365, at p. 370 (Note).

*Cole v. LaGrange*, 113 U. S. 1 (1885).

*Ferrell v. Doak*, 152 Tenn. 88, 257 S. W. 29, 46 A. L. R. 590.

46 A. L. R. 609, at pp. 733-745 (Note).

*A fortiori* when there is no Virginia statute granting such authority, the Board of Supervisors have no power to aid a private corporation.

McQuillin on Municipal Corporations, (2nd ed. 1928), Vol. 5, p. 950, section 2328 states the rule thus:

"Unless the power so to do has been *expressly delegated* by the legislature, a municipality has no power to donate money, issue bonds, subscribe to the stock, or otherwise aid a private corporation, and this is so notwithstanding the municipality may be incidentally benefited by the location of the company in the municipality or otherwise. This includes aid to railroad companies proposing to build to or through the municipality; subscription to stock in a navigation company; aid to steamship lines; aid to manufacturing plants; aid to a private water company; or aid to a fraternal association in consideration of locating the chief office in the city. \* \* \*

See: *Collier Shovel & Stamping Co. v. Washington*, 38 Ind. App. 370, 76 N. E. 122 (1905).

The power of the Board of Supervisors to raise money to meet expenses incident to or arising from the execution of their lawful authority under sections 2727 and 2757a of the Virginia Code (1936) would not include the expenses of this "private" project:

"It is well settled that money raised by taxation cannot be lawfully expended to contribute aid to any kind of manufacture carried on by a private individual or corporation for profit and not under obligation to serve the public, even if the establishment of a factory will be of indirect benefit to the people of a city or town which is for that reason desirous of making the contribution. \* \* \*" 26 R. C. L. 59, section 41.

Section 1783 of the Virginia Code (1936) punishes the pollution of potable water used for the supply of cities and towns, but there are no sections in the Virginia Code requiring approval of proposed sewers, except section 2757 which covers only the building of a *public sewer* by a private landowner. It seems, therefore, that no provision in the Code makes it necessary for a manufacturing or industrial concern to submit plans of sewage or disposal of waste matters in a stream before the plant is constructed or permit is obtained. Clearly the Federal authorities have no jurisdiction in a case of this nature.

Under the ruling that the county cannot legally appropriate money for this private work, the question how the county can avoid responsibility for stream pollution in this instance will not arise.

Very truly yours,

ABRAM P. STAPLES,

*Attorney General.*

**COUNTIES—Boards of Supervisors—Power to acquire land for use of sanitary district.**

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

HONORABLE M. A. COGBILL,  
*Commonwealth's Attorney,*  
*Chesterfield Court House, Virginia.*

DEAR MR. COGBILL:

I am in receipt of your letter of March 14, in which you desire the opinion of this office as to the authority of the Board of Supervisors of Chesterfield county to acquire and hold title to land for the use of a sanitary district. I note your reference to section 2854 of the Code of Virginia.

I assume that the sanitary district to which you refer has been duly and legally created by the circuit court of your county under the provisions of section 1560a of the Code of Virginia.

In my opinion, section 1560c of the Code, setting forth the "Powers and duties generally" of the Board of Supervisors with respect to the practical operation and management of a sanitary district created under section 1560a, authorizes your board to acquire and hold title to land necessary for the purposes specified in section 1560c. Your board is also authorized, under section 1560c of the Code, to acquire title to sufficient land on which to erect a municipal building for housing your fire fighting apparatus, and for the use of any purpose or purposes included in the authority vested in the board by that section.

With kind personal regards, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—Expenditures—Use of Accumulated Sewer Taxes for Building Sidewalks.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 24, 1937.*

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

MY DEAR MR. THOMPSON:

I refer to your letters of May 14 and 20, in connection with the right of the Board of Supervisors of Campbell County to use funds accumulated by virtue of the sewer tax, in order to lay sidewalks in Brookville District, under the authority of the Acts of 1932, page 402. I note that this sewer tax has not been levied since 1933.

It would appear, therefore, that it is too late for any person to apply for a refund of this tax. See section 414 of the Tax Code of Virginia.

I also note your statement that there was no statutory authority for originally levying this sewer tax.

In view of the situation as it exists, I am of opinion that this fund that has accumulated as described by you is available to the Board of Supervisors for complying with the authority granted in the Acts of 1932, to which you refer.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—Bonds—Refunding Literary Loans without Referendum.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 16, 1937.

HONORABLE ROBERT WHITEHEAD,  
*Attorney for the Commonwealth,  
Lovingston, Virginia.*

DEAR MR. WHITEHEAD:

This is in reply to your letter of March 11, in which you request that I reconsider an opinion given by this office to Mr. T. D. Foster appearing on page 23 of the annual report of the Attorney General for the period July 1, 1935, to June 30, 1936. The principal question dealt with in that opinion is whether or not the General Assembly has the power under section 115a of the Constitution to authorize the board of supervisors and school board of a county to issue refunding bonds to be sold on the general market for the purpose of refunding and discharging the literary fund loan.

I have read carefully your letter and appreciate the force of your argument. I do not think the question is entirely free from doubt.

You suggest that a literary loan is a "previous liability" within the meaning of section 115a of the Constitution, which by that section is permitted to be refunded without a referendum. I think that upon this point the answer to the question hinges. It has been my opinion that a literary loan is not a "previous liability" within the meaning of section 115a of the Constitution.

In the case of *Board of Supervisors v. Cox*, 115 Va. 687, the court was careful to distinguish the obligation of a county to the State by virtue of a literary fund loan from the obligation of the county under an ordinary bond issue. The literary loan is treated by the court as one of the steps in the discharge of the duty imposed by the Constitution to provide and maintain the public school system, and is thus referred to in the opinion:

"\* \* \* In other words, the obligation on the county to repay a literary fund loan for schoolhouses is in the nature of an involuntary one, imposed by the General Assembly in carrying out the mandatory directions of the Constitution, while its obligation to repay a bond issue loan for schoolhouses, the proceeds of which have been used in lieu of, or to supplement the funds provided by the General Assembly, is a voluntary obligation brought about by the approval of the voters. It is only to the debts or loans of the voluntary class that section 115-a of the Constitution is directed. To hold otherwise, would in effect be to construe section 129 of the Constitution as imposing on the General Assembly the duty to provide schools, and section 115-a as denying it the power to perform that duty." (155 Va. at pages 703 and 704).

Thus the court holds in effect that only a voluntary obligation of the county constitutes a "previous liability" within the meaning of said constitutional provision.

I am not unmindful, however, of the fact that the court may take a different view of these various statutory and constitutional provisions. The opinion of this office, of course, is only advisory and would not affect the validity of the bonds in any way. I have been informed that a prominent New York law firm specializing in bond issues has raised this same question, and declined to approve a bond issue of the type to which you refer.

It seems to me that, if you are of the opinion that this bond issue is authorized and permissible, and the attorneys for the purchaser are willing to approve the validity of the issue, it would not be improper in any way for the school board and board of supervisors to go ahead with the proposed plan without having the referendum.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—School Levies—Authority to Levy Special District Tax for Erection of School Building.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 2, 1937.*

HONORABLE DOUGLAS S. MITCHELL,  
*Attorney for the Commonwealth,*  
*West Point, Virginia.*

MY DEAR MR. MITCHELL:

I am in receipt of your letter of February 19, in which you refer to our conversation of a few days ago relative to the question of whether a special district tax may be levied under the provisions of section 698 of the Code for the purpose of erecting a school building in a district.

The General Assembly in 1936 added a new section to the Code, designating it as section 698. This Act may be found at page 150. The section specifically provides, among other things, that "for capital expenditures \* \* \* the board (of supervisors) may levy a district tax in the magisterial district in which the money is to be spent \* \* \* not exceeding twenty-five cents \* \* \*." This section plainly answers your question in the affirmative.

However, later on at the same session, in one Act a number of sections of the Code dealing with public schools were amended. This later Act also added a new section to the Code, to be designated as section 698. This later section 698 is substantially similar to the 698 added in the earlier Act, but it does not contain authority for the levy of a special district tax for capital expenditures in a district.

We are thus confronted with the problem of determining whether this later section 698 repeals the earlier section 698, insofar as the authority to levy the special district tax is concerned. Strangely enough, section 673 of the Code as amended in the later Act specifically provides for the erection of a schoolhouse at the expense of a school district where the funds are to be derived from a bond issue, and further gives authority to levy a special district tax for the creation of a sinking fund to retire the bond issue and to pay the interest on the bonds. It would appear unreasonable to impute to the General Assembly the intention to authorize the levy of a special district tax for the erection of a school building when bonds are floated to raise the funds and to hold that the General Assembly did not intend to authorize a special district tax where the building could be constructed without the use of the bond issue. I call your particular attention to the fact that the later Act adding section 698 to the Code is not amendatory of the first Act also adding section 698.

While the question is not at all free from difficulty or doubt, it is my opinion that all of the 1936 legislation on this question of special district taxes should be considered together and an effort made to give effect to every provision possible. It is a fundamental principle that statutes dealing with the same subjects enacted at the same session of the General Assembly should be construed so as to give effect to all the provisions in each statute that are not irreconcilably in conflict. When this is done, I reach the conclusion that, notwithstanding the absence of the authority in the later section 698, effect must be given to the specific authority to levy the district tax you mention in the earlier section 698.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**COUNTIES—Taxation—Exemptions to Encourage Establishment of New Industries.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 12, 1937.

HONORABLE JOHN H. DOWNING,  
*Commonwealth's Attorney,*  
*Front Royal, Virginia.*

DEAR MR. DOWNING:

Through Senator Aubrey G. Weaver, you request the opinion of this office as to the authority of the Board of Supervisors of Warren county to exempt the Viscose Corporation of Virginia from local taxation for a period of time of an aggregate sum not exceeding \$17,000, which sum will not exceed local levies on the property of the corporation lying in the county of Warren during the next five years, and, in the absence of the Attorney General, I am replying.

Pursuant to section 189 of the Constitution of Virginia, the General Assembly enacted chapter 119, Acts 1930, page 338, carried as section 299-b of the State Tax Code, authorizing the Board of Supervisors of your county, as an inducement to its location in Warren county, to exempt the corporation from local taxation for a period of not exceeding five years.

While the corporation has already purchased real estate as a site for its manufacturing plant, I understand that it cannot operate without an improved highway from an existing improved highway; that sufficient funds are not available to construct the required highway, and that the reasonable expectation of such highway was an inducement to the corporation locating in Warren county.

Under the recited facts, I am of the opinion that the Board of Supervisors of Warren county is legally authorized by the statutes cited to exempt the Viscose Corporation of Virginia from local levies in an aggregate sum not exceeding \$17,000 for the next five years, as provided in the Constitution and Tax Code cited above.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.***COUNTY FARMS—Governing Board—Removal of Members.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., February 22, 1937.

HONORABLE RALPH L. LINCOLN,  
*Commonwealth's Attorney,*  
*Marion, Virginia.*

DEAR MR. LINCOLN:

I have before me your letter of the 16th instant, in which you ask my opinion upon the two questions hereinafter set forth:

Your first question is as follows:

"(1). About eight years ago, Smyth, Wythe and Pulaski Counties combined and consolidated for the purpose of building and maintaining a poor house and farm which was located in Pulaski County. At the time of the consolidation, Mr. J. A. Eller, Chairman of the Smyth County Board of Supervisors was elected the representative from Smyth County to serve on the governing board of the consolidated poor farm. This appointment was made under sections 2812 (b) and 2812 (c) of the Code. Since his appointment Mr. Eller has continued to serve on the governing board and his per diems and expenses have been paid by this county. In 1935, however, Mr.

Eller was defeated for reelection to the County Board and an entire new board was elected and has held office since January, 1936. In the meantime Mr. Eller has continued to act as Smyth County's representative on the consolidated governing board. It is the desire of the present board of supervisors to elect a new member from among themselves to serve on the governing board. They have so advised Mr. Eller but he refuses to resign and has informed the board of supervisors that he considers his original appointment as perpetual and that he can only be removed for cause. An examination of the acts cited will disclose no limit for which time any such representative shall serve once he is elected, nor does such representative have to be a member of the county board of supervisors. The question therefore is whether or not the new board of supervisors can dispense with Mr. Eller's services in this connection and elect a new representative, or does Mr. Eller continue to hold office despite the wishes of the new board. We would appreciate your construction of the statutes and your opinion as to whether Mr. Eller may be removed from this position by the present board of supervisors."

As you state in your letter, the statute contains no provision for the removal of a representative of a county on the governing board, nor is there any limitation upon the term of his office. In my opinion, in order for an officer to be removed prior to the expiration of his term of office, as fixed by the statute, there must be statutory authority for such removal. Since the statute contains no such provision and there seems to be no limitation upon the term of his office, it is my opinion that the board of supervisors has no authority to remove this officer. The General Assembly has made no provision for his removal and, unless and until there is legislation authorizing same, I can find no authority to prevent his continuance in office.

Your second question is as follows:

"(2). The Board of Supervisors has also requested that I secure an opinion from your office as to whether or not the medical staff of the Southwestern State Hospital, located at Marion, have the right to charge the usual fees allowed other doctors when a resident of Smyth County is committed to that institution and the members of the medical staff act as the examining commission."

Section 1017 of the Code, providing for the creation of a lunacy commission, requires a justice or a judge of a circuit or corporation court to summon two licensed and reputable physicians, and those physicians, together with the judge or justice, shall constitute the commission to inquire whether a suspected person be insane, epileptic or inebriate and a suitable subject for a hospital for the care of such persons.

Section 1008 of the Code provides that the special board of each hospital of the type here under consideration shall, subject to the approval of the general board, appoint all resident officers and prescribe their compensation, and further provides that assistant physicians shall be resident officers of the hospital. This section further provides that the officers named, among which assistant physicians are included, shall, in addition to their salaries, receive their board and lodging at the respective hospitals, but they shall not receive any additional perquisites or emoluments.

The answer to your question would seem to me to depend upon whether the physicians composing the "medical staff", to which you refer, are employed by the board to devote their sole and exclusive time to the discharge of their duties in the hospital. Obviously, the duties performed by a member of the lunacy commission are entirely separate and distinct from the duties required of an assistant physician, or a member of the hospital staff. The services rendered as a member of the commission would be performed in an essentially different capacity.

It follows from the foregoing, therefore, that if the members of the staff are under a contract to devote their entire time to the discharge of the duties imposed upon them by their contract of employment with the hospital board, they would hardly have authority to act as members of a lunacy commission. On the other

hand, if their contract of employment does not require their entire time, in my opinion they would be entitled to the compensation prescribed by law for all services rendered outside of their regular duties as members of the hospital staff.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **CREAMERIES—License of Whom Required.**

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

MR. S. S. SMITH, *Director,*  
*Dairy and Food Division,*  
*Department of Agriculture and Immigration,*  
*State Office Building,*  
*Richmond, Virginia.*

DEAR SIR:

Your letter of August 8, directed to my assistant, Edwin H. Gibson, reads in part as follows:

"The nature of the business conducted by this company has been investigated by us, as you suggested. We find that a substantial portion of the volume of milk and cream handled by them is bought from creameries in the west, though they also buy a considerable quantity of milk and cream from the Richmond Dairy Company, and some portion of their supply is bought from other plants in the State. It appears that the greater portion of their volume originates out of the State, and is sold out of the State, but all of it is received by them in Richmond in the form of milk and cream and by purchase."

You then ask to be advised if, in my opinion, the operator of the plant to which you refer is required by section 1173 of the Code of Virginia, as amended by chapter 402 of the Acts of 1936, page 751, to obtain the license provided in the amended section for the conduct of the business you have described.

In my opinion, the Southern Cream Company, Incorporated, conducting such a business as you have described, comes within the provisions of section 1173 of the Code, as amended, requiring a license for the conduct of that business.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **CRIMINAL PROSECUTIONS—Expenditures—Employing Shorthand Reporter.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 4, 1937.*

HONORABLE B. P. HARRISON,  
*Commonwealth's Attorney,*  
*Frederick County,*  
*Winchester, Virginia.*

DEAR MR. HARRISON:

I have your letter of the 1st instant, in which you request my opinion upon the question whether or not it would be permissible, in view of the unusual cir-

cumstances in connection with the anticipated trial of Mr. T. G. Scully, to pay the expenses of the employment of a court reporter at the first trial in order to obtain a transcript of the evidence and proceedings. I note that you intend to apply to the court for an order authorizing such employment. In my opinion, it is within the discretion of the court to incur this expense under the provisions of section 4960 of the Code, in which the following appears:

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

It is my opinion that the comptroller should pay the expense you anticipate incurring, upon receiving a certificate of the court approving same.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**DAIRY AND FOOD DIVISION—Regulations Affecting Enforcement of Stock Feed Laws.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 30, 1936.*

HONORABLE N. A. LAPSLEY, *Assistant Director,*  
*Dairy and Food Division,*  
*Department of Agriculture and Immigration,*  
*Richmond, Virginia.*

DEAR MR. LAPSLEY:

I have your letter of September 28, requesting the opinion of this office as to the authority of the Department of Agriculture and Immigration to promulgate certain rules and regulations, a copy of which you enclose.

The general effect of the regulations in question would be to relieve from the penalties provided by chapter 52 of the Code, stock feed dealers who unintentionally misbrand or adulterate their products within certain limits, provided that they deposit with the Commissioner of Agriculture a refund proportionate to the deficiency in the feed. The regulations further provide that this refund shall be paid over to such purchasers of the deficient feed as may appear and present their claims, and any amount unclaimed after a certain period is to be used for carrying out the purposes of the stock food laws.

I regret to say that, after a careful examination of the relevant statutes, I can find no authority for such action. In support of this conclusion, suffice it to point out that the law seems to require unconditionally that all persons guilty of selling, or possessing for sale, goods substantially deficient in their guaranteed analysis should be punished.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**DOGS—Licenses—Where and to Whom Issued.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 23, 1937.*

HONORABLE C. R. KENNETT,  
*Treasurer, City of Roanoke,*  
*Roanoke, Virginia.*

DEAR MR. KENNETT:

I have your letter of February 9, requesting the opinion of this office as to your duties under section 64 of the Game, Inland Fish and Dog Code. You state

that many residents of Roanoke who own dogs keep them in adjoining counties, and that you are in doubt as to whether the licenses for such dogs should be issued by yourself or by the clerks of the counties in which the dogs are being kept, having reference to a ruling given by the late Colonel Saunders to the game warden of Bedford county.

Under the statute referred to, it seems quite clear that in such cases either the treasurer of the city of Roanoke, on application of the dog's owner, or the treasurer of the county in which the dog's keeper resides, on application of the custodian, may issue the licenses for such dogs.

The ruling given by Colonel Saunders to the game warden of Bedford county related primarily to the question whether the holder of a kennel license could properly keep some of his dogs in the city and some in the county, and contained nothing inconsistent with this opinion.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**DRY CLEANING LAW—Identification of Licensee.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 25, 1937.

MR. R. W. BILLINGSLEY, *Secretary,*  
*State Dry Cleaners Board,*  
*Richmond, Virginia.*

DEAR MR. BILLINGSLEY:

I have your letter of May 10, asking if a person who holds a license in his own name from the Dry Cleaners Board is operating within the Dry Cleaning Act, and the regulations promulgated by the board, when such person owns three separate and distinct outlets and operates them under different names, but displays his name and license number on each of these separate outlets and the trucks used in connection with each establishment.

I am of the opinion that the licensee here is operating within the law as long as his name and license number are displayed on the window and all the trucks of the separate outlets.

Chapter 335, section 3, subsection (1), paragraph a, of the Acts of the General Assembly, 1936, allows the board to promulgate rules for the purpose of

"Identification to the public of all persons, firms, corporations or associations licensed by the board to engage in said business, as well as their agents or representatives."

Rule I, section 1, of the Official Bulletin of the State Dry Cleaners Board, dated July 7, 1936, provides that for identification purposes

"\* \* \* all outlets of cleaning, dyeing and pressing to the wholesale trade and consuming public shall display on plant windows, retail store windows and on both sides of all delivery equipment the name of the person, firm, corporation or association holding license so that the same shall be plainly visible and there shall likewise be displayed on plant windows, retail store windows, and on both sides of all delivery equipment the State license Number of the person, firm, corporation or association holding such license, in block letters and figures, three inches in height \* \* \*"

I have your proposed amendment of the above quoted section of the Rules and Regulations of the State Dry Cleaners Board, which reads:

"All outlets of cleaning, dyeing and pressing to the wholesale trade and consuming public must be identified by displaying one trade name on plant windows, retail store windows and on both sides of all delivery equip-

ment and that name must be only the trade name of the person, firm, corporation or association in which the license is issued, so that the same is plainly visible and there shall likewise be displayed on plant windows, retail store windows, and on both sides of all delivery equipment the State License Number of the person, firm, corporation or association holding such license, in block letters and figures not less than 2 inches nor more than 4 inches in height, for example:

“‘STATE LICENSE 1.’

“Licensees may operate as many outlets for cleaning, dyeing and pressing under the trade name in which the license is issued, as is desired.”

I am of the opinion that this is a valid regulation for identification purposes and within the powers vested in the State Dry Cleaners Board. This new regulation may be passed by your board to become effective when the present licenses expire.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**DRY CLEANERS—Licenses—Grounds for Denying.**

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

MR. R. W. BILLINGSLEY, *Secretary,*  
*State Dry Cleaners Board,*  
*Capitol Building,*  
*Richmond, Virginia.*

MY DEAR MR. BILLINGSLEY:

I am in receipt of your letter of November 7, in which you ask if the State Dry Cleaners Board may, under the provisions of chapter 335 of the Acts of 1936 (Acts 1936, page 537) decline to grant a license to an applicant therefor under the provisions of the said Act, on the ground that such applicant has violated a provision of the Act.

Section 3 of the Act, dealing with the granting of licenses by the Board, provides in part as follows:

“This Board may decline to grant a license, or may suspend or revoke a license already granted after due notice and after hearing, on the grounds of any violation of the provisions of this Act or the rules and regulations promulgated by said Board, not in conflict with the provisions of the Act. \* \* \*”

It is clear that the quoted language gives to the Board authority to decline to grant a license on the ground that the applicant therefor has violated the provisions of the Act.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**DRY CLEANING ACT—Operation in County in Which No Cleaning Business Operated.**

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

MR. R. W. BILLINGSLEY, *Secretary,*  
*State Dry Cleaners Board,*  
*Capitol Building,*  
*Richmond, Virginia.*

MY DEAR MR. BILLINGSLEY:

I am in receipt of your letter of December 12, in which you inquire as to the power of the State Dry Cleaners Board to make effective the Dry Cleaning Act of 1936 (Acts 1936, page 537) in a county in which no persons residing in the county are engaged in the dry cleaning business, nor do any persons engaged in such business have a place of business in the county.

Section 8 of the Act provides in part as follows:

"This act shall apply to and be effective in all cities and in any counties where after notice has been published in a newspaper having general circulation in said county, there has been filed with the board a petition signed by two-thirds of the resident persons actually engaged in the cleaning, dyeing and pressing business at the time of said petition in any such counties signifying their desire to be governed by this act; \* \* \*."

In view of this provision, it appears that there can be no petition presented to the board signed by two-thirds of the resident persons actually engaged in business in the county, and I am, therefore, of opinion that under this state of facts, the board cannot make the act effective in such county.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Absent Voters—Disposition of Unused Ballots.**

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

MR. K. K. JONES,  
*General Registrar,*  
*Newport News, Virginia.*

MY DEAR MR. JONES:

I am in receipt of your letter of November 9, in which you ask what should be done with ballots mailed out by you under the absent voters' law and brought to you unused, in one case on the day before the election and in another case on the day of election.

While the statute does not deal specifically with ballots returned in this way, I am of opinion that the most practical way to handle the matter is to treat them as unused ballots and turn them over to the judges of election, as provided in section 210 of the Code.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Ballots—How Marked—Rubber Stamps.**

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

HON. HORACE H. EDWARDS,  
*Member of House of Delegates,  
Richmond, Virginia.*

DEAR MR. EDWARDS:

This is in reply to your letter of the 16th instant, requesting my opinion upon the question whether it is permissible, under the provisions of section 162 of the Code as amended by Acts 1936, p. 278, for a voter to use a rubber stamp for the purpose of marking a proper symbol, such as a check, cross mark or line, in the square contained on the ballot preceding the name of the candidate for whom he or she wishes to vote. The statute does not undertake to prescribe any particular instrument with which this symbol must be marked, and it is my opinion that a voter may use a rubber stamp for this purpose if he or she so desires.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Ballots—How to be Marked.**

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

MR. M. S. McCLUNG, *Chairman,  
Roanoke County Electoral Board,  
Salem, Virginia.*

DEAR MR. McCLUNG:

This is in reply to your letter of the 26th instant, requesting a copy of the ruling made by this office on the method and manner of marking the ballots in the election to be held November 3, 1936, and also the effect of marking partially under the new system and partially under the old system. These questions are covered in separate opinions and I am summarizing them below:

(1) With reference to your first question, this office has held that, under the provisions of section 162 of the Virginia Election Laws, as amended by Acts 1936, a person desiring to vote shall 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.

(2) With reference to your second question, this office has expressed the opinion that the fact that the name or names of a candidate or candidates not voted for are scratched does not invalidate the ballot and same should be counted, provided the name or names of a candidate or candidates voted for are checked or marked as required by section 162 of the Election Laws, as amended by Acts 1936. Failure to check or mark a ballot properly, however, will invalidate it and render it void.

In voting for the president the statute provides that it is necessary only to place a proper check or mark in the square immediately preceding the name of the president for whom the vote is to be cast, leaving the names of the other presidential candidates unmarked in the squares preceding their names. It is not necessary to make a mark or check before the name of the vice-president voted for. The check or mark before the name of the president is counted as a vote

for all the electors of that candidate's party and they are electors for the vice-president of the same party, as well as for the president.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Ballots—How Marked—Electoral Boards—Placing Posters Near Polls Instructing Voters as to Marking Ballots.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 31, 1936.

HONORABLE H. BRANCH WOOD, *Chairman,*  
*City Electoral Board,*  
*1134 Mutual Building,*  
*Richmond, Virginia.*

DEAR MR. WOOD:

I am in receipt of your letter of July 28, in which you ask the following question:

"In regard to the method of voting prescribed by Section 162 of the Code, as amended by Acts of 1936, page 278, which Section requires the voter to place a check (✓) or a cross (X or +) or a line (—) in the square provided for such purpose, preceding the name of the candidate for whom he wishes to vote, I would appreciate your opinion as to whether a ballot should be counted as a vote when some other mark is used other than the four designated by the State. In other words, if a man should place a circle or should put the word 'Yes' in the square preceding the name of the candidate for whom he wishes to vote, would such a ballot be a good vote?"

It is unquestionably the law, and this office has so ruled, that the election laws should be liberally construed so as not to result in a disfranchisement of a citizen if it can be avoided. However, the statute to which you refer specifically prescribes how the ballot shall be marked, and has given to the voter a choice of symbols to be used. If, despite the plain provisions of the law, the voter should deliberately mark his ballot in some way which cannot by any interpretation be held to comply with the method prescribed by the statute, I am of the opinion that the ballot should not be counted.

I am sure you will appreciate the fact that it is extremely difficult to lay down any hard and fast rule to be applied in every case. For example, taking one of the cases you suggest, a voter may in haste place a check (✓) in the square provided for the purpose which very much resembles a circle. When the ballots are counted, I think that the voter should be given the benefit of every doubt in this respect. I do not think a ballot marked "yes" complies with the statute.

You next make this inquiry:

"I would also appreciate your informing me as to whether the placing of posters at each precinct in this City, setting forth instructions as to the new method of voting, would be illegal or improper under the constitutional provisions prohibiting the giving of aid to persons intending to vote."

For purposes of reply I assume that the electoral board is to place these posters, and that they are to be placed within forty feet of the ballot box. The duties of the electoral board are prescribed by statute, and I cannot find any authorization for the practice you suggest. I can readily conceive of how this practice may be susceptible of abuse if it were established.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Candidates—Requirement as to Notice of Candidacy—Convention Nominees.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 1, 1936.*

HONORABLE A. J. DUNNING, JR.,  
2746 Vincent Avenue,  
Norfolk, Virginia.

DEAR MR. DUNNING:

I have your letter of September 29, with reference to my ruling that, by reason of the fact of your not being eligible to vote in the November election, your name should not be printed upon the official ballot under the provisions of section 154 of the Code. Whether the language of said section, which excepts a party primary nominee, was intended to apply to a person not qualified to vote is a question which has not been passed upon in this office and is, in my opinion, not raised by the facts stated in your letter.

The said section 154 provides the machinery by which the names of party primary nominees are furnished to the electoral boards for printing on the ballot. The language is as follows:

"\* \* \* The names of party primary nominees to be voted on in the several counties and cities shall be furnished the secretaries of the respective electoral boards thereof by the several persons to whom abstracts of primary elections must be furnished under section two hundred and forty-one. \* \* \*"

Section 241 requires that abstracts of the votes in primary elections for the nominee to the office of United States senator shall be furnished by the commissioners of election to the Secretary of the Commonwealth, who in turn is required, upon the basis of such abstracts, to certify the name of the primary nominee to the secretaries of the respective electoral boards. In other cases, the commissioners of election are required to furnish such abstracts to the party chairman of the districts, counties, or cities, in which the election is to be held.

You state in your letter that you were nominated by a convention, and that no primary was called by the party officials of the prohibition party. That being true, of course, you did not file as a candidate for a primary nomination, and did not pay the fee of two per centum of the salary of an United States senator to the Comptroller, as required by section 249 of the Code. (The act provides that such fee shall be paid to the auditor of public accounts, but a subsequent statute provides that wherever the auditor of public accounts is designated in the statute the Comptroller shall be deemed to be the officer referred to).

You expressly admit in your letter that you were nominated by a convention and not by a primary. For this office to hold that section 154 of the Code, in so far as same dispenses with the filing of a notice of candidacy with the Secretary of the Commonwealth, applies to a convention nominee as well as a party primary nominee would have the effect of completely eliminating from that section the word "primary."

The office of the Attorney General has no authority to enact laws, but only to interpret same and give effect to the language used in the statutes. It has no authority to change the laws to conform to the ideas of the Attorney General as to what the statute ought to provide.

I am unable to escape the necessary conclusion that, under the facts in your case, it will be improper for the Secretary of the Commonwealth to certify your name to the electoral boards for the purpose of having same printed on the official ballots.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Candidates—Expense Account—Inclusion of Filing Fees.**

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

HONORABLE PETER SAUNDERS,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR SIR:

This is in reply to your letter of August 14, in which you request my opinion upon the question whether or not a candidate running in a primary for Congress, in filing his expense account pursuant to the requirements of the Virginia Election Laws, should include as a part of the expense the filing fee paid by the candidate.

It is my opinion that the statute which limits the amount a candidate can expend in procuring his election has reference only to those expenses which are made for the purpose of securing votes for his election. The filing fee paid to the party authorities is more in the nature of an assessment than an expense and, in my opinion, the candidate is not required to include same in his expense account filed pursuant to the statute.

I am also of the opinion that any fee or tax which may be imposed upon a candidate by law, for the same reason, need not be included.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Candidates—Requirements for Getting Name Printed on Ballot—Ballots—How Marked—Rubber Stamps—Stickers.**

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

HONORABLE W. H. DUKE, *Chairman,*  
*Norfolk County Electoral Board,*  
*Churchland, Virginia.*

HONORABLE CHAS. E. PETTIS, *Chairman,*  
*Electoral Board,*  
*Norfolk, Virginia.*

HONORABLE GEORGE R. PARRISH, *Chairman,*  
*Portsmouth Electoral Board,*  
*Portsmouth, Virginia.*

GENTLEMEN:

Each of you have submitted to me certain questions raised in a letter addressed to you by certain chairmen of the Republican Party and, as the questions are identical, I am writing you a joint letter.

The first question presented is whether or not the electoral board will have printed on the official ballot the name of Mr. Rumble, party nominee of the Republican party for Congress in the second district, who was nominated after the death of the former nominee Admiral Stickney. The death of Admiral Stickney occurred after he had given notice to the Secretary of the Commonwealth of his intention to become a candidate for Congress in the Second Congressional District. Mr. Rumble was nominated thereafter, but within sixty days of the date of holding the general election.

The only authority that electoral boards have for printing the names of congressional candidates on the official ballots is where the secretary of the

electoral board is notified of such names by the Secretary of the Commonwealth pursuant to section 154 of the Election Laws, or where the names of party *primary* nominees are certified to the electoral boards, in accordance with the provisions of said section 154, by the chairman of the Party District Congressional Committee. The notice from the chairman follows as a result of the provisions of section 154 and section 241, the latter section requiring the commissioners of election in a primary election to certify abstracts of votes in the primary to the district party chairman. Section 154 requires such chairman in turn to notify the secretaries of the respective electoral boards.

Since Mr. Rumble is not a primary nominee, and since he failed to file the required notice of his intention to become a candidate with the Secretary of the Commonwealth sixty days prior to the date of election, it is my opinion that he is not eligible to have his name printed upon the official ballot. I have heretofore rendered an opinion to the Secretary of the Commonwealth to the same effect, in response to his inquiry as to whether he should certify the name of Mr. Rumble to the secretaries of the respective electoral boards of the Second Congressional District.

The second question is as follows: Would it be permissible for the voter to use a rubber stamp with the candidate's name preceded by a square containing the check mark? In other words, a stamp which only necessitates the voter stamping the ballot with the name of the candidate already checked.

Section 162 of the Election Laws, as amended by the Acts of the General Assembly of 1936, page 276, contains this provision:

"\* \* \* but it shall be lawful for any voter to place on said official ballot in writing, the name or names of any person or persons for any office for which he may desire to vote and mark the same by a check (V) or cross (X or +) mark or a line (—) immediately preceding the name inserted."

This language raises the question as to what constitutes placing the name of a person on the ballot "in writing."

Section 5 of the Code, clause 11, provides that "The words 'written' and 'in writing' shall be construed to include any representation of words, letters, or figures, whether by printing or otherwise; \* \* \*"

For many years the office of the Attorney General has repeatedly held that a rubber stamp may be used for the purpose of placing the name of a person a voter desires to vote for upon the ballot, and this practice has been generally followed, whenever the occasion required it, without objection thereto so far as I know. Section 162 does not undertake to designate or prescribe any particular instrument, such as a pen, pencil, or rubber stamp, which may be used by the voter for placing the name of his choice "in writing" upon the ballot, nor does the statute prescribe any particular instrument to be used in marking the name with one of the required marks.

In a recent opinion of this office given to Honorable Horace H. Edwards, a member of the General Assembly, it was held that a rubber stamp may be used for making one of the required marks in the square immediately preceding a name printed on the ballot.

It is my opinion, therefore, that it is permissible for a voter to use a rubber stamp with the candidate's name preceded by one of the marks designated in section 162 of the Election Laws. Attention is called to the fact, however, that said section does not require that there be any square within which such mark shall be made preceding the name of a person "written" on the ballot.

The third question is whether or not it is permissible for a voter to use a small sticker with the name of the candidate already checked which the voter may paste on the ballot.

It is my opinion that the addition of a sticker to the ballot constitutes adding thereto other material in the form of paper in addition to the actual ballot itself. No such practice has ever prevailed in Virginia. The pasting on of the additional strip of paper might not be permanent, as it is frequently the case that papers pasted together come apart and that stamps often come off of envelopes. I am further of the opinion that the pasting of a sticker could be readily detected by the judge of election at the time the ballot is handed to him, as is required by law, to be

deposited in the ballot box, and that voting in this manner would be in violation of the provision of the State Constitution providing for the secrecy of the ballot.

The fourth question is whether a different type of sticker can be used, and has been answered in response to the third question.

The fifth question is whether, where stamps are used, it is permissible to place the same in voting booths for the convenience of the respective voters.

It has heretofore been customary in this State to follow this practice, and to leave in the booths a pencil, or other instrument such as a rubber stamp, if stamps are being used, for the convenience of the voters in marking their ballot, and it is my opinion that this practice is permissible.

The sixth question has already been answered by what has been said with respect to the third question.

The seventh question is whether or not the electoral board, in printing the ballot, should leave a blank space below the name of the Democratic party primary nominee, Mr. Hamilton, with a box or square on the left where the voters may write in their choice, or stamp in their choice and mark same in the box or square provided.

It is my opinion that the electoral board has no authority to follow this practice. As above stated, section 162 of the Code, as amended, does not require a square preceding the name of a person whose name is written by the voter on the ballot.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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#### **ELECTIONS—Capitation Taxes—When to be Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 10, 1937.*

HONORABLE B. GRAY TUNSTALL,  
*City Treasurer,*  
*Norfolk, Virginia.*

DEAR MR. TUNSTALL:

Pardon my not having sooner replied to your letter of March 4, in which you ask to be advised as to the last day for the payment of poll taxes as a prerequisite for voting in the August primary and general election in November.

In order to vote in the August primary, a person must be qualified to vote in the succeeding November election.

The law requires the payment of all capitation taxes six months prior to the general election. This year's general election falls on November 2, and the last business day six months prior to that time is Saturday, May 1. Accordingly, as this office has previously ruled, it is my opinion that May 1 is the last day upon which capitation taxes may be paid in order to qualify one to vote in the forthcoming elections.

The above requirements do not apply to persons who become of age after January 1, 1936. Such persons may vote in both the August primary and the general election if they pay their capitation taxes and register on or before the last day of registration prior to the November election, and before the date of the primary.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Capitation Taxes—Naturalized Aliens.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 28, 1936.*

HONORABLE FRANKLIN EDWARDS,  
*Commissioner of Revenue,*  
*Franklin, Virginia.*

DEAR MR. EDWARDS:

I have your letter of the 26th instant, inquiring whether a person who has become naturalized since January 1, 1936 would have the same status regarding his right to pay his capitation taxes and vote as a person becoming twenty-one years of age since that date.

In my opinion, a person just becoming naturalized, if he has lived in Virginia the three preceding years, would occupy the same status as a citizen of Virginia and would be required, in order to vote, to pay the three years capitation taxes which were assessable against him. It is not necessary for a person to be a citizen of the United States in order for him to be liable for the capitation tax. If he has been a resident of Virginia, the tax was assessable against him.

If he has not been a resident of Virginia more than one year, that is, if he moved into Virginia after January 1, 1935 and before November 3, 1935, in my opinion, he would have the right to vote without the payment of any capitation tax as no capitation tax would be assessable against him until the year 1936 and this is not yet due.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Capitation Taxes—Tax Bills—How Sent.**

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

HONORABLE W. M. TOWNSEND,  
*City Treasurer,*  
*South Norfolk, Virginia.*

MY DEAR MR. TOWNSEND:

I have your letter of October 8, in which you ask the last day for the payment of poll taxes in order to be eligible to vote in a city election to be held in June, 1937.

This election falls on the 8th day of June and, as the capitation tax should be paid six months in advance, I am of opinion that the last day for the payment of the tax is December 8, 1936.

You also ask whether tax bills can be mailed by second-class mail.

Section 371 of the Tax Code simply provides when tax bills shall be mailed to taxpayers, but does not specify that they shall be sent by first-class mail. So far as the State law is concerned, therefore, I am of opinion that the sending of these bills by second-class mail will comply therewith.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Cities Annexing Territory—Duties of Registrars, Etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 19, 1937.*

HONORABLE JOHN D. CROWLE, JR., *Chairman,*  
*Electoral Board,*  
*Staunton, Virginia.*

DEAR MR. CROWLE:

I am in receipt of your letter of February 18, in which you state:

"On January 15, 1937, the City of Staunton in conjunction with the County of Augusta took in a section of suburban property through the usual process in the Circuit Court and I think there are something like one hundred and fifty or two hundred voters in the section taken in and made a part of Staunton. This added section automatically becomes a part of the Second ward of the City and will remain a part of the second ward, as there will be no effort to create an additional ward."

You inquire as to the statute covering this situation. I refer you to section 2964 of the Code, which provides as follows:

"Whenever, by extension of its territorial limits as aforesaid, territory is annexed to a city or town, the council thereof shall, by ordinance organize the same into a new ward or wards, and shall forthwith select the proper number of councilmen from the residents and qualified voters of such new ward or wards, to serve until the next general election, or attach the same to existing ward or wards, under such regulations as are provided by law. This shall be done long enough before the next ensuing general city election to enable electors in such annexed territory to register. All electors residing in such annexed territory shall be entitled to transfers to the proper poll-books in said city or town without again registering therein. Any person residing in said territory who shall not have registered shall be entitled to register in said city or town if he would have been entitled to register and vote at the next succeeding election in said county or town. But the failure of the council to so district said territory shall not invalidate an election held in said city or town."

Section 102 of the Code provides:

"When a rearrangement of existing election districts is made, the registrars thereof shall make out, certify, and deliver to each other, lists of the registered voters in their respective districts whose voting places are changed by the rearrangement; \* \* \*."

In my opinion the effect of the foregoing provision is to require the registrar or registrars of the election district or districts, of which the annexed territory was a part, to certify and deliver to the registrar of the ward to which the territory was annexed, (or to the general registrar of the city, if there be one), a list of the registered voters residing within the annexed territory. This section then provides that the registrar to whom the list or lists are certified shall forthwith enter upon his books the names contained thereon, and these persons so transferred to the new registration books shall at once acquire the right to vote in the ward to which the territory is annexed.

As to persons living in the annexed territory who have not registered previous to the annexation, they are entitled to register, if he would have been so entitled in the annexed territory if there had been no annexation.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Clerks of—Right of Minority Party to Select.**

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

HONORABLE THOMAS W. BLACKSTONE,  
*Chairman of the Electoral Board,*  
*Accomac, Virginia.*

DEAR MR. BLACKSTONE:

I am in receipt of your letter of August 18, the effect of which is to inquire whether, under the law, the minority party is entitled to a clerk of election.

While section 31 of the Constitution, and section 84 of the Code, provides that each of the two political parties casting the highest and the next highest number of votes at the next preceding general election shall have representation in appointing judges of election, there is no similar requirement that I can find as to clerks of election.

With best wishes, I am

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

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**ELECTIONS—Registrars—Compensation—Copying Mutilated Books.**

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

HONORABLE WM W. MICHAUX,  
*Registrar,*  
*Michaux, Virginia.*

DEAR MR. MICHAUX:

Your letter of August 3, addressed to the Secretary of the Commonwealth, has been referred by him to this office, with the request that I furnish you the information desired.

Under the provisions of section 200 of the Virginia Election Laws, a registrar is allowed \$3.00 for each day's service rendered.

Under the provisions of section 96 of the Virginia Election Laws, a registrar is allowed \$1.00 for posting notices.

Section 91 of the Virginia Election Laws provides:

"Whenever the registration books in any election district are so mutilated, blotted, defaced, or otherwise in such condition as to render it difficult, troublesome or unsafe to use them longer, the electoral board shall order that the said books shall be copied \* \* \*."

This latter provision does not, in my opinion, cover the mere purging of registration books under the provisions of section 107 of the Virginia Election Laws, unless it is found necessary to provide a new set of books by virtue of the provisions of section 91 thereof.

The question of the compensation of a registrar for copying mutilated or defaced poll books was considered by the office of the late Attorney General Saunders in a letter under date of October 16, 1929, in which this office advised, as a good policy, the registrars take up the matter of their compensation with the electoral boards and enter into agreements fixing the compensation for work to be performed, so as to eliminate a subsequent controversy as to compensation after the work has been completed.

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

**ELECTIONS—Electoral Boards—Employing Persons to Affix Seal on Ballots;  
Id.—Mileage.**

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

MR. W. T. HICKS, *Chairman,*  
*Electoral Board of Carroll County,*  
*Hillsville, Virginia.*

MY DEAR MR. HICKS:

I am in receipt of your letter of December 11, in which you ask this question:

"According to section 158 of the Virginia election laws, is it legal or not for electoral boards to employ a person who is not a member of the electoral board to affix the seal on the ballots at the expense of the county?"

Section 158 plainly contemplates that placing the seal on official ballots may be done in the presence of a member of the electoral board by some other person than a member of the board. It is manifest that there is considerable labor involved in the placing of the seal on ballots in a large county or city, and in view of this fact and of the language of the statute itself, I am of opinion that it would be entirely proper for the member of the electoral board who has charge of this work to employ some other person to assist him in affixing the seal, and that this is a legitimate expense to be paid as other election expenses are paid. The situation is somewhat analogous to the printing of the ballots themselves.

You next desire to know whether you, as secretary of the electoral board, in distributing the ballots should be paid for the number of miles you travel or be paid for the number of miles allowed a juror.

The pay and mileage of members of the board are fixed by section 89 of the Code. The secretary of the board is one of the members thereof. (See section 85 of the Code). Section 89 provides that each member of the electoral board shall receive for each day of actual service the sum of \$5 and the same mileage as is now paid jurors. In view of this provision as to mileage, it seems to me that the secretary in distributing the ballots should be paid the same mileage as is now paid jurors.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Electoral Boards—Furnishing Rubber Stamps.**

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

MR. W. H. DUKE, *Chairman,*  
*Norfolk County, Electoral Board,*  
*Route 1, Box 96,*  
*Portsmouth, Virginia.*

MY DEAR MR. DUKE:

I am in receipt of your letter of October 8, in which you ask the following question:

"Since my letter to you, the question has been raised as to whether the electoral board should furnish these stamps. It seems to me that the electoral board is officially ignorant of the candidacy of any person other than those whose names have been submitted by the Secretary of the Commonwealth, and is, therefore, without authority to go to the expense of procuring stamps, or sending out to the various polling places stamps that have been procured by others."

I find nothing in the statute giving the electoral board authority to procure and send out stamps in order that persons may vote for candidates whose names do not appear on the ballot, and in my opinion the board has no such authority.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Electoral Boards—Placing Rubber Stamps in Booths.**

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

HONORABLE ROBERT F. McMURRAN,  
*Commonwealth's Attorney,*  
*Portsmouth, Virginia.*

DEAR MR. McMURRAN:

I have your letter of October 20, with reference to the placing of rubber stamps in voting booths by electoral boards.

This office has ruled that electoral boards have no authority to provide rubber stamps, or to distribute same, in voting booths. I have expressed the opinion, however, that it is not contrary to the general practice or law in Virginia for the friends of any candidate, whose name is not printed on the ballots, to place rubber stamps for their favorite candidate in voting booths.

In my opinion, for an electoral board to undertake to place, or cause to be placed, such stamps in voting booths would be an act which would tend to promote the candidacy of a particular person, and would not be consistent with the general duties of such electoral board. Any such act of favoritism should be on the part of the friends of the candidate and not of the election officials.

It is further my opinion that electoral boards have no authority to approve or disapprove any particular rubber stamp which may be selected by the friends of a candidate. Whether or not the stamps are sufficient and comply with the requirements of the law is a question which the judges of election will have to pass upon when counting the ballots.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Filling Vacancies—Informal Primary under Exclusive Supervision of Party Committee.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 30, 1936.*

HONORABLE HARRY L. NACHMAN, *Chairman,*  
*Electoral Board,*  
*Newport News, Virginia.*

DEAR MR. NACHMAN:

I have before me your letter of September 28, from which the following facts appear:

On September 19, 1936, the judge of the Corporation Court of Newport News called a special election to be held on October 20, 1936, to fill a vacancy in the council of said city. On the same day the Democratic Executive Committee of said city met and decided to hold an election on October 6, 1936, at the expense of the committee, to be participated in by the Democratic voters of the city, for

the purpose of nominating a Democratic candidate for council at the special election. The committee published a notice on September 20, 1936, in the local newspaper, that such election will be held and the purpose thereof, and stating the committee's requirements that candidates at the October 6 election must file their declaration of such candidacy with the party chairman by midnight of September 25, and that the entrance fee for such candidates for nomination had been fixed by the committee at \$75. The salary of a councilman is \$1200 per year.

In addition to the foregoing facts your letter also states as follows:

"The Democratic Executive Committee has assumed the right to print the ballots, designate the location of polling booths, select the judges and clerks for the election on October 6, 1936, and generally supervise the said election. The Electoral Board has not been asked to take any part in this election, nor has any official notice been served on the said Electoral Board." You then ask the following four questions:

"1. Can the primary held under party control plan be called and conducted under the circumstances mentioned in this letter?

"2. Can the ballots be printed by the Executive Committee and not under the supervision of the Electoral Board?

"3. Can the said Democratic Committee select the clerks and judges for this election of October 6, 1936 and designate the polling booths?

"4. Can an entrance fee of \$75.00 in the said primary be charged?"

The answer to all of these questions is dependent upon whether the party election here involved is a "Primary" election within the meaning of chapter 15, sections 221-250 inclusive, of the Code of Virginia regulating the conduct of statutory primary elections. Section 223 restricts the times for the holding of statutory primaries under said chapter to the first Tuesday in August preceding the November general election and the first Tuesday in April preceding the June general elections in cities and towns. There is no provision for a statutory primary to be held at any other time. Section 226 provides that "this chapter shall not apply \* \* \* to the nominations of candidates *to fill vacancies*, unless the candidates for nomination to fill vacancies are to be voted for *on the date set by this chapter for regular primaries*."

It seems clear from the foregoing that the said election to be held on October 6 is not a primary election conducted under the statutes, and is not a "Statutory Primary Election."

The question then arises whether the Democratic City Executive Committee possesses the power to privately conduct an election or poll among its members to ascertain their choice of a party nominee. Section 227 provides that "each party shall have the power to provide in any way it sees fit for the nomination of its candidates," to prescribe the rules and regulations for its own government and to determine its own methods of making nominations for office, "and to provide in any way it sees fit for the \* \* \* nomination and election of its candidates for office in case of any vacancy."

Section 3 of the Virginia "Democratic Party Plans" relating to "Democratic County and City Committees," adopted by the State Convention at Richmond June 9, 1932, provides that the "City Committee shall have charge of the affairs and the nomination of candidates of the party in their respective \* \* \* cities and shall regulate and direct same." Section 15 of the said "Party Plan," under the same heading, empowers the City Committee to provide for nominations of party candidates for local offices "by either mass meetings, conventions or primaries as the respective committees may see fit."

Section 4 of said Party Plan relating to "Democratic Legislative and Senatorial District Committees," by referring to a nomination "by some other method than a primary election, *held under the provisions of the State Primary Law*" impliedly recognizes that the party authorities may conduct informal primaries for those elections where the State Primary Laws do not provide for the conduct of statutory primaries at public expense.

In consideration of the foregoing provisions of the statute and "Party Plan," I am of opinion that the proposed election to be conducted by the Democratic Com-

mittee at Newport News on October 6, 1936, is fully authorized by law and may be conducted in any reasonable manner and under any reasonable regulations which said committee may adopt. I am further of opinion that said election is not a statutory primary within the meaning of chapter 15 of the Code relating to primary elections.

The question whether the nominee of such a party election is a "Party Primary Nominee," within the meaning of the provisions of section 154, so as to entitle him to have his name printed on the official ballot without filing the required notice of intention to become a candidate, was answered in an opinion from this office on May 7, 1934, given to Mr. N. J. Webb, Chairman, Electoral Board, Newport News, Virginia, a copy of which I am herewith enclosing for your information.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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#### **ELECTIONS—Primaries—Ballots—Disposition of Unused.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 26, 1937.

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

GENTLEMEN:

I am in receipt of your letter of May 21, inquiring as to what must be done with unused ballots in the primary elections.

You refer to section 238 of the Code, which provides that:

"The judges of election shall be responsible for all primary ballots delivered to them."

This section does not specifically state what must be done with unused ballots, although, in general elections, by section 159 of the Code, unused ballots are to be destroyed before the box is opened. Formerly section 238 provided that unused ballots should be returned to the clerk of the court. I do not know why this provision was left out of the section when it was amended in 1934 (Acts 1934, page 79). Certainly the unused ballots cannot be preserved indefinitely and, in view of the precedent established by section 159, I am of the opinion that it would not be improper for the unused ballots to be destroyed. Since the statute makes the judges of election responsible for all ballots delivered to them, it would appear that it would be in the exercise of reasonable discretion for them to destroy the unused ballots. The view I am expressing is also supported by the following from section 224 of the Code:

"All of the provisions and requirements of the statutes of this State in relation to the holding of elections, the counting of ballots, the making and certifying of returns, and all other kindred subjects shall apply to all primaries insofar as they are consistent with this chapter."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Primaries—Disposition of Ballots.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 15, 1937.

HONORABLE W. T. HICKS, *Chairman,*  
*Electoral Board,*  
*Hillsville, Virginia.*

DEAR MR. HICKS:

I am in receipt of your letter of June 10, in reference to the disposition of unused primary ballots.

As you write, section 238 of the primary law holds the judges responsible for all primary ballots delivered to them. There is nothing in the primary law which specifically provides for the disposition of unused ballots.

However, section 159 of the general election laws provides in part that "All ballots remaining unused at the close of the polls shall be carefully destroyed before the box is opened."

The above provision, taken in connection with that part of section 224 of chapter 15, covering primary elections, providing

"\* \* \* All the provisions and requirements of the statutes of this State in relation to the holding of elections, the counting of ballots, the making and certifying of returns and all other kindred subjects shall apply to all primaries insofar as they are consistent with this chapter. \* \* \*"

in my opinion applies to the disposition of unused primary ballots and requires the destruction by the judges of all unused ballots at the closing of the polls and before the ballot box is opened.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Registration—Effect of Registration in 1902 Only.**

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

MR. H. L. RODEFFER,  
*Lovettsville, Virginia.*

DEAR SIR:

I am in receipt of your letter of October 6, in which you ask my opinion as to the right of a person, whose name is on the registration list of October, 1902, to vote in the general election this fall, though in 1903 there was a new registration.

I call your attention to section 19 of the Constitution of Virginia, which provides:

"Persons registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, whose names were required to be certified by the officers of registration for filing, record and preservation in the clerks' offices of the several circuit and corporation courts, shall not be required to register again, unless they have ceased to be residents of the State, or become disqualified by section twenty-three."

Section 23 of the Constitution provides in part:

"The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury; \* \* \*"

It is my opinion that a person registered in 1902, although there has been a new registration since that time, is entitled, without further registration, to have his name placed on the present registration books of his precinct unless his name has been removed by some valid legal proceeding, or such person has ceased to be a resident of this State or has become disqualified by section 23 of the Code (Virginia Election Laws).

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Referendum as to County Government—How Certain Ballots Counted.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 10, 1937.

HONORABLE HUNSDON CARY, *Member State Senate,*  
*Mutual Building,*  
*Richmond, Virginia.*

MY DEAR SENATOR CARY:

I have your letter of April 19, from which for purposes of reply I quote as follows:

"Constituents in one of the Counties in the Senatorial District which I represent are contemplating holding an election to change the form of County Government as provided by Chapter 368 of the Acts of 1932. Under Section 2773-n 2 (b), it is provided:

"The ballots used shall be printed to read as follows:

"Question one. Shall the county change its form of government?

For

Against

(Strike out one.)

"Question two. In the event of such change, which form of organization and government shall be adopted?

County Executive Form

County Manager Form

(Strike out one).'

"Some of the citizens interested in voting on a change of government desire a ruling from you on this question: Supposing under question one they should vote 'For' and fail to vote under question two either for 'County Executive Form' or 'County Manager Form', would that ballot be thrown out? And, contra, in case they vote under question one 'Against', could they vote for either 'County Executive Form' or 'County Manager Form' as set out in Section two?"

Section 2773-n 2 is carried in Michie's Code of 1936 as section 2773(25). This is the section authorizing an election to be held on the question of changing the existing form of government in a county to the County Executive Form or the County Manager Form. The section provides that, if a majority of the qualified voters of the county voting are in favor of changing the existing form therein provided, the circuit court or the judge thereof in vacation shall enter of record such fact, and the additional fact as to the form of county organization and government adopted. If, therefore, an elector voted for a change in government but neglected to specify the particular form, in answer to question two on the ballot, then I am of the opinion that his vote for a change should be counted, but that his ballot could not be counted as a vote for either particular form of government. In other words, the judge would certify his preference for a change, but his ballot would not be counted so far as question two is concerned.

Referring to your second question, I think the rule that the intention of the elector is to be given effect if possible should be invoked. I take it that in the case you refer to the elector is against the change but his idea is, if a majority are in favor of a change, that he desires to indicate his preference for the form to be adopted. Taking this view, I am of the opinion that his ballot should be counted as against a change, but, if a majority of the voters favor a change, I am of the opinion that his vote for the particular form of government indicated should be counted.

You do not indicate in your letter what county you have in mind, but, if your inquiry refers to a county which has already held an election, in accordance with section 2773(25) of the Code, and the election now to be held is to determine whether such a county shall change back to the form of county organization and government provided by Article 7 of the Constitution, I refer you to section 2773(79) of Michie's Code of 1936 for the form of ballot and procedure.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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#### **ELECTIONS—Registration—Closing Books.**

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

MR. G. L. SMITH, *Registrar,*  
*South Hill, Virginia.*

DEAR MR. SMITH:

I have your letter of October 5, which for purposes of reply I quote seriatim:

1. "Should I close the books of registration, without exception, 30 days prior to election day?"

This office has frequently held that all registration books in counties are to be closed thirty days prior to the November election, as provided in section 98 of the Code (Virginia Election Laws). There is no exception to this provision as to original registrations, and no person should be originally registered after October 3, 1936, that day being thirty days previous to the November election.

2. "If exceptions are permissible, please state them to me in a letter of opinions."

As stated in my reply to your first question, there are no exceptions so far as original registrations are concerned. However, I should call your attention to the fact that, under the provisions of section 100 of the Code (Virginia Election Laws), a voter changing his place of residence from one election district to another, in the same county or city, may apply to the registrar of his former elec-

tion district, *at any time*, for a certificate that "he was duly registered, and that his name, has, since his removal, been erased from the registration books of said election district which shall be sufficient evidence to entitle him to be registered in the election district to which he has removed, on its appearing to the satisfaction of the registrar that he has resided, prior to the next election, in such district for thirty days; and the name of every such person shall be entered *at any time*, by the registrar, on the registration books of the election district to which the voter has removed; \* \* \*." (Italics supplied.)

I should also call your attention to section 173 of the Code (Virginia Election Laws), which reads in part as follows:

"\* \* \* but 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, if he has a certificate showing that he was duly registered in his former election district in said county, and that his name has since his removal been erased from the registration books of said election district, it shall be sufficient evidence to entitle him to vote in the district in which he resides, and his name shall be registered in the registration book by the registrar, if he be present, or by one of the judges of election if he be not present. \* \* \*"

The foregoing quotations from sections 100 and 173 apply to what may more appropriately be termed "transfers," and the registration of such transfers, than to original registrations.

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

#### **ELECTIONS—Registration—Transfer of—List of Qualified Voters—Finality of.**

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

MR. R. L. WALDROP, *Registrar,*  
*Cardwell, Virginia.*

DEAR MR. WALDROP:

\* This is in reply to your letter of the 26th instant, in which you request to be advised as to the opinions heretofore rendered by this office upon the following questions:

(1) Whether the registrar is authorized to enter upon his registration books the name of a voter upon a transfer certificate of the registrar of another district.

Section 100 of the Election Laws provides that such name shall be entered upon the registration books at any time upon the presentation of such certificate, provided the change of residence is from one electoral district to another in the same county or city. Section 173 provides that the name of such voter may be entered on the registration books even on the day of election by the registrar if he be present, or by one of the judges of election if the registrar be not present.

Where the change of residence is from one county or city to another county or city the name of the person so transferring cannot be entered after the close of the registration books thirty days prior to the election (section 100 Election Laws).

(2) Whether or not a voter who has actually paid the required poll taxes six months before the election, but whose name has been omitted from the treasurer's list, may vote upon presentation of the tax certificate showing that the taxes were actually paid within the required time.

This office has held that such person is not entitled to vote. The law allows him the opportunity of having his name entered upon the treasurer's tax list after the publication of same, if he feels it has been improperly omitted, by application to the court. If he fails to take advantage of this opportunity within the

required time, he is not eligible to vote in the election. The only exception to this is provided for by section 115 of the Code, which provides that where a voter has paid a part of his three years' required poll taxes in one county or city, and part of them in another county or city, or if he has paid all of his said three years' poll taxes in a county from which he has moved, being a county different from that in which he offers to vote, he may vote upon the presentation of the treasurer's certificate certifying the personal payment of said taxes. Of course, it is understood that payments in such cases must have been made six months prior to the election.

With reference to the method of marking ballots, I am enclosing herewith a copy of a letter I have this day written to the clerk of the Electoral Board of Roanoke County.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Registrars—Qualifications of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 1, 1936.*

MR. THOS. W. BLACKSTONE,  
*Chairman of Electoral Board,  
Accomac, Virginia.*

MY DEAR MR. BLACKSTONE:

I am in receipt of your letter of July 31, in which you inquire whether one of the qualifications of a registrar is that he shall be a qualified voter.

While I have never heard of a registrar who was not a qualified voter, yet I can find no provision in the election laws prescribing that he shall be one. Section 86 of the Code provides that a registrar "shall be a discreet citizen and resident of the election district for which he is appointed," but there appears to be no requirement that he shall be a qualified voter.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Residence.**

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

MR. W. H. COLLINS, *Registrar,*  
*Madison, Virginia.*

MY DEAR MR. COLLINS:

I am in receipt of your letter of November 10, in which you inquire as to the right of certain persons to vote. The answers to your questions may be summarized from former opinions of this office as hereinafter set out.

The question of the domicile of a particular person depends upon the facts present in each case and is largely controlled by the intention of the individual involved. I am sure you will understand that this office cannot pass upon the facts in any case, but I am glad to advise you the general principles concerning which I have heretofore ruled.

An individual, once having established a domicile, may temporarily reside in some other place, within or without the State, and still retain his original domicile and vote there as long as he has not by act and intention established a domi-

cile at some other place. Certainly it is not necessary for the purpose of retaining domicile that a person physically reside continually at that place, nor is it necessary to retain a physical place of abode at a domicile once established. The absence may be indefinite provided a new domicile is not established.

When a person desires to establish a new domicile and abandon the old, it is necessary that he not only have the intention so to do, but also that he have a physical place of abode at such new domicile. Once the new domicile has been established, then the principles mentioned in the preceding paragraph apply.

You will understand, of course, that I am using the word "domicile" in the sense of legal residence.

I trust that this will give you the information you desire.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **ELECTIONS—Residence.**

#### COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 25, 1936.*

HONORABLE CHARLES F. HARRISON,  
*Attorney for the Commonwealth,  
Leesburg, Virginia.*

MY DEAR MR. HARRISON:

I am in receipt of your letter of September 24, relating to the eligibility for registration of a Mr. and Mrs. "B".

I note you have ruled that Mr. "B", having stated that it was his intention since November, 1935, to establish his domicile in Virginia, could register here. As you know, to establish a new domicile, there must be something more than mere intent. In other words, in addition to the intention to establish a new domicile in any particular place, there must be the physical act of acquiring a place of abode there. Since you ruled that Mr. "B" could register, I assume that the facts in his case met the above conditions and, so assuming, I concur in your view.

It seems to me that, from the facts disclosed in the registrar's letter, you are unquestionably right in holding that Mrs. "B" is liable for three years' poll taxes. This seems plain when it is considered that she apparently was a resident of Virginia several years before her marriage in 1935.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **ELECTIONS—Secretary of Commonwealth—Certification of Name of (1) Deceased Candidate; of (2) New Candidate Who Files Notice Within Time Limit.**

#### COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 16, 1936.*

COLONEL PETER SAUNDERS,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR COLONEL SAUNDERS:

This is in reply to your letter of the 16th instant, in which you enclose two letters from Mr. Lester S. Parsons, District Chairman of the Republican Party Organization of the Second Congressional District of Virginia. Two questions are raised by these letters which will be dealt with separately.

The first letter from said District Chairman advises you of the death of the Republican Party nominee for Congress for the Second Congressional District and requests that you refrain from notifying the Electoral boards of the counties and cities of the Second Congressional District of the fact that Admiral Stickney, the said deceased nominee, had filed notice of candidacy with you.

This office has heretofore, in 1927, ruled that the name of no person shall be printed on the ballot in a general election unless said person is qualified to vote in said election and that, since it is obvious that a person cannot vote after his death, therefore, the name should be omitted from the ballot. In order to carry out this construction of the statute, it is my opinion that you should refrain from certifying the name of Admiral Stickney to the various electoral boards.

The second question to be considered is whether or not, if a new candidate is named by the Republican Party prior to the actual printing of the official ballots and, if you as Secretary of the Commonwealth are advised of such fact and the name of a candidate so named, or the name of an independent candidate, you would have authority to certify the name of such Republican Party nominee or of such independent candidate to the various electoral boards of the Second District of Virginia for printing on the official ballots to be used at the November election.

Section 154 of the Code, as amended by Chapter 383 of the Acts of 1936, provides as follows:

"Any person who intends to be a candidate for any office, State or national, to be elected by the electors of the State at large or of a congressional district, shall, at least sixty days before such election, if it be a general election \* \* \* notify the Secretary of the Commonwealth, in writing, attested by two witnesses, of such intention, designating the office for which he is a candidate. \* \* \* 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; \* \* \*."

Since the time for holding the primary provided by law has passed and the persons whose names would be filed with you will not be party primary nominees, it is my opinion that you have no authority to certify the name of any such candidate or candidates to the various electoral boards to be printed on said ballots.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Secretary of the Commonwealth—Duties as to Notifying Electoral Boards of Candidacies.**

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

HONORABLE PETER SAUNDERS,  
*Secretary of the Commonwealth,*  
*Richmond, Virginia.*

DEAR SIR:

I have before me your request for my opinion upon the question whether, under the facts disclosed by the letters, telegrams and affidavits submitted to me, it is your duty to notify the secretaries of the respective electoral boards throughout the State of the fact that Honorable A. J. Dunning, Jr., has filed with you, as Secretary of the Commonwealth, a notice of his intention to become a candidate for the United States Senate from Virginia.

Objection to your giving said notice of Mr. Dunning's candidacy has been made in writing to you by Honorable J. Hume Taylor, Chairman of the Demo-

cratic Executive Committee of the city of Norfolk, upon the ground that Mr. Dunning is ineligible to have his name printed on the official ballot in the November general election for the reason that he has not paid the capitation taxes assessed against him for the years 1933, 1934 and 1935. In support of this objection you have been provided with an affidavit of the city treasurer of Norfolk that capitation taxes for said years were assessed against Mr. Dunning and have not been paid. There has also been filed with you an affidavit of the general registrar of the city of Norfolk that, since the year 1924, Mr. Dunning has been registered as a voter in the city of Norfolk and has never applied for a change of registration.

Upon receipt of the foregoing, on September 28, 1936, it appears that you sent to Mr. Dunning the following telegram:

"I am advised that you are ineligible to have your name printed on the official ballot by reason of non-payment of the required capitation taxes. If you do not admit the fact of such non-payment please advise me immediately and furnish evidence of such payment. Answer Western Union."

In response to the foregoing, Mr. Dunning replied, insisting that under a proper interpretation of the election laws he is entitled to have his name printed on the ballot, but he did not dispute the fact of his failure to pay the required capitation taxes, thus, in effect, admitting that same have not been paid.

It is clear from sections 154 and 155 of the Code that the Secretary of the Commonwealth is directed to notify the secretaries of the county and city electoral boards of the names of candidates who have filed the required notices with him, for the sole purpose of informing the said electoral boards of the names of the candidates they shall cause to be printed on the ballot. Section 154, which provides for you to furnish this information to the electoral boards, 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. \* \* \*" (Italics supplied.)

This section provides that party chairmen shall notify the electoral boards of the names of their party *primary* nominees, based upon the abstracts of primary elections required by section 241 of the Code to be furnished such party chairmen by the commissioners of election. It does not appear that Mr. Dunning has made any claim that he is a party *primary* nominee.

It is clear from the facts presented to you that Mr. Dunning is not qualified to vote in the November election, and, therefore, that he is not entitled to have his name printed upon the official ballots for said election.

Since the sole purpose of the requirement that the Secretary of the Commonwealth shall furnish the electoral boards with the names of candidates who have filed their notices with him is to provide information of the names which said electoral boards shall cause to be printed on the official ballots, it would be a clear violation of the spirit and purpose of the statute for the Secretary of the Commonwealth to furnish the electoral boards with a name to be so printed, where it is known to the Secretary of the Commonwealth that such name is not eligible for that purpose.

You also request my opinion as to your duties with respect to ascertaining whether persons who file with you the notices of intention to become candidates, as required by said section 154 of the Code, are eligible to vote or to have their names printed on the official ballots.

The question of a person's eligibility to vote is determined by various facts. To be eligible he or she must have been a resident of the State for one year; must be a citizen of the United States over the age of twenty-one years; must not be disqualified under section 23 of the Constitution, and must have paid his or her capitation taxes as required by law. It is my opinion that the Secretary of the Commonwealth may assume that every person who files the required notice with him is eligible to have his name printed on the ballot, unless and until objection

to such eligibility is raised and the person raising the objection provides the Secretary of the Commonwealth with convincing evidence that the name objected to is not eligible.

It is my opinion that it is also the duty of the Secretary of the Commonwealth to notify any such prospective candidate of any objection raised as to his eligibility and afford such person the right to be heard on the questions raised.

There is no provision of law imposing on the Secretary of the Commonwealth the duty to investigate the facts determining the eligibility of a person filing the said notice to have his name printed on the ballot, and in the absence of convincing evidence of his ineligibility I am of opinion that said officer should certify the names of all parties filing such notices in compliance with section 154 of the Code.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Special—How Called and When Held.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 30, 1936.*

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

DEAR GOVERNOR PEERY:

This is in response to your request for my opinion as to the authority of the Governor of Virginia to issue a writ of election for a special election to fill a vacancy in the Eighth State Senatorial District caused by the resignation of Honorable Benjamin Muse, former senator from said district.

The provisions of the statute relating thereto are for your convenience quoted in full as follows:

"Section 81. How vacancies in General Assembly filled.—When a vacancy occurs during the recess of the General Assembly by the death or resignation of a member thereof, or when a member-elect to the next General Assembly shall die prior to its meeting, a writ of election to fill such a vacancy shall be issued by the Governor, and when such vacancy happens during the session of the General Assembly, of which the person so dying or resigning is a member, the writ shall be issued by the Speaker of the House of Delegates, or by the President of the Senate, as the case may be.

"Such writ shall be directed to the sheriff of the county or sergeant of the corporation for which the election is to be held, or to the sheriffs and sergeants of the respective counties and cities composing the election district, or districts, for the election of senators or delegates, when the election is for such districts, but whenever any district is changed after the election of a delegate or senator, and the delegate or senator shall die, resign, or be removed from office, the election to fill the vacancy shall be held in the district as constituted when the said delegate or senator was elected."

"Section 146. When special election ordered by Governor, etc.; how writ issued and notice given.—Whenever a special election is ordered by the Governor, Speaker of the House, or President of the Senate, it shall be his duty to issue a writ of election, designating the office to be filled at such election and the time when such election is to be held, and to transmit the same to the sheriff of the county and the sergeant of the city in which such election is to be held, to be by such sheriff or sergeant published by posting a copy thereof at each voting place in his county or city at least ten days before such election."

In my opinion, it is clear from the foregoing that the Governor possesses the authority to issue a writ of election to fill said vacancy. The only limitation upon the time at which such a special election must be held is that resulting from the requirement that notice of such election shall be published ten days prior to the election day.

You also request my opinion upon whether there would be any violation of law for you to fix the date for said special election on November 3, 1936, which is the same day as the general election in November at which will be elected a member of the United States Senate, members of Congress and the President and Vice-President of the United States.

The general election in November is required by section 140 of the Code to be held on the Tuesday after the first Monday in November, and is a State election conducted at the expense of the counties and cities of the State and is in no sense a federal election.

Section 141 of the Code provides that special elections may be held at such time as may be designated by the proper officer duly authorized to order such election.

While I have been unable to find any provision in the statutes either authorizing or forbidding the holding of a special election on the same day as the general election, there is a provision in the statute relating to primary elections which by analogy would seem to contemplate that such a practice is a proper one.

Section 226 of the Code, which is in the chapter regulating the conduct of primary elections, provides that the provisions of said chapter regulating said elections "shall not apply to the nominations \* \* \* of candidates to fill vacancies unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries. \* \* \*"

It appears to me that this provision contemplates that a candidate nominated at such a primary to fill a vacancy would come up for election at a special election to be held at the same time as the next ensuing general election.

Furthermore it is obvious that the holding of the special election by the same election officials at the same time as the general election would result in the saving of considerable money and also the saving of the time of the voters in again going to the polls to vote if the special election were held at a different time.

I am of the opinion, therefore, that the calling of the special election contemplated to fill the vacancy in said Senatorial District to be held November 3, 1936, is in accord with and not in violation of our State election laws.

It is my opinion further that separate ballots and separate ballot boxes should be provided for the special election.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **ELECTIONS—Special—Eligibility of Persons Becoming of Age to Vote in.**

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

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

DEAR MR. JONES:

This is in reply to your letter of September 30, which is as follows:

"I have just registered a person who will not be 20 years of age until Oct. 27, 1936. We are having a special election on Oct. 20, 1936. Will this person be eligible to vote in special election before she becomes 21? (Section 83)."

Section 26 of the Constitution authorizes the registration of the above person for the purpose of voting in the November election. Under the provisions of section 18 of the Constitution a citizen, in order to be eligible to vote, must be twenty-one years of age.

It is my opinion, therefore, that the registration of the person you refer to does not entitle such person to vote in the special election which will be held prior to her reaching the age of twenty-one years.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **EXTRADITION—Necessity for Presence in State.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 7, 1937.*

HON. EMORY L. CARLTON,  
*Commonwealth's Attorney,  
Tappahannock, Virginia.*

Re: Extradition of Malcolm A. Moye, Jr.

DEAR MR. CARLTON:

It is well settled that "constructive presence" only of the accused in the demanding state is not enough to authorize his extradition from a foreign state. The basis of this doctrine is that one who was beyond the limits of a state when the crime was committed could not be a "fugitive from justice" of such a state, if he continued to remain outside. For an elaborate treatment of this subject see the note in 91 A. L. R. 1262, following the recent case of *Tennessee Ex Rel., Luke Lea v. Brown*, 166 Tenn. 669, 64 S. W. (2d) 841, 91 A. L. R. 1246. There you will find certain variations in the application of the above rule, as well as cases involving substantially the same situation as the one with which you are concerned.

Applying the authorities above, as well as those cited in the Virginia Law Register, Volume Number 5, N. S., at page 1, to the facts stated in your letter of December 31, I am of the opinion that one who was only constructively present in Virginia at the time of the crime, and has never been physically present here cannot be extradited from a foreign state.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **FEDERAL FARM CREDIT ACT—Loans from Associations, Etc., Organized Under—Provision as to Recordation of Instruments—Constitutionality.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 22, 1936.*

HONORABLE WILLIAM E. SANDIDGE, *Clerk,*  
*Circuit Court of Amherst County,*  
*Amherst, Virginia.*

MY DEAR MR. SANDIDGE:

I am in receipt of your letter of July 18, in which you refer to chapter 336 of the Acts of 1936 (Acts 1936, page 540). The title of the Act is as follows:

"An ACT to permit persons, associations, partnerships, or corporations of the State of Virginia to borrow funds from production credit associations, regional agricultural credit corporations, banks for cooperatives, or the gov-

ernment of the United States or any department, agency or officer thereof, federal intermediate credit banks or any institution which has made arrangements to discount therewith or to procure funds therefrom on the security of the obligations of the borrower and providing a means of securing said loans."

Section 1 of the Act provides in part as follows:

"Any person, association, partnership or corporation may enter into an agreement with and borrow funds from any person, firm, partnership or corporation, or a production credit association organized under the farm credit act of one thousand nine hundred thirty-three, a regional agricultural credit corporation, or the government of the United States or any department, agency or officer thereof, a federal intermediate credit bank, or any institution which has made arrangements to discount therewith, or to procure funds therefrom on the security of, the obligations of the borrower, \* \* \*."

Section 5 of the Act provides for the recordation of deeds of trust given under the Act by the clerk of the circuit court of the county in a well bound book to be known as the Federal Farm Credit Lien Book.

You call my attention to the fact that the title to the Act only relates to funds borrowed from production credit associations and certain other institutions, departments and agencies of the United States, while the Act itself in the above quoted portion of section 1 refers not only to these institutions, departments and agencies of the United States, but also to funds borrowed "from any person, firm or corporation."

In this respect, I am of opinion that the Act is clearly broader than its title and to the extent that it requires the recordation in the Federal Farm Credit Lien Book of deeds of trust securing funds borrowed "from any person, firm, partnership or corporation" other than those mentioned in the title of the Act is unconstitutional. Manifestly, it would be an absurdity to require the recordation in the Federal Farm Credit Lien Book of deeds of trust securing funds borrowed from private persons, firms, partnerships and corporations in the regular course of business.

However, I am of opinion, as this office has heretofore ruled on similar questions, that, although the portion of the Act to which I have referred may be invalid, it does not affect the validity of the other portions of the Act which are germane to the title. Therefore, I think that the instruments referred to in relation to funds borrowed from production credit associations and such other institutions, departments and agencies as are mentioned in the title should be recorded in your office in the Federal Farm Credit Lien Book provided for in the Act. This seems to be the real purpose of the Act, and section 11 thereof provides that it shall be liberally construed to effectuate this purpose. This section further provides that, if any provision of the Act is held invalid, the remainder of the Act shall not be affected thereby.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Attorneys for the Commonwealth—Cases Where Several Defendants Are Prosecuted under Single Warrant—Cases Where Defendant Pleads Guilty.**

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

HONORABLE R. TURNER JONES,  
*Attorney for the Commonwealth,*  
*Monterey, Virginia.*

MY DEAR MR. JONES:

I am in receipt of your letter of September 4, from which I quote as follows:

"It is usually our practice to issue separate warrants in cases where there are several offenders charged with the same offense, but if the offense

with which they are charged is identical as to each, we include them in one warrant. Where we have separate warrants and all consent to a joint trial, should there be costs taxed as if each had had a separate trial and should there be a Commonwealth's Attorney fee charged on each warrant? My opinion is that each should be taxed the costs of a separate trial and there should be a fee assessed against each. But if we should include four offenders in the same warrant for the same offense and they are tried together, I suppose the fee and costs should be taxed as if there was one trial and one offender.

"If the Commonwealth's attorney prepares the warrant against an offender, but at trial he pleads guilty and the attorney appears, but takes no part, should he be taxed with a fee for the attorney for the Commonwealth. My opinion is that such a fee should be taxed."

Section 3505 of the Code provides that "for each person prosecuted by him (that is, the Commonwealth's attorney) before any court or justice of his county or city for a misdemeanor, which he is required by law to prosecute, he shall be paid five dollars, "out of the State treasury unless the costs, including such fee, are paid by the defendant." The section further provides that the fee shall be taxed as a part of the costs.

Under this language, I am constrained to advise you that the fee of \$5 for the Commonwealth's attorney should be taxed against each person he prosecutes, it being immaterial whether the offenders are charged under one warrant or under separate warrants. I can see no escape from this conclusion under the plain wording of the statute.

Of course, you understand that under the Compensation Act of 1934 (Acts 1934, page 733), the Commonwealth's attorney no longer retains fees taxed for his appearance, nor is his fee paid by the Commonwealth, although it is still collectible from the defendant. I am sure you also understand that the fee of the attorney for the Commonwealth is only taxed in such cases where he is required by law to appear before the trial justice, and there are only a comparatively few cases in which he is so required by law to appear.

Replying to your second question, I agree with you that, where the Commonwealth's attorney appears to prosecute a case, but the defendant pleads guilty, the fee of the attorney for the Commonwealth should be taxed, as it is my view that this action on the part of the Commonwealth's attorney represents a prosecution.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **FEES—Commonwealth's Attorney—Fee Paid by Accused After Commonwealth's Attorney Has Collected from State Under Fee System—How**

##### **COMMONWEALTH OF VIRGINIA,**

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 28, 1936.

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

MY DEAR MR. SWITZER:

Your letter of July 23 addressed to the Auditor of Public Accounts has been referred to this office for reply. You state as follows:

"In January, 1931, Lee Brown was convicted of a felony in the circuit court of this county, the amount of the Commonwealth's attorney's taxed fee being \$20.00.

"Within the last few days, the amount of the costs has been paid to this office, and as the Commonwealth's attorney collected from the State ten dollars in this case, execution having been returned 'no property found', I am now requesting information as to whether ten dollars of the twenty dollars recently collected as the Commonwealth's attorney's fee shall be paid over to the attorney for the Commonwealth and the State reimbursed for the ten dollars heretofore paid him."

Inasmuch as the attorney for the Commonwealth was paid out of the State treasury the amount provided by law to be paid out of such treasury, I am of opinion that, the amount taxed as the fee of the attorney for the Commonwealth having now been collected, the State is subrogated to the rights of the attorney for the Commonwealth, and that the whole amount now collected should be paid into the State treasury.

You next inquire:

"Of course, the trial was before the attorney for the Commonwealth was placed on a salary basis, and the collection has been since that time. The question arises also whether the entire ten dollars should be paid to the State, or whether one-half of the same should be paid over to the county."

Since this fee covers services rendered prior to the taking effect of the Compensation Act of 1934, I am of opinion that the whole amount is to be paid into the State treasury.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **FEES—Commonwealth's Attorney—Forfeiture under ABC Law.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 5, 1937.*

HON. E. R. COMBS,  
*State Comptroller,*  
*Richmond, Virginia.*

DEAR MR. COMBS:

I refer to the attached letter from Miss Josephine M. Schaffer, in which she asks if a fee for the Commonwealth's Attorney should be taxed in connection with the forfeiture of an automobile used in violation of the Alcoholic Beverage Control Act, and the amount of such fee, if any should, be charged.

The statute (section 4675(38a)) contemplates that out of the proceeds of the sale the costs should be paid and the residue paid into the literary fund. I am of the opinion that the language is broad enough to include a fee from the Commonwealth's Attorney. However, I cannot find that the amount of this fee is specifically prescribed and I am, therefore, of the opinion that to determine this fee reference must be had to section 3533 of the Code, providing for taxed attorney's fees. Subsection 3 of this section provides that "in a case of the Commonwealth" the fee shall be \$5, and it seems to me that the better view is that this is the fee to be charged.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **FEES—Clerks—Delinquent Tax Collections.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 23, 1936.*

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

MY DEAR MR. McLEMORE:

I am in receipt of your letter of December 17, in which you raise the following question:

"Under section 2491 of the Code of Virginia it would seem and it has been the custom of this office to charge a fee of fifty cents on each item of

delinquent tax collected. This amount is for services rendered as set out in said section. A local attorney has recently taken issue with me in this matter and contends that section 3484 (41) applies. I have discussed this matter with a number of county clerks and find that they are divided in this matter, some using one section and some the other. I would thank you to let me have a ruling on this at your earliest convenience."

I have delayed replying to your letter in order that I might give the matter careful consideration, in view of the fact that the construction of two conflicting statutes is involved.

Section 3484 (41) of the Code fixes the clerk's fee as follows:

"For making statement, calculating interest, receiving payment of taxes on any tract of land returned delinquent for first three years, fifty cents.

"And for each additional year, ten cents."

Section 2491 of the Code also provides for this same fee as follows:

"\* \* \* For making statement, calculating interest, and so forth, the said clerk shall be entitled to a fee of fifty cents, payable by the person redeeming his land. \* \* \*"

In the Code of 1919 sections 2491 and 3484 (41) were entirely consistent as to this fee. It was not until 1920 (Acts 1920, page 800) that section 3484 (41) was amended so as to provide:

"And for each additional year, ten cents."

It is plain, therefore, that in 1920 the Legislature intended to increase the compensation of the clerks for services required of them under section 2491. It is true that section 2491 has been amended several times since 1920, but on none of these occasions has that part of the section dealing with the fee of the clerks been amended. Since it was plainly the intention of the General Assembly in 1920 to increase the fee of the clerks, I do not think that the fact that section 2491 has been subsequently amended and re-enacted in other respects should be taken to indicate that the General Assembly had receded from its action in reference to this fee in 1920. It follows that, in ascertaining this fee, section 3484 (41) of the Code controls.

In my opinion, therefore, for doing the things required of him under section 2491, the clerk is entitled to a fee of fifty cents for the first three years and ten cents for each additional year. I do not think that the fee is fifty cents for each of the first three years, but it seems to me plain that one fee of fifty cents is supposed to cover these years. I am supported in this view by the fact that, as I have stated, sections 2491 and 3484 (41) were perfectly consistent in the Code of 1919, and it is plain that the clerk, under section 2491, was only entitled to one fee of fifty cents.

I realize from your letter that the views I am expressing herein may be somewhat in conflict with the practice followed in some localities and for this reason I have given the matter unusual consideration and have taken the liberty of consulting with Honorable C. H. Morrisett, State Tax Commissioner, and he concurs with me in the views I am expressing.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Clerk of House of Delegates—Furnishing Copies of Bills, Etc.—Special Sessions.**

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

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

DEAR COLONEL OSBORNE:

I have your letter of December 11, asking if the fee of \$15.00 for furnishing copies of bills, calendars and joint resolutions of the General Assembly to such persons, firms or corporations as may desire them applies to special sessions of the General Assembly.

Section 390 of the Code provides that for rendering this service a fee of \$15.00 shall be charged for "each session of the General Assembly."

I am of the opinion that the term "each session" includes special sessions of the General Assembly as well as regular sessions.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**FEES—Justices of the Peace.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 12, 1937.*

HON. JAMES O. HAMMER,  
*Justice of the Peace,*  
*McGaheysville, Virginia.*

DEAR MR. HAMMER:

I am in receipt of your letter of March 31, in which you ask the proper fees of the justice of the peace in certain cases.

For issuing an attachment, fifty cents (Code sections 3481, 3484(22)); for issuing a warrant of arrest in the case of a misdemeanor, fifty cents (Code section 3507); for admitting any person to bail, \$1.00 (Code section 3507); for issuing any other warrant in which the Commonwealth is not plaintiff, fifty cents (Code section 3481(5)).

In this connection I call your attention to the fact that, under the existing trial justice law, the justice of the peace has no jurisdiction to try civil or criminal cases and any warrants issued by him must be made returnable before the trial justice (Code section 4987f).

In your letter you inquire as to the fees of certain other officers. I regret to have to advise that, in my opinion, I have no authority to express an official opinion to you on the fees of these other officers, inasmuch as taxing of these fees does not relate to the duties of your office. You will see from the enclosed card that this office only has authority to express official opinions to officers in matters relating to the duties of the officers.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Mileage—Arresting Officer Transporting Prisoner—Justices of the Peace  
—Power to Take Bond of Person Appealing from Trial Justice.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 7, 1936.

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

DEAR MR. COMPTON:

I have your letter of July 3, in which you ask several questions. Your first question is:

"If an arresting officer carries a prisoner to jail, will he be entitled to mileage for the prisoner and the officer to the jail and the officer's return home, or, in other words, if he carries the prisoner 30 miles to jail, will he collect only for the 30 miles travelled with the prisoner or for 90 miles travelled by himself and prisoner? I find that some officials take the first position and some the second."

Section 3508 of the Code, dealing with fees and mileage of sheriffs, provides in part as follows:

"For carrying a prisoner to jail under the order of a justice, for each mile travelled of himself in going *and returning*, eight cents; for each mile travelled of the prisoner in carrying him to jail, where the distance is over ten miles, eight cents; \* \* \*."

This office has heretofore ruled that a sheriff, in carrying a prisoner to jail under the order of a justice, is not only entitled to his own mileage going and returning, but, where the distance is over ten miles, is entitled to mileage for the prisoner for the whole distance in carrying him to jail. In other words, in the case you suggest, allowance should be made for 90 miles.

Your second question is:

"Also if two or three misdemeanor charges which happen at the same time and place, and the different cases are heard and disposed of at one hearing, should one or more trial fees be collected from the defendant? I find officials attending our court have different opinions on this question."

Before answering this question, I shall be glad if you will advise me if a warrant was issued for each misdemeanor. Also please advise me exactly what you mean by the cases being heard and disposed of "at one hearing". In other words, do you mean that there is the same evidence in the case of each misdemeanor, or is each misdemeanor simply tried at one sitting of a justice, with different evidence in each case? I shall appreciate it if you will be a little more specific as to the facts bearing on this question.

Your third question is:

"If the defendant in a criminal case tried by a trial justice notes an appeal, can a justice of the peace legally take the bond and collect the fee?"

Section 4987f of the Code as enacted in 1936 (Acts 1936, page 615) subsections (7) and (8) provides:

"\* \* \* Justices of the peace within their respective counties and mayors or other trial officers, within their respective territorial jurisdictions shall, however, have the same power to issue attachments, warrants and subpoenas within the jurisdiction of the trial justice as is conferred upon the trial justice, and they shall also have power to grant bail in any case in which they are now authorized by general law to grant bail and to receive their fees therefor, but said attachments, warrants and subpoenas shall be returnable before the trial justice for action thereon.

"Except as herein otherwise specifically provided, all the provisions of law now in force or which may hereafter be enacted governing granting of bail, procedure and appeals in criminal cases, relating to police justices in cities shall apply in like manner to trial justices appointed hereunder, \* \* \*."

Section 4828 of the Code, speaking of the granting of bail by a justice, provides in part as follows:

"\* \* \* provided that in any city where there is a police justice or a civil and police justice, and in which the justices of the peace have no jurisdiction to try persons charged with crimes, a justice may admit to bail only persons charged with misdemeanors before such persons have been arraigned or tried before said police justice or civil and police justice, \* \* \*."

Construing these two sections together, I am of opinion that your question must be answered in the negative.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Officers Serving Process, Etc.—Civil and Criminal Cases—What Statutes Applicable.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 13, 1937.*

HONORABLE J. CALLAWAY BROWN,  
*Trial Justice,*  
*Bedford, Virginia.*

MY DEAR MR. BROWN:

I am in receipt of your letter of February 5, in reply to mine of February 3.

I do not think there is any question about the fact that section 3487 of the Code relates to civil cases and that section 3508 is applicable in criminal cases. While paragraph 9 of section 3487 on its face appears confusing, I think, when it is borne in mind that this is a statute of ancient origin and at times this particular subsection has been applicable in a civil case, the difficulty is removed. Within the past year I have had occasion to give this question rather careful consideration and my study of the history of these two statutes convinces me that my view in this particular is the correct one.

In connection with your inquiry as to what is meant by "under the order of a justice", I do not think there is any doubt but that, where an officer arrests a man under a warrant issued by a trial justice or his clerk, he is acting "under the order of a justice"

With kindest personal regards, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Physicians in Lunacy Commissions—Medical Officials of State Hospitals.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 16, 1937.*

HONORABLE L. PRESTON COLLINS,  
*Attorney at Law,*  
*Marion, Virginia.*

MY DEAR MR. COLLINS:

I am in receipt of your letter of April 13, in which you inquire if the medical officials of the Southwestern State Hospital are entitled to the usual fees incident to the commitment of the insane.

Section 1017 of the Code provides for the summoning of two physicians by a judge or justice to constitute a commission to inquire into the sanity of a person against whom a complaint is made. Section 1021 of the Code provides that the two physicians shall receive a fee of \$5 each for their services.

Inasmuch as the physician members of the commission are provided for by statute and their compensation is fixed by statute, I know of no reason why the fact that the physician members are State employees should prevent them from receiving the stated compensation. The situation is somewhat similar to that of a State employee summoned as a witness, in which case I am of opinion that it would be proper for the per diem prescribed for witnesses to be paid.

I do not think that the provision you refer to in the Appropriation Act has any bearing on the question, as it seems to me that this provision relates to "perquisites or emoluments" in connection with the Physician's services to the Southwestern State Hospital. When an employee of the Southwestern State Hospital is summoned as a member of a lunacy commission, he is not acting as such employee, but as a regular licensed physician.

Of course, if the physician, as a condition of his employment, has agreed that the institution shall receive the benefit of such fees, a different situation would be presented, but I take it that your inquiry is not directed to a contract between the physician and the institution.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Sheriffs—Single Arrest for Several Offenses—Trial Justices—Single Trial on Several Charges.**

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

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

MY DEAR MR. COMPTON:

I am in receipt of your letter of July 15, in which you refer to mine of July 7, construing section 3508 of the Code. You call my attention to section 3487 of the Code, as amended in 1936 (Acts 1936, page 545).

However, section 3487 deals primarily with fees of sheriffs and the other officers named therein in civil cases, while section 3508 relates primarily to fees in criminal cases. A consideration of the history of these two sections clearly demonstrates this fact.

It is true that a sheriff is entitled to mileage for a prisoner only for the distance he actually carries the prisoner. However, section 3508 specifically provides that the sheriff shall be entitled to mileage of himself in going and returning. I must, therefore, adhere to my previous opinion given you that, in carrying a prisoner to jail under the order of a justice, a sheriff is not only entitled to his own mileage going and returning, but, where the distance is over ten miles, is entitled to mileage for the prisoner for the whole distance traveled in carrying him to jail.

You elaborate your second question as follows:

"If A has three warrants against him, (1) warrant on charge of disturbing a gathering for the purpose of public worship, (2) a warrant for public drunkenness or being intoxicated in a public place, and (3) profane swearing in public; all of these charges occurring at the same time and place. A is arraigned in court for trial. The Commonwealth's Attorney appears in the case and suggests that all the cases or warrants be heard at one time, which is done. Witnesses are questioned relative to all charges in one trial. The evidence shows that A is guilty of all the charges against him.

"I am taxing up costs on these warrants. Should we allow an arrest fee on each charge when the defendant is arrested but one time? Also a trial fee is on the three warrants where only one trial is had. My position is that the defendant only be taxed with one arrest fee and one trial fee, as only one trial is held and one arrest has been made."

I do not think there can be any question about the fact that only one arrest fee is chargeable, as only one arrest is made.

I also agree with you that only one trial fee should be charged. My view as to the trial fee is strengthened by the following from section 3507 of the Code:

"\* \* \* nor shall a justice receive more than one fee for issuing more than one warrant of arrest or search warrant, or trying or examining more than one case of misdemeanor, or examining more than one charge of felony against the same party defendant, when said warrants are issued or trials or examinations had on the same day."

While section 3507 of the Code was enacted long before the trial justice system became effective, yet I think it is only reasonable to construe this particular provision of the section as applicable also to trial justices.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**FEES—Summoning Witnesses in Criminal Cases—Justices of the Peace—Warrants in Civil Cases—Amount in Controversy.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 23, 1936.

MR. JOHN D. HOOKER,  
*Trial Justice,*  
*Stuart, Virginia.*

DEAR MR. HOOKER:

I have your letter of July 24, in which you ask two questions. Your first is:

"Section 3487 of the Code, relating to fees for sheriffs, constables, etc., was amended at this past session of the Legislature. As it now reads, does this section apply to the summoning of witnesses in criminal cases as well as the serving of process in civil cases? If not, is the summoning fee in criminal cases still determined by section 3508 of the Code?"

This office has heretofore ruled that fees of sheriffs, constables, etc. in criminal cases are fixed by section 3508 of the Code, while section 3487 deals primarily with fees in civil cases.

Your second question is as follows:

"Section 6015 of the Code limits the power of a justice of the peace to issue warrants in civil cases where the amount of the claim does not exceed \$300. Section 4987-f, subsection 7 of the 1936 Acts says, in effect, that justices of the peace have the same power to issue warrants, etc., that is conferred upon the trial justice. Does this mean that section 6015 of the Code has been repealed, and that a justice of the peace now has the power to issue a civil warrant on a claim up to \$1,000?"

Subsection 7 of section 4987-f of the Code, as amended in 1936 (Acts 1936, page 622), provides in part as follows:

"\* \* \* Justices of the peace within their respective counties and mayors or other trial officers, within their respective territorial jurisdictions shall, however, have the same power to issue attachments, warrants and subpoenas within the jurisdiction of the trial justice as is conferred upon the trial justice,

and they shall also have power to grant bail in any case in which they are now authorized by general law to grant bail and to receive their fees therefor, but said attachments, warrants and subpoenas shall be returnable before the trial justice for action thereon."

The authority of justices of the peace to issue warrants is in terms set out in the above quoted portion of the Trial Justice Act, and to the extent that it is in conflict with section 6015 of the Code it supersedes the same.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**FEES—Trial Justices—Filing Papers with Clerk—Sheriffs and Sergeants—  
Summoning Witnesses in Criminal Cases.**

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

MR. J. T. HAMILTON,  
*Trial Justice,*  
*Wise, Virginia.*

MY DEAR MR. HAMILTON:

I am in receipt of your letter of July 17, in which you ask, first:

"On or before the trial of each civil case in the trial justice courts, some trial justices seem to be collecting a fee of \$1 only where others are collecting a trial fee of \$1 plus a fee of 25c to be paid to the clerk of the circuit court upon filing the papers with the clerk. Please advise me as to which is proper."

Section 4987j of the Code, which is a part of the new trial justice act (Acts 1936, page 615), provides that all papers connected with any of the proceedings of a trial justice, except such as may relate to cases appealed or removed, or which by general law are required to be sooner returned to the clerk's office, shall remain in the office of the trial justice for one year after final disposition. At the end of this period the section further provides that the papers shall be returned to the clerk's office of the appropriate court of the county or city, and shall be properly filed, indexed and preserved by the clerk, "who shall receive the same fees as are now allowed for receiving, filing and indexing like papers returned by justices of the peace."

In view of this provision, I am of opinion that it is proper for a trial justice to collect the clerk's fee specifically authorized in this section, which is twenty-five cents.

Your second question is:

"Some of the officers construe the laws or Acts of 1936 Virginia to allow them a fee of 75c for summoning each witness for the Commonwealth in criminal cases. Please advise me on this point also."

I presume that the officers invoking this construction refer to section 3487 of the Code, as amended in 1936 (Acts 1936, page 545). However, I call your attention to the fact that this section relates primarily to fees in civil cases. The fees of sheriffs, sergeants, etc., in criminal cases are fixed by section 3508 of the Code, which section has not been changed for the past several years. The provisions of that section as to fees for summoning witnesses in criminal cases are plain, and I refer you to them.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Trial Justices—Garnishment.**

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

MR. W. E. HOGG,  
*Trial Justice,*  
*Yorktown, Virginia.*

MY DEAR MR. HOGG:

Your letter of December 10 addressed to Honorable C. H. Morrissett, State Tax Commissioner, has been referred to me for reply.

You write in reference to the provisions of section 4987-m of the Code, as amended in 1936 (Acts 1936, page 626):

"It is my construction that, when I issue a garnishment and the same is returned and I am called upon to issue an order directing payment by the garnishee, I should collect from the plaintiff a fee of \$1.00 for issuance of the order for payment or for the trial of any questions that may be raised by the garnishee or the defendant and a hearing upon the garnishment proceeding."

This section provides that the trial justice, for services rendered by him in civil actions, is entitled to the following fees only:

"(3) For trying and giving judgment on a civil warrant, notice of motion, attachment or in a garnishment proceeding, including taxing costs, issuing the first execution, filing papers upon return of executions, and issuing one abstract of judgment, one dollar, to be paid by the plaintiff at or before the time of hearing;"

In view of this provision, I am of opinion that you are plainly right in charging a fee of \$1.

You further state:

"I am further of opinion that, if a garnishment is issued by me and the same is released by the plaintiff before the return day, I am not required to collect any fee for the release, and this seems to have been the practice."

I find no provision for charging any fee for the release mentioned and, inasmuch as the fees which may be charged by a trial justice are limited to those provided in the aforesaid section, I am of opinion that you are correct in not charging a fee for this release.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES AND COSTS—Payment of in Commonwealth's Suit to Enjoin Public Nuisance.**

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

HONORABLE R. NORMAN MASON,  
*Commonwealth's Attorney,*  
*Accomac, Virginia.*

MY DEAR MR. MASON:

I have your letter of July 9, in which you state that you are commencing proceedings to enjoin the operation of a nuisance under Virginia Code (Michie 1930) section 1521, et seq. You request the opinion of this office as to who should pay the clerk's filing fee in such a case.

Your attention is called to a provision of the 1936 Appropriation Act, at page

827 of the Acts of 1936, setting aside a sum of money for the prosecution of civil cases on behalf of the State.

In view of this appropriation, I take it that the Comptroller would certainly pay a bill presented by the clerk, or if you have advanced the fee in question yourself, by you, for any costs incident to bringing such a suit as you describe.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES AND COSTS—Witnesses in Criminal Cases, Where Accused Is Tried for Several Offenses; Id.—Officers, Where Several Make Arrest Together.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 22, 1937.*

MISS ANNA I. DuVAL, *Clerk,*  
*Hustings Court, Part II,*  
*Richmond, Virginia.*

DEAR MISS DuVAL:

I am in receipt of your letter of the 12th instant, in which you call my attention to certain acts of the General Assembly of Virginia, and in which, after you state that it is very clear that a witness who attends court in two or more cases can only be allowed one fee, you ask whether all of the officers jointly making an arrest shall be allowed fees or only the two officers.

You also ask when there are two or more charges against a prisoner, and the fine and costs are paid in one case, will the State allow witness fees in the other cases.

The appropriation bill, carrying an item for criminal charges, expressly limits fees paid by the Commonwealth, in cases where more than two officers participate in making arrests, to fees for two of such officers without, however, specifying the two who are to receive fees.

This same provision provides that where a witness attends in two or more cases on the same day only one fee can be allowed. In my opinion, that provision applies to the fees of a witness in all cases, and where one case has been tried and the accused is convicted and all costs, including witness fees, are paid the same witness should not be allowed witness fees payable either by another accused who is tried and convicted or paid by the Commonwealth out of the appropriation for the enforcement of the criminal laws.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FIDUCIARIES—Amortization and Accumulation of Bonds Bought at Premium or Discount.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 11, 1937.*

HONORABLE M. E. BRISTOW,  
*Commissioner of Insurance and Banking,*  
*Richmond, Virginia.*

Re: Interpretation of section 5133h of the Code of Virginia (Michie 1936).

DEAR MR. BRISTOW:

This section of the Code, enacted in 1936 (Acts 1936, chapter 432, page 1027), is taken from the Uniform Principal and Income Act as adopted by the National Conference of Commissioners on Uniform State Laws in 1931. It was designed to cover the problem of amortization of bonds *bought by trustees* at a premium and accumulation in the case of bonds bought at a discount. As stated in your letter, there has been and still is, in the absence of an express statute, a great conflict of authority as to the duty of trustees in these instances.

See: *Old Colony Trust Co. v. Comstock* (Mass.), 195 N. E. 389, 101 A. L. R. 1 (1935);  
48 Harvard Law Review, 1194-1195.

The Uniform Principal and Income Act was followed in Oregon in 1931 (a similar Act had been adopted in Hawaii in 1927), but there have been no decisions in these jurisdictions, or Virginia, concerning the import of the section involving premiums and discount bonds. However, the wording of this section leads us to the conclusion that this statute does stand in the way of accumulation and amortization by the trustee. Such was the object of the Commissioners.

See: 9 U. L. A., 1935 Cumulative Annual Pocket Part, page 167, at page 168;  
Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, 1931, pages 326, *et seq.*

"\* \* \* In the interests of administrative simplicity, suggestion has been made that both premium and discount be charged to principal. \* \* \*" (48 Harvard Law Review, page 1195.)

Mr. Bogert, in his work on Trusts and Trustees, volume 4, section 830, page 2424, title "Bonds Bought at a Discount", says:

"\* \* \* What little statutory law there is upon the subject places no duty upon a trustee to pay part or all of discounts to life cestuis."

citing section 6 of the Uniform Principal and Income Act (which has been enacted as section 5133h of the Code of Virginia).

Mr. Bogert, after discussing the merits of the conflicting decisions in other jurisdictions on the matter of amortization and accumulation, points out (Trusts and Trustees, volume 4, section 831, page 2431, title "Bonds Purchased at a Premium"):

"The Uniform Capital and Income Act and statutes in Hawaii and Oregon place the loss from premium bonds on capital and require no amortization."

Of course, section 5133h of the Code of Virginia does not apply when the intention of the settler is to the contrary, and applies only in cases where the settler either expressed no intention or his intention cannot be ascertained from the deed or will creating the trust. Regardless of the merits of the conflicting views on this matter in the administration of trusts, it would seem that, under section 5133h, the trustee is under no legal duty to provide for accumulation or amortization in the administration of a Virginia trust.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**FINES AND COSTS—Extinguishment of Judgment for by Serving Time for Non-Payment—Right of Election between Paying and Serving Time.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 22, 1937.

HON. J. G. JEFFERSON, JR.,  
*Trial Justice,*  
*Amelia, Virginia.*

DEAR JUDGE JEFFERSON:

I have before me your letter of the 19th instant, in which you request my opinion as to the construction of section 2095 of the Code, as amended by the Acts of 1936.

You state you recently imposed a fine of \$50 and costs, and four months in

jail upon a person convicted of the possession of illegal ardent spirits, and state that the person so convicted is now serving his time at the State Farm. You further state that this man is able to pay his fine and costs, and inquire, if he should elect to serve his fine and costs instead of paying same, whether or not such serving of time would operate to extinguish the judgment for the fine and costs.

It is my opinion that, if this party serves his time as provided by the statute, it will operate to completely extinguish any claim which the Commonwealth may have against him for the fine and costs.

I am of opinion, however, that the election as to whether this fine and costs shall be paid, or whether the defendant shall serve time in lieu of paying same, is vested in the Commonwealth's Attorney, under the provisions of sections 2552-3 and sections 2558-61, inclusive. The Commonwealth's Attorney may have a writ of *feri facias* issued and placed in the hands of the sheriff for execution. If the sheriff is able to find any assets he may collect the fine and costs and thus dispose of the matter.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FINES—For Violations of County Ordinance—How Disposed of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 17, 1936.

HONORABLE R. H. L. CHICHESTER,  
*Trial Justice,*  
*Stafford, Virginia.*

MY DEAR MR. CHICHESTER:

I have your letter of November 7, inquiring as to whether fines collected under a county ordinance, as provided by chapter 425 of the Acts of 1936, shall be paid to the clerk of the circuit court or direct to the treasurer, as other county revenue is paid.

In view of section 4987m of the Code, providing that fines assessed for violation of county ordinances "shall be turned promptly into the treasury of the city, town or county whose ordinance has been violated," I am of the opinion that such fines as are collected by the trial justice should be turned over to the county treasurer.

In connection with this act, I am enclosing for your information a copy of a letter written by me under date of July 24, 1936, to Honorable E. Peyton Turner, Attorney for the Commonwealth of Greensville County.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FORFEITURES AND PENALTIES—How Disposed of.**

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

COLONEL JOHN A. CUTCHINS,  
*Director of Public Safety,*  
*Richmond, Virginia.*

DEAR COLONEL CUTCHINS:

This is in reply to your letter of September 2, requesting my opinion upon the question whether or not one-half of a fund of \$25.37 in gambling equipment seized by two police officers should be paid to the officers making the seizure, or whether the entire amount should be paid into the treasury of the State.

Section 4676 of the Code, providing for the disposition of money of this character, provides that "the money so seized shall be forfeited, one-half to the person making the seizure, and the other half to the Commonwealth." In a letter from your City Attorney, Honorable James E. Cannon, to you, he expresses some doubt as to whether or not this provision is in violation of section 134 of the State Constitution, which requires the General Assembly to set apart as a permanent literary fund "all property accruing to the State by forfeiture."

The language quoted from the above section of the statute does not forfeit to the State the entire amount seized, but only one-half thereof. The other half is forfeited directly to the person making the seizure. Unless, therefore, this provision of the statute forfeiting the property direct to the person making the seizure is invalid, it seems clear that the money forfeited to such person is not forfeited to the State and does not accrue to the State within the meaning of the constitutional provision quoted.

The question of the validity of such a statutory provision has been passed upon and upheld by the Supreme Court Appeals of Virginia in the case of *Southern Express Company v. Walker*, 92 Va. 59, 65, where this is said:

"\* \* \* If the Legislature possesses the right, as it does, to impose a fine or forfeiture, it has the power, as appurtenant to such right, to prescribe the proceeding or adopt the means deemed by it most likely to result in the enforcement of the fine or forfeiture. If it thought that its policy, as evidenced by the forfeiture provided for in section 1220, was more likely to be enforced by giving one-half of the forfeiture for the use of the informer, it had the right to do so, and only such part as it reserved for the use of the State would be covered by the constitutional provision. \* \* \*"

It is my opinion, therefore, that, under the provisions of the statute heretofore referred to, the person seizing money used in gaming is entitled to one-half of same.

I am returning the check to you, as in my opinion it should be delivered to the officers who seized the money.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **GAMBLING—Forfeiture of Stakes—"Private" Poker Game.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 27, 1937.*

HONORABLE WILLIAM T. SPENCER,  
*Commonwealth's Attorney,*  
*Lynchburg, Virginia.*

DEAR MR. SPENCER:

I have your letter of January 25, requesting the opinion of this office upon a question now confronting the Municipal Court of your city.

I wish to say at the outset that it is the settled policy of this office never to express an opinion on any question currently before any court in the State. Since, however, you make your request on behalf of both yourself and the Municipal Court judge, it seems proper to make an exception in this case.

You state that officers in your city recently apprehended a number of persons engaged in what appeared to be an ordinary game of poker; that several of the participants have been convicted under the gaming laws, and that the officers have moved the court for an order declaring a forfeiture of the stakes for which these men were playing. You submit to this office the question of whether such an order should be entered.

Virginia Code (Michie 1936) section 4676 provides for the forfeiture of stakes being wagered or equipment being used in committing the offense defined by that section. This offense is described as "keeping" or "exhibiting" any table, bank, etc., for the purpose of gaming. From these terms, and from the context

of the entire section, it seems that the statute is specifically directed against the practise of conducting, as a proprietor, gambling devices or games open to such customers as may be willing to put up their stakes.

It is the opinion of this office that this element of proprietorship is essential to the specific offense defined by Code section 4676; that therefore the stakes sought to be forfeited in your case were not being used in violation of that section and cannot be confiscated under its provisions.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Crabs—Dredging for in Tidewater Virginia.**

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

HONORABLE JOHN A. LESNER,  
*145 Orleans Circle,  
Norfolk, Virginia.*

DEAR SENATOR LESNER:

In response to your letter of August 20, relating to the question whether there is a provision of law prohibiting the dredging of crabs between certain distances from the shore lines of Tidewater, Virginia, this will advise that I have made a search of the Acts of the last Legislature and have found a provision which I take to be the one you have in mind.

Subsection (8) of the Virginia Code (Michie, 1930), section 3265, as amended by chapter 393 of the Acts of 1936, at page 707, prohibits altogether the use of scrapes or dredges in taking crabs, other than the soft crab "peeler", in any of the rivers, their estuaries, inlets or creeks, excepting the waters of the Chesapeake Bay or Hampton Roads, and the eastern or ocean side of Accomac and Northampton counties.

I trust that this is the information which you desire.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME AND INLAND FISH LAWS—Dip Net Permits—Who May Acquire.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 18, 1937.*

HON. M. D. HART, *Executive Secretary,  
Commission of Game and Inland Fisheries,  
Richmond, Virginia.*

DEAR MR. HART:

This will acknowledge your letter of March 8, requesting an opinion from this office as to whether county dip net permits may be obtained by non-residents of the county for which they are issued.

The statute requiring such permits is section 3305(33) of the Code (Michie 1936), which makes it unlawful to exercise certain privileges without first obtaining the permits required therefor. Among these are permits to use various types of nets and seines, all of which are referred to simply as "county" permits.

Neither in this section nor elsewhere in the game laws do I find anything requiring that these permits be sold only to residents of the county for which they are issued. Section 3305(22) of the Code, imposing such a limitation on the issuance of licenses to hunt, trap and fish deals exclusively with regular hunting and trapping licenses and licenses to fish with hook and line. This seems especially clear in view of the succeeding sections, which indicate a clear distinc-

tion between "licenses" and "permits" as these terms are used in the game laws.

It is the opinion of this office, therefore, that the county dip net permits provided for in section 3305(33) may be obtained by non-residents of the respective counties for which they are issued.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME AND INLAND FISH—Licenses—Hunting—Son-in-Law of Resident Landowner.**

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

HONORABLE DAVID NELSON SUTTON,  
*Commonwealth's Attorney,*  
*West Point, Virginia.*

DEAR MR. SUTTON:

I have your letter of September 25, requesting the opinion of this office as to whether a hunting license is required of a person hunting on the land of his father-in-law.

Section 19 of the Virginia Game, Inland Fish and Dog Code as amended by chapter 90, Acts of 1936, expressly excepts from the license requirements "land-owners, their husbands or wives and their children" hunting on their own land.

While on the face of this statute there might be some question as to whether sons-in-law could be considered "children", it seems clear that the manifest purpose and intent of the statute lead to such a construction.

It is therefore the opinion of this office that the son-in-law of a landowner may hunt on his father-in-law's property without obtaining a license.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME LAWS—Trespassing Hunters.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 25, 1937.*

ALEX BELCHER, ESQUIRE,  
*Justice of the Peace,*  
*Ettrick, Virginia.*

DEAR MR. BELCHER:

I have your letter of March 6, requesting an opinion from this office as to the right of a landowner to exclude licensed hunters from his property during hunting season. You ask particularly whether there is any provision of law under which such trespassers may be criminally prosecuted, and, if so, how the warrant in such a case should read.

As to the civil liability of the hunter to the landowner in such cases there is no question: while the Legislature might decline to punish such a trespass as a crime, it has never, so far as I can discover, attempted to give hunting licenses the effect of authorizing one private individual to hunt on the land of another without the latter's consent.

The question of the criminal responsibility of such trespassers is controlled by section 3305(50) of the Code (Michie 1936). I wish to say at the outset that the meaning and effect of much of this statute are very doubtful and present debatable questions which must be left to the courts for final determination.

Under the last sentence of section 3305(50), it is clear that a hunter who goes on the lands of another a second time, after having been warned not to do so, is guilty of a misdemeanor. The warrant in such a case should simply follow the language of the statute.

Whether the initial trespass defined in the preceding part of section 3305(50) constitutes a criminal offense, punishable under section 3305(48) of the Code, is a question which, in my opinion, might justifiably be decided either way. For the purposes of your inquiry, suffice it to say that, in my opinion, a justice would be justified in issuing a criminal warrant for such initial trespass, the warrant charging that the defendant "did unlawfully go upon the private land of" (the owner) "to hunt", etc., "and did trespass, hunt", etc., "on said lands without the consent of said owner and without the consent of any other person having the legal right to grant the same" (see *Miller v. Commonwealth*, 159 Va. 924, 927).

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **GARNISHMENT—Time Within Which Summons Must Issue—Fee.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 24, 1937.*

MISS MAUDE DAVIS, *Clerk,*  
*Schoolfield, Virginia.*

DEAR MISS DAVIS:

I have your letter of February 19 in which you state:

"After a judgment has been granted and an execution issued and the plaintiff waits for more than 60 days and then asks for a Garnishment to be issued, can the Garnishment be issued from the judgment or is it to be issued from the execution? If, from the execution, will a new execution have to be issued and for what price?"

It is my view that a summons in garnishment must be issued on a *feri facias* or execution before the return day thereof, and that, if a summons in garnishment is desired after such return day it will be necessary for a new *feri facias* to be issued.

As to the fee for issuing same, section 4987m of the Code, as amended in 1936, specifically provides that the fee shall be twenty-five cents for an additional execution.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **GARNISHMENT—Venue.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 5, 1936.*

HONORABLE ROBERT T. WINSTON,  
*Trial Justice,*  
*Hanover, Virginia.*

DEAR MR. WINSTON:

This will acknowledge receipt of your letter asking the opinion of this office on certain questions relating to garnishment proceedings.

Your letter presents the following questions: where a judgment has been entered by a civil justice of the city of Richmond against a defendant who now resides in Hanover county, may garnishment proceedings against a resident of Henrico county be entertained (1) by the trial justice of Hanover county, or (2) by the civil justice of the city of Richmond?

(1) I concur in your opinion that such proceedings cannot be had before you as trial justice of Hanover county. The Trial Justice Act does not specifically confer on trial justices any jurisdiction in garnishment, but provides that

"\* \* \* all statutes heretofore enacted, except section forty-eight hundred and sixteen of the Code, conferring any power, authority, or jurisdiction upon justices of the peace in any civil action or proceeding, shall apply in like manner to trial justices appointed hereunder." (Virginia Code (Michie 1936), section 4987f.)

The only jurisdiction in garnishment conferred on justices of the peace is that provided for in section 6509 of the Code, which is, in part, as follows:

"\* \* \* a summons" (in garnishment) "may be sued out of the clerk's office of the court in which the judgment is, or, if rendered by a justice, may be issued by a justice, or sued out of the clerk's office to which an execution issued thereon has been returned as provided in section six thousand and thirty \* \* \*."

Under these statutes, especially in view of the fundamental principle that garnishment proceedings are exclusively statutory and must be expressly authorized by the Legislature, it is the opinion of this office that the trial justice of Hanover county has no jurisdiction to entertain garnishment proceedings based on a judgment entered by another court.

(2) The question of the Richmond civil justice's jurisdiction is perhaps more difficult.

As in the case of the trial justice, the jurisdiction of the civil justice in garnishment is defined only by general reference to "civil matters cognizable by justices of the peace" (Virginia Code (Michie 1936), sections 3114 and 3102, subsection (b)). As already indicated, section 6509 of the Code expressly authorizes justices of the peace to entertain garnishment proceedings based on their own judgments. The last paragraph of that section, however, requires such justices to make their summonses in garnishment returnable to some place in the magisterial district wherein the judgment debtor resides.

At the time when this statute was drawn (1887), this latter provision was consistent with the general laws fixing the venue of all actions before justices of the peace in the magisterial district of the defendant's residence. However, when the courts of civil and police justices and civil justices were established with their comparatively broad jurisdiction, the venue for proceedings before them was prescribed by a general venue statute, which provided, in part as follows:

"Any warrant or other process issued upon any claim or cause or action of which a civil and police justice is given jurisdiction by sub-sections (b) and (d) of section thirty-one hundred and two, may be made returnable before such civil and police justice if the defendant, or one of them if there be more than one defendant, resides, or is regularly employed, or has his regular place of business in such city, or if the cause of action or any part thereof arose therein; \* \* \*." (Virginia Code (Michie 1936), section 3105a. The provisions of this section apply to civil justices under Code section 3114.)

It is the opinion of this office that the language of this general venue statute is broad enough to cover garnishment proceedings, and hence repeals the final provision of section 6509.

It follows that, in the case to which you refer, the propriety of bringing the proceedings in question before the civil justice of the city of Richmond would depend on whether the facts of the case met the conditions of this general venue statute. In any event, of course, it is necessary that proper personal service be had on the garnishee and on the judgment debtor as in any other case.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**GENERAL ASSEMBLY—"Majority of Members."**

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

HONORABLE E. GRIFFITH DODSON,  
*Clerk of House of Delegates,  
Capitol Building,  
Richmond, Virginia.*

DEAR MR. DODSON:

This is in response to your request for the opinion of this office as to the construction of certain constitutional and statutory provisions relating to the number of votes required to enact certain measures.

You wish to know whether the phrase, "majority of all the members elected to each house", should be construed to mean majority of existing qualified members, excluding those who have died or been disqualified at the time of voting, or whether it should be taken to mean a majority of the original membership as fixed at the time of election.

It is the opinion of this office that the latter construction is correct, and that wherever this phrase appears in the Constitution or statutes it should be construed to refer to the number of Delegates or Senators originally elected.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**GOVERNOR—Jurisdiction over Person Committed to Department of Public Welfare and Industrial Schools.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 25, 1936.*

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

DEAR GOVERNOR PEERY:

I am in receipt of your letter of November 23, in which you ask my opinion "as to the jurisdiction of the Governor over persons committed to the Department of Public Welfare and inmates of Virginia Industrial Schools." I presume you refer to pardoning power.

Section 73 of the Constitution gives to the Governor "power to remit fines and penalties under such rules and regulations as may be prescribed by law; and \* \* \* to grant reprieves and pardons after conviction; \* \* \*." However, persons may be committed to the Department of Public Welfare or sent to one of the industrial schools without having been convicted of any crime. I have in mind particularly chapter 78 of the Code, dealing with delinquent, dependent and destitute children, and to chapters 79 and 79a of the Code, dealing with the care of and home for children. See also chapter 81 of the Code, providing how persons may be committed by juvenile and domestic relations courts. Where persons have been committed to the Department of Public Welfare or to one of the industrial schools, without having been convicted of a crime, in such cases I am of the opinion that there is no room for the exercise of the pardoning power. However, if a person has been convicted and sentence imposed, I am of opinion that the pardoning power may be exercised.

It would be difficult to presuppose the various types of cases in which these commitments might be made. The question whether the Governor has the power to pardon would have to be determined by the record and facts in each particular case. If you now have before you a specific case and will let me have the benefit of the record and facts, I shall be glad to express an opinion thereon.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**HIGHWAYS—Cities and Towns—Effect of Chapters 317 and 384 of Acts 1936.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 20, 1937.*

HONORABLE BENJAMIN E. CHAPMAN,  
*Member of the House of Delegates,  
Salem, Virginia.*

DEAR MR. CHAPMAN:

I have your letter of February 9, with respect to the construction of chapters 317 and 384 of the Acts of 1936 in so far as same are applicable to the town of Vinton.

It is my opinion that these acts are to be considered entirely separate and independent of one another, and that the town of Vinton is entitled to receive an allotment of at least fifteen hundred dollars for each mile of primary highway in the town which is maintained by the town up to the standard of maintenance of the State highway system adjoining the town. In addition, the State Highway Commission is authorized in its discretion, whenever it deems it advisable that any of such primary highway in the town be constructed or reconstructed, to make an additional allotment of five hundred dollars.

I am further of the opinion that, under the provisions of chapter 384 of the Acts of 1936, the streets in said town coming within the provisions of said section are established as a part of the secondary highway system.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**INEBRIATES—Furloughs—Arrests.**

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

DR. J. S. DEJARNETTE, *Superintendent,  
Western State Hospital,  
Staunton, Virginia.*

DEAR DR. DEJARNETTE:

This is in response to your request for the opinion of this office as to your authority to require a sheriff to arrest and deliver to your representatives persons who have been furloughed from your hospital after commitment for inebriacy and whose return is made necessary by their behavior on furlough.

The power of a hospital superintendent to require the assistance of law enforcement officers in such matters, as well as the officers' power to make such arrests, is strictly confined to such express authority as may be granted by the legislature. The statutes (sections 1040-1041 and section 1044 of the Code) merely authorize you to issue a warrant for the arrest of any patient who, after having been furloughed, fails to return to the hospital when required by you to do so. Pursuant to such a warrant (which may be executed anywhere in the State), and then only, any officer authorized to make arrests, to whom such warrant is directed, is required to apprehend the patient and deliver him into such custody as you may designate. The law neither requires an officer to make such arrests without a warrant nor justifies him in doing so.

As to the form of such warrants, the statute affords no aid. By analogy to the conventional justice's warrant for arrest on a criminal charge, the enclosed form is suggested. Again, by analogy to the rules governing criminal warrants, it would seem to be necessary that an actual copy bearing your signature and seal be delivered to the officer.

Thus it would seem that the only procedure which is at all effective, and at the same time authorized by law, would be for you to limit every furlough on terms which require the patient's return immediately upon his violating whatever

conditions you may prescribe. In case of such a violation it would then be necessary for you to transmit a copy of a warrant to the appropriate officer.

Having in mind the necessity for effecting such arrests speedily, I regret to find the law susceptible to no construction more favorable to your needs.

Yours very truly,

ABRAM P. STAPLES.

*Attorney General.*

**INSANE, EPILEPTIC, FEEBLE MINDED AND INEBRIATE—Racial Segregation—Effect of Commission's Finding as to Race.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 19, 1937.*

HONORABLE ARTHUR W. JAMES,  
*Commissioner of Public Welfare,*  
*Richmond, Virginia.*

DEAR MR. JAMES:

I am in receipt of your letter of February 9. In effect you state that under proper proceedings an individual has been regularly committed to the State Colony for Epileptics and Feeble-minded at Lynchburg as an Indian.

You further state that the superintendent of the institution would have accepted this individual without question, "considering his color, connections, et cetera," but for the fact that he was advised by the registrar of the Bureau of Vital Statistics that the individual so committed had an ascertainable strain of Negro blood sufficient, under the Virginia Act, to define him as a Negro.

You ask my opinion on two questions, the first being whether the superintendent of the institution "is bound by the opinion or decision of the Director of the Bureau of Vital Statistics in such a case, or if he is bound by the action of the Mental Hygiene Commission which makes the commitment and the determination which the court makes as to race, which is contained in the committal order."

Of course, you will understand that this office cannot attempt to pass on the question of whether or not any particular individual is an Indian or a Negro. This is a question of fact. Certainly, the opinion of the registrar of the Bureau of Vital Statistics expressed after a careful examination of the facts is entitled to much weight as a matter of evidence. However, in the case you present, where an individual has been committed under proper proceedings as an Indian, I know of no statute or other authority, the effect of which is to make the opinion of the registrar of Vital Statistics final. I, therefore, do not think that, as a matter of law, the superintendent of the institution is bound by such opinion.

Your second inquiry is "whether a person recognized in his domicile under the law as Indian is admissible as such to an institution for the white."

Unquestionably, a person does not lose his original domicile by being committed to a State Institution. I call your attention to the provisions of section 1047 of the Code.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,

*Attorney General.*

**INTERSTATE COMMERCE—Oyster and Shellfish Laws—Inspection of Crabs in Hands of Carrier.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 10, 1937.*

MR. GEORGE L. DOUGHTY,  
*c/o Commission of Fisheries,*  
*Accomac, Virginia.*

DEAR MR. DOUGHTY:

I have your letter of April 23, wherein, on behalf of the Commissioner of Fisheries, you request my opinion on the following question:

"Seafood is being delivered here to common carriers on consignment basis. Our inspectors have reason to believe that crabs, in particular, are under the minimum size. It is almost impossible for the inspectors to get at this seafood until it has actually been consigned into the hands of the carriers. These consignments are intended for interstate shipments. Can, in your opinion, our inspectors demand to examine the packages after they are in the hands of the carriers, and if they find where the seafood laws have been violated, seize the shipment and confiscate it?"

It seems to me that the inspectors can demand to examine the packages after they are in the hands of the common carriers, and, if the crabs are under the minimum size, they may be seized and confiscated.

Section 3253 of the Code of Virginia (Michie 1936) provides:

"For the purpose of *protecting the fish and shellfish industries of the State of Virginia*, as well as the public health of the country, and preventing the sale of fish and shellfish which are deemed unfit for market, the Health Commissioner of this State is hereby directed in his discretion, or at the request of the Governor, or the Commissioner of Fisheries, to make an examination or analysis of the fish and shellfish by either of the aforesaid officers, whether on the planting grounds, in packing house, or in any other place or places in this State, from which such fish and shellfish are to be taken or sold for food purposes. \* \* \*" (Italics supplied.)

Section 3265, subsection (9), provides as follows:

"It shall be unlawful for any person to catch, take, or *have in possession at any time* a hard crab which shall measure less than five inches across the shell from tip to tip of spike, except the crab commonly known as the peeler crab, nor any buckram (a paper shell crab) or any soft crab measuring less than three and one-half inches from tip to tip of spike, nor any peeler measuring less than three inches from tip to tip of spike; or to destroy them in any manner, but shall immediately return same to the water alive when taken out of said net or scrape." (Italics supplied.) (See section 3216, requiring measurement of oysters.)

It is perfectly valid for your inspectors to seize crabs under the minimum size (see section 3150) and confiscate them. Confiscation is not expressly provided for in the statute relating to the size of crabs as in the case of shellfish taken from polluted waters or are otherwise unfit for market (see section 3260), but confiscation here naturally follows from the provision making it unlawful to have crabs under the minimum size in one's possession at any time.

Fisheries and oyster beds within the territorial waters of the State are the common property of the citizens of the Commonwealth and have never been ceded to the United States.

See: *Boggs v. Commonwealth*, 76 Va. 989, 995 (1882);  
*Taylor v. Commonwealth*, 102 Va. 759, 764-765, 47 S. E. 875 (1904).

Under her police power, the Commonwealth may validly regulate or prohibit the private appropriation of crabs and oysters. Laws specifying closed seasons and the size of oysters and shellfish that can be taken are clearly within the State's power to conserve the supply of seafood within her borders. Inspection of seafood, while within the State in the hands of licensed fishermen, packing houses or common carriers, to enforce this police power measure is not unreasonable.

The fact that interstate shipment is being undertaken does not prevent the Commonwealth from requiring compliance with her shellfish regulations. The nature of the seafood here and the methods of preserving such for foreign markets prevent adequate inspection before the shellfish is delivered to the carrier. Although Congress has the power to regulate interstate commerce, there are numerous instances where State police regulations affecting commerce are perfectly valid.

See: 2 Cooley, Constitutional Limitations (8th ed.), pages 1267-1278, 1340, and notes.

State inspection laws are expressly recognized by the Federal Constitution (Article I, section 10, clause 2). Seafood in the hands of a carrier on a consignment basis awaiting transportation to another State is still subject to the State's right to inspect it.

To prevent the taking of oysters and shellfish from polluted waters, inspectors

"\* \* \* may enter upon premises located in the State of Virginia, or upon any boat, vessel, barge, car, motor vehicle, or other conveyance, wharf, packing or shucking house, store, stall, or other place where oysters, clams, crab meat, or scallops may be found, and if it appears that the provisions of said sections, or any of them, have been violated, may, with or without a warrant, arrest any person or persons who are or who have been, or who are believed to be or have been, in charge of such oysters, clams, crab meat, or scallops, and may seize, in the name of the Commonwealth of Virginia and take possession of such oysters, clams, crab meat, or scallops, and may seize and take possession of any boat, vessel, barge, car, motor vehicle, or other conveyance used in violation of the provisions of said sections, together with the cargo of any such boat, vessel, barge, car, motor vehicle, or other conveyance \* \* \*." (Section 3260 of the Code.)

Inspection to protect the public health is no less a burden on interstate commerce than a police regulation in regard to the conservation of shellfish and oysters. On the same principles, both are valid under the police power of the State.

See: *Geer v. Connecticut*, 161 U. S. 519, 535, 40 U. S. (L. ed.) 793, 16 Sup. Ct. 600 (1896), affirming 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804 (1891).

In *Geer v. Connecticut*, *supra*, the Supreme Court of the United States held that (1) Connecticut had the power to make it an offense to have in one's possession, for the purpose of transportation beyond the State, birds which had been lawfully killed within the State during the open season, and that (2) this statute did not violate the interstate commerce clause of the Federal Constitution. It certainly follows that crabs unlawfully taken or possessed can be validly seized and confiscated even though in the hands of a common carrier for interstate shipment, and that inspection to insure compliance with the statute does not violate the commerce clause of the Constitution of the United States.

The cases are based on the reasoning that one who takes undersized fish or prohibited game into his possession does not thereby divest the property rights of the State therein, and that such fish or game does not become an "article of commerce." Therefore, regulations affecting such fish or game cannot be held as interfering with interstate commerce.

See: 11 R. C. L. 1045, section 3; 5 R. C. L., 761-762, section 81.

It also follows from cases allowing a State, under its police power, to prohibit the sale of certain fish within its borders, when shipped in from a sister State where such fish were validly caught (*People v. Lassen* (Mich.), 106 N. W. 143 (1906); note 3 L. R. A. (N. S.) 163), that a State can prohibit the possession of fish, etc., under the minimum size when such are taken from its own territorial waters, even though the fish are in the hands of a carrier for shipment outside the State.

Yours very truly,

ABRAM P. STAPLES,  
Attorney General.

**JAILS AND JAILORS—Compensation—Prisoners Committed for Violating Ordinances.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 11, 1937.

HON. EDWARD MCC. WILLIAMS,  
*Commonwealth's Attorney,*  
*Berryville, Virginia.*

MY DEAR MR. WILLIAMS:

You request my opinion as to whether the Town of Berryville should pay the jailor of Clarke County for receiving and keeping prisoners committed to the Clarke County jail for violation of Berryville town ordinances.

Virginia Code (Michie 1936), section 3510, providing for the payment of jailor's fees out of the treasury in State criminal cases, expressly provides that:

"But no payment shall be made out of the treasury for receiving, keeping and supporting any 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."

While there is no express provision requiring towns in cases of the latter class to pay these fees, it seems clear that the jailor, who is wholly a fee officer, is entitled to receive payment from some source, and the express provision eliminating the State Treasury would seem to leave this obligation on the town.

It is, therefore, my opinion that fees for receiving and keeping in the county jail prisoners committed for violation of town ordinances should be paid by the town.

With kindest personal regards, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND JAILORS—Fees—Prisoners Committed for Violation of Ordinances.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 14, 1937.

HONORABLE EDWARD MCC. WILLIAMS,  
*Commonwealth's Attorney,*  
*Berryville, Virginia.*

DEAR MR. WILLIAMS:

This will acknowledge your letter of May 11, with reference to my letter of even date concerning the duty of a town to pay bills rendered by the county jailor for receiving and keeping prisoners committed for violation of town ordinances.

You correctly point out that section 3510 (Michie 1936), according to its literal import, denies the jailor his fees out of the State treasury only in cases of prisoners committed under a *capias pro fine* for failure to pay a fine imposed under a city ordinance and not in cases where the prisoner is committed simply for violation of an ordinance. The present statute reads as follows:

"But no payment shall be made out of the treasury for receiving, keeping and supporting any 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."

When this provision as to fees in similar cases was first enacted, it took the following form:

"\* \* \* But no payment shall be made out of the treasury for receiving, keeping, and supporting any prisoner committed to jail for a violation of the ordinances of any city or town, *or* who is in jail under a *capias pro fine* issued for a failure to pay a fine imposed for a violation of such ordinances. \* \* \*"  
(Acts 1889-'90, page 79; italics supplied.)

In substantially identical form, this provision was repeated in Acts 1897-98, page 992; Acts 1908, page 362; Acts 1918, page 266, and Code 1919, section 3510. In 1918, however, when this section was re-enacted for the purpose of revising the fees provided for, the word "or", where underscored above, was omitted (Acts 1920, page 529). This was repeated by Acts 1928, page 1361, which is the present statute.

I am informed by the Comptroller's office that ever since the enactment of 1918 this omission of the word "or" has been treated as a typographical error, and accordingly no fees for jailors in any ordinance cases have been paid out of the treasury.

In view of this settled administrative construction of the statute, and in view of the obvious purpose and intent of the statute, it is my opinion that the omission of the word "or" must be treated as a manifest clerical error. Accordingly, my opinion on the question originally put by you is unchanged.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS & PRISONERS—Allowance for Good Conduct While Held in Jail under Penitentiary Sentence.**

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

MR. PAUL W. HALL,  
*City Sergeant,*  
*Newport News, Virginia.*

MY DEAR MR. HALL:

I am in receipt of your letter of July 13, in which you inquire as to the good conduct credit of a prisoner who has been sentenced to the State convict road force for a year and a day. Your inquiry is specifically directed to the question of the allowance to which such prisoner is entitled while in jail awaiting transfer to the State convict road force.

I call your attention to section 5017 of the Code, as amended in 1932 (Acts 1932, page 152), which provides for a good conduct credit of fifteen days per month from the date the prisoner is received in the penitentiary or the convict road force camp. However, the section further provides:

"\* \* \* And in addition thereto, each prisoner shall be allowed a good conduct credit of fifteen days per month for each month actually served by him in jail after sentence and while awaiting removal to the penitentiary or the convict road force. \* \* \*"

In view of the above quoted provision, I am of opinion that the prisoner to whom you refer is entitled to a good conduct credit of fifteen days per month for each month actually served by him in jail after sentence and while awaiting removal to the State convict road force.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND PRISONERS—Convicts—Property of—Subjection to Claims of Creditors.**

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

MAJOR RICE M. YOEUELL, *Superintendent,*  
*The Penitentiary,*  
*Richmond, Virginia.*

DEAR MAJOR YOEUELL:

I have your letter of the 20th instant, enclosing a list of property owned by David McClanahan, an inmate of the penitentiary, and requesting information

as to the laws relating to the preservation or sale of his property during his custody at the penitentiary.

The principal property of this inmate of your institution appears to be real estate and it seems that suit has been or thought to have been instituted against him for the collection of a note of \$400.

Of course, this office has no knowledge of the actual facts of the situation and can only advise you generally as to the statutory provisions applicable. These are found in sections 4998-5004, inclusive, of the Code. These sections provide for the appointment by the circuit or corporation court of the county or city in which his estate or part thereof is located of a person selected by the court to act in capacity of a committee to have charge of his real estate until his discharge from confinement. Any suit against the convict must be brought against his committee and no action or suit can be brought against the convict during his confinement.

I suggest that inquiry be made as to whether a committee has been appointed for Mr. McClanahan. If not, it would seem no suit can be properly prosecuted against him. If a committee has been appointed, then the committee has authority to employ counsel and defend any suit or action instituted against the convict. If a creditor of the convict desires to subject the real estate to a debt, he must do so by suit in chancery in proceedings similar to those required by statute in cases of sales of infants' lands.

I am returning herewith the statement which was sent to you by Mr. John A. Velke.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND PRISONERS—Convicts—Misdemeanants Confined at State Farm  
—Credit for Time Served.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 5, 1936.

CAPTAIN R. R. PENN, *Superintendent,*  
*State Farm,*  
*State Farm, Virginia.*

DEAR SIR:

I am in receipt of your letter of August 3, which for purposes of reply I quote in full:

"I am enclosing herewith a letter recently received by me with reference to Bud Robertson, a misdemeanant who served time at this Institution for his fine and costs under section 4953 instead of section 2095.

"Kindly advise us whether or not such men should be furnished certificates of credit according to section 2095 as amended in the Acts of 1936."

Section 2095 of the Code of Virginia was further amended by chapter 112, page 187, Acts of 1936, so as to include in its provisions persons confined at the State Farm for the non-payment of fine and costs, or costs alone.

Upon working out the term of confinement, as provided by law, at the State Farm, every person released therefrom is entitled to a certificate from the superintendent showing that fact.

Persons confined at the State Farm are no longer subject to the provisions of section 4953 on this subject, although a misdemeanant is transferred to the State Farm from confinement in jail under the provisions of section 4953.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND PRISONERS—Management of Jails in General—Duties Delegated to Employee.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 17, 1937.

HON. A. D. JOHNSON,  
*Commonwealth's Attorney,*  
*Windsor, Virginia.*

DEAR MR. JOHNSON:

I am in receipt of your letter of May 15, in which you state:

"The sheriff of a county employs X for the purpose of cooking and delivering food to the prisoners in the county jail. X, who lives approximately a quarter of a mile from the jail, is not a deputy sheriff, constable or special police officer and is clothed with no official authority whatsoever. The duties of jailor have not been devolved upon a deputy sheriff or other officer."

You then ask if X has authority to carry or control the jail keys.

There seems to be no statute specifically dealing with this question, but I refer you to section 2858 of the Code, making it unlawful for any person other than the officers of the law in charge of the prisoners, the counsel of the prisoner, or such other persons as may be authorized by the court, to hold any communication with prisoners confined in any jail except in the presence of the sheriff or his deputies or of the jailor. I also refer you to section 2859 of the Code, authorizing the board of supervisors, with the approval of the judge, to prescribe rules for the government of jails. Some action may have been taken under section 2859 in your county. Certainly it may be taken. Independent of statutes, I should certainly say that it would be contrary to public policy for a person with no official responsibility to have control of the keys to a jail.

My reply to your first question makes unnecessary any reply to your second and third questions.

Your fourth inquiry raises a question as to whether X has authority to buy food and supplies for the prisoners and charge same to the county.

The sheriff as jailor is compensated for keeping and supporting prisoners in jail by allowances. See section 3510 of the Code. The manner in which jails are to be kept and the responsibilities of the sheriffs and the boards of supervisors are fixed by section 2857 of the Code. Certainly I know of no statute which would give to X as an individual authority to incur any obligation on the part of the county.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND PRISONERS—Sentence and Punishment—Convicts at State Farm for Women—Transfer to State Hospitals—Credit for Time in Hospital.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 7, 1936.

MISS ELIZABETH M. KATES, *Superintendent,*  
*State Industrial Farm for Women,*  
*Goochland, Virginia.*

DEAR MISS KATES:

I am in receipt of your letter of December 2, in which you ask for a ruling upon the following state of facts:

1. " \* \* An inmate (misdemeanant) having received sentences totaling four years was transferred here from Fincastle jail. It soon became very evident that we could not care for her here and that she was in need of confinement in a State Hospital. Upon inquiry, we found her to be a parolee

from Western State Hospital and, upon request, had no trouble in returning her. She served 27 days here. Upon such time as Dr. DeJarnette is ready to release her, does the balance of this sentence have to be served here and is there any credit given on the time spent at Western State?"

The situation described in the foregoing quotation is unusual. It seems that the misdemeanant, now confined in your institution, had, prior to her conviction and incarceration therein, been committed to the Western State Hospital; that she had been furloughed or paroled from that institution; that thereafter she had committed criminal offenses for which she has been sentenced for a total of four years' confinement; that, after having served twenty-seven days in your institution, she was returned to the Western State Hospital, and that the superintendent of that hospital is now ready to release her from confinement as an insane person.

Ordinarily persons charged with crime, whose sanity is questioned, are committed to the Southwestern State Hospital, at Marion, Virginia, for observation. This not having been done, but the furloughed patient having committed criminal offenses and been sentenced to confinement in jail, then transferred therefrom to your institution and subsequently transferred to the Western State Hospital, I am of the opinion that, upon her re-transfer to your institution, she is entitled to a credit for the time spent in the Western State Hospital on her total period of confinement.

I quote your statement of facts as to two other inmates transferred from jail to your institution:

2. "I have two others transferred at the same time from Fincastle jail having similar sentences, one having received a sentence of one year in Circuit Court and three additional years in Trial Justice Court and the other having received a sentence of one year in Circuit Court and two additional years in Trial Justice Court. One of these girls, 20 years old, is entirely a misfit in this Institution and, I believe, if studied by a clinic results would show that she should be transferred to the Colony. If this should become effective, the same questions would arise in this case as in the above case."

Under the provisions of section 4910 of the Code, any person, after conviction of any crime, or while serving sentence in any penal institution of the State, who is suspected of being insane or feeble-minded, may have his or her mental condition inquired into by the court or a commission and, if found to be insane or feeble-minded, such person shall be committed to the department for the criminal insane until restored to sanity; and the time such person is confined in the department for the criminal insane shall be deducted from the term for which sentence of confinement was imposed.

You then ask the following question:

3. "To state the case more clearly, in case of transfer to some other Institution does the responsibility of the Court commitment remain with me or does the new Superintendent assume this as well as the custody? \* \* \*"

From the time of the transfer of a person from your institution to another institution, the responsibility for the custody of such person is with the institution to which he or she may be transferred until re-transferred to your institution.

Your fourth question is as follows:

4. "\* \* \* In case of Indeterminate sentence, who assumes custody in case of parole?"

Before answering your fourth inquiry, I should like to know the facts, as Virginia does not, except as to the custody of juvenile criminals, provide what may be called an indeterminate sentence.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND PRISONERS—Suspension of Sentence after Commitment.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 26, 1937.*

HONORABLE J. CALLAWAY BROWN,  
*Trial Justice,*  
*Bedford, Virginia.*

DEAR MR. BROWN:

This will acknowledge your letter of March 10, with reference to the authority of a court or a justice to suspend the execution of a jail sentence after the sentence has been pronounced and the defendant has served part of his time.

After a careful consideration of the matter, I am unable to conclude that any such authority exists.

The relevant statute, Virginia Code (Michie 1936), section 1922b, was considered by the Court of Appeals in the case of *Richardson v. Commonwealth*, 131 Va. 802. In that case the opinion points out that a court ordinarily has no power over the execution of its judgments after they become final. The court then construes the statute as modifying this principle by allowing courts to prevent judgments from becoming final by suspending the execution of sentence while the judgment is still subject to the court's control. In the words of Judge Prentis' opinion:

"\* \* \* When the execution of a sentence is thus suspended, under the Virginia statute, the case remains pending and the court does not thereby lose its control over the accused or his case. \* \* \*" (131 Va. at 807.)

This being the effect of the statute as construed by the Court of Appeals, it seems that, where execution of a judgment is not suspended while the case is still in the court's control, the judgment becomes irrevocable.

With kindest personal regards, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND PRISONERS—Time Allowed for Good Behavior.**

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

MR. CHARLES C. CURTIS, *Secretary,*  
*Virginia State Sheriffs' Association,*  
*Hampton, Virginia.*

DEAR MR. CURTIS:

I am in receipt of your letter of August 10, in which you refer me to section 2860 of the Code of Virginia, as amended by chapter 396 of the Acts of 1932, page 815, and to section 4953 of the Code of Virginia, as amended by chapter 165 of the Acts of 1932, page 335. You then inform me as to the construction placed upon these two statutes by the members of your Association and ask my construction of them.

1. Section 2860 of the Code, as amended, applies to a definite or flat term of confinement upon conviction of criminal offenses. I agree with the construction placed upon that section by the members of your Association to the effect that each person in confinement is entitled to an allowance of ten days per month for good behavior. This allowance for time off for good behavior is, however, subject to the consent of the judge of the court trying his or her case, and subject further to the provision as to the addition of periods of confinement for violation of the rules and requirements of the jail.

2. Section 4953 of the Code, as amended, has no reference to confinement of persons sentenced to terms, or flat time confinement, and applies only to those confined in jail for the non-payment of fine and costs, or costs alone. There is no

provision in this section for time off allowance for good behavior. It provides a scale by which each sheriff is to determine the time he is to confine each prisoner, depending upon the aggregate amount of fine and costs, or costs alone where there is no fine. It provides further that no person can be confined for the non-payment of fine and costs, or costs alone, for a period in excess of two months.

You will also notice that the jailor is required to note upon the commitment the amount of fine and costs, or costs alone, and the date of commitment. He is also required, without any order or direction of the court, to release the person in confinement upon the expiration of the limits fixed as terms of confinement.

I note that my construction of section 4953 of the Code, as amended, agrees with the construction placed upon that section by the members of your Association.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**JAILS AND PRISONERS—Time Allowed for Good Behavior—Persons Committed for Non-Payment of Fines and Costs.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 23, 1936.*

MR. N. W. CARTER,  
*Deputy Sheriff and Jailer,*  
*Clarke County,*  
*Berryville, Virginia.*

DEAR SIR:

I am in receipt of your letter of July 22, from which it appears that the sheriff desires to be advised of the opinion of this office as to the number of days per month which a prisoner who is serving a jail sentence for non-payment of fine and costs is entitled to receive for good behavior.

The General Assembly of 1932 amended section 2860 of the Code of Virginia, by which amendment it is provided that a jailer shall keep records of each convict, and for every month that any convict appears to have faithfully observed the rules and requirements of the jail while confined therein, and not to have been subjected to discipline for the violation thereof, shall with the consent of the judge deduct ten days per month from the time of confinement of such convict. In the event of violation of jail rules by the prisoner, the jailer is authorized to add to the time to be served from time to time such additional days of service as added together equals the full sentence imposed upon the convict by the court. Acts 1932, Section 2860, pages 815-16.

As to the necessity for the consent of the judge, I quote from my letter of April 3, 1935, to Honorable W. Francis Binford, Prince George, Virginia:

"It is my opinion that it is not necessary for the order committing a criminal to jail to state that the prisoner shall be entitled to time off for good behavior. Section 2860 provides that such allowance for time off may be made 'with the consent of the judge.' It does not provide, however, that the consent of the judge shall be given at the time the prisoner is committed to jail or at any time prior to the actual allowance of good time off."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JUSTICES OF THE PEACE—Collection of Accounts—Authority to Appoint Special Officer.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 31, 1936.*

HONORABLE E. A. CHRISTIAN,  
*Justice of the Peace,*  
*Cuckoo, Virginia.*

DEAR JUDGE CHRISTIAN:

I have your letter of October 27, in which you inquire whether or not there is any Virginia statute prohibiting the collection of accounts by a justice of the peace.

Section 6019 of the Code contains this provision:

"\* \* \* it shall be unlawful for any such justice to receive claims of any kind for collection, or to accept or receive money or any other thing of value by way of commission or compensation for or on account of any collection made by or through him on any such claim, either before or after judgment.

"Any justice violating this provision shall be guilty of a misdemeanor."

You also inquire as to your authority to appoint a citizen as a special constable to serve a warrant in case of a crime being committed, where no regular officer is available to serve same.

I have been unable to find any authority for a justice to make any such appointment. It seems to me that it might be well for the sheriff to appoint a deputy in your section of the county if he is unable to perform the necessary duties himself.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**JUSTICES OF THE PEACE—Jurisdiction—Criminal Warrants.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 2, 1937.*

MR. J. E. BAUMGARDNER,  
*Justice of the Peace,*  
*Bristol, Virginia.*

MY DEAR MR. BAUMGARDNER:

I have your letter of March 31, in which you inquire as to the authority of a justice of the peace for the City of Bristol to issue warrants.

I refer you to section 3092 of the Code providing for justices of the peace in cities, a portion of which section reads as follows:

"The said justices \* \* \* within the corporate limits of the cities for which they are respectively elected \* \* \* shall possess the jurisdiction and exercise the powers conferred upon justices of the peace \* \* \* except that nothing herein contained shall be construed as vesting in such justices any portion of the jurisdiction given by law to police justices or civil and police justices of the cities of this Commonwealth."

I also refer you to section 3103 of the Code conferring upon justices of the peace in cities authority to issue warrants.

The above provisions of general law appear to give justices of the peace in cities authority to issue criminal warrants. Of course, I am not advised as to whether there is any provision of the charter of the City of Bristol contrary to the general law, nor is this letter to be taken as expressing an opinion on anything in such charter.

With best wishes, I am

Yours very sincerely,

ABRAM P. STAPLES,  
*Attorney General.*

**JUSTICES OF THE PEACE—WARRANTS—Where May Be Issued.**

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

MR. JULIAN T. CHRISTIAN,  
*Justice of the Peace,*  
*Mathews, Virginia.*

MY DEAR MR. CHRISTIAN:

I am in receipt of your letter of August 9, in which you ask if a justice of the peace may issue a warrant in other districts in his county than the district in which he was elected.

Your question is answered in terms by section 4987-f of the Code, as enacted in 1936 (Acts 1936, page 619), which provides that justices of the peace within their *counties* shall have the same power to issue warrants, returnable to the trial justice, that the trial justice has.

Your second question is not entirely clear to me, but it seems to relate to what may be a case of a contested election. The answer, therefore, will depend almost entirely upon the facts in the particular case, and is a matter upon which the courts will have to pass. Therefore, I do not think it proper for me to attempt to express any opinion.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**JUVENILE AND DOMESTIC RELATIONS COURTS—Offenses against Children—Indecent Exposure in Child's Presence As.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 13, 1937.*

HONORABLE W. B. F. COLE,  
*Commonwealth's Attorney,*  
*Fredericksburg, Virginia.*

DEAR MR. COLE:

I have your letter of March 10, requesting the opinion of this office as to whether a prosecution for indecent exposure should be brought in the Juvenile and Domestic Relations Court where the exposure was made in the presence of children only.

As you point out in your letter, section 1953e of the Code (Michie 1936) vests in the Juvenile and Domestic Relations Court exclusive original jurisdiction of all criminal offenses against children, and the question presented is whether, for the purposes of this section, the crime of indecent exposure may be considered an offense against the persons before whom the exposure is made.

While the question is not, in my opinion, altogether free from doubt, I feel that the purpose and spirit of the statute referred to do not justify considering this offense as one "against" any individual within the meaning of its terms.

It is therefore the opinion of this office that proceedings in such a case need not be brought before the Juvenile and Domestic Relations Court.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**LABOR AND INDUSTRY—Department of—United States Employment Service—Compensation of State Appointees Out of Federal Funds.**

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

HONORABLE JOHN HOPKINS HALL, JR., *Commissioner,*  
*Department of Labor and Industry,*  
*Richmond, Virginia.*

DEAR MR. HALL:

I have your letter of November 12, in which you request my construction of

chapter 13, page 29, of the Acts of the Extra Session of the General Assembly in 1933. This Act designates the Department of Labor and Industry of Virginia as a State agency to cooperate with the United States Employment Service in accordance with the terms and conditions expressed in an Act of Congress approved June 6, 1933, providing for the establishment of a National employment system, and for cooperation with the states in the promotion thereof.

The Act of the Virginia Assembly vests the Department of Labor and Industry with all powers necessary for the cooperation provided for in the Federal Act. The Federal Act is very broad and authorizes assistance to the state in the maintenance, establishment and operation of an employment service.

You inquire whether, in my opinion, in view of the provisions of the Federal and State statutes above referred to, it would be a violation of same for the State Director, and other State appointees of the Virginia State Employment Service, to be compensated directly by Federal funds.

It is my opinion that the provisions of these two statutes construed together fully authorize such compensation, and that, in view of the express provisions of these acts, same would not constitute a violation of sections 290 and 291 of the Code.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LICENSES—Automobile—Who Required to Have—Secretary of Foreign Minister.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 5, 1936.*

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

MY DEAR GOVERNOR:

In the matter of the application of Mr. Joseph C. Rocca, Secretary of the Minister of Colombia at Washington, for a refund of the Virginia motor vehicle license taxes levied on automobiles belonging to the secretary and his wife, Mrs. Maria Rocca, I beg to advise you that in my opinion no refund of any part of such taxes should be allowed.

The servants of a minister have no immunities of their own, but may claim certain privileges by virtue of the protection given to the minister himself under the Law of Nations or by an express provision of a statute of the receiving country. While the property of ministers is generally not taxable, founded upon the principle that such public ministers should be entirely independent of the local authority in order to fulfill the duties of their mission, and while free entry of goods intended for their private use is allowed on the basis of comity, yet there is no exemption from payment of local dues which are raised for purposes of local administration and which are expended on local objects from which the ministers themselves in common with their neighbors derive immediate benefit. The Virginia automobile license tax is a privilege tax and falls within this last classification. Sections 251-255, Title 22, of the United States Code neither expressly nor by implication give the secretary himself, or derivately from the minister, any immunity from such a tax.

Inasmuch as Mrs. Rocca is not listed in the official "List of Employees in the Embassies and Legations in Washington not Printed in the Diplomatic List", as required by Title 22, section 254, of the United States Code, she has no basis for any claim of immunity from the tax for the automobile which she owns.

The course followed in the case of the 1935 property taxes assessed by the Commissioner of Arlington county upon personal property of the Secretary to the Military Attache of the British Embassy, and later withdrawn, is clearly distinguishable from a privilege tax and should not be followed here. The cases of free licenses issued to foreign consuls have no application to the present situation. Consuls are in an entirely different class of foreign representatives from

ministers and other envoys in regard to their privileges and immunities as well as in the functions they perform, and have no immunities save by express provision of a treaty or statute.

Enclosed herewith you will find your file of correspondence relative to this matter.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**LICENSES—Cities and Towns—Licensing Incident of Business Already Licensed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 9, 1937.*

HONORABLE WILLIAM H. LOGAN,  
*Attorney for the Commonwealth,  
Woodstock, Virginia.*

MY DEAR MR. LOGAN:

I am in receipt of your letter of February 5, in which you advise that filling stations in the town of Edinburg are assessed with and pay a town merchant's license. You ask if the town could now impose on filling stations the special license tax on each gasoline pump used in dispensing gasoline at the filling stations.

While I have not seen the charter of the town of Edinburg, it is very doubtful whether the charter contains authority to impose both of these licenses. As a general matter of law, in my opinion, if the town imposes a merchant's license tax on filling station operators, and then attempts to impose another license tax on the gasoline pump through which he dispenses his merchandise, the effect would be to license a mere incident of a business already licensed and would come within the prohibition set out in *American Tobacco Company v. Danville*, 125 Va. 12, 24, 25, 26 and 27, and *McKenney v. Alexandria*, 147 Va. 157, 162.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LICENSES—Palmistry—When Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 29, 1937.*

HONORABLE HUGH R. SMITH,  
*Commissioner of the Revenue,  
Petersburg, Virginia.*

MY DEAR MR. SMITH:

I am in receipt of your letter of March 26, in which you ask my opinion as to the liability to the license prescribed by section 179a of the Tax Code of the individual whose business you describe as follows:

"This man contemplates selling certain articles under a Merchant's license (section 188), and offering a palm reading free of charge, which appears to me as just another way of evading the license provided for under the section to which reference has been made in the beginning of this letter."

In my opinion, this individual is subject to the license imposed by section 179a. From the facts stated by you, it appears plain that the offer of a palm reading is made as an inducement to purchase the articles being sold.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**LICENSES—Palmistry.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 16, 1937.

MISS SARAH N. FORNEY,  
*Deputy Commissioner of the Revenue,*  
112 E. Clifford Street,  
Winchester, Virginia.

MY DEAR MISS FORNEY:

I have your letter of recent date, in which you ask if there is a license fee on "free palm reading".

Section 179a of the Tax Code of Virginia imposes a State license of \$500 on the practice of fortune telling, including palmistry, for compensation. If the person to whom you refer reads palms absolutely free, then, of course, he is not subject to a license. However, if he is selling an article and offers a palm reading free in connection with the sale of the article, then it would appear, and I have heretofore so ruled, that he is practicing palmistry for compensation and, therefore, is subject to a license.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LUNATICS—Commitments—Disposition of Records.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 13, 1937.

HONORABLE FRANK GILBERT,  
*Justice of the Peace,*  
Salem, Virginia.

DEAR MR. GILBERT:

I am in receipt of your letter of May 10, inquiring what should be done with the record before a Lunacy Commission where the patient is found not to be insane.

The statute (section 1019 of the Code) dealing with the disposition of the record is not entirely satisfactory where the person is not committed, but, inasmuch as this is a formal proceeding, in my opinion, the record should be preserved. The matter should be handled by delivering a copy of part 1 of the record to the clerk of the court, to be by him preserved as provided in the aforesaid section.

Inasmuch as section 1019 especially provides that part 2 of the record should not be filed in the clerk's office, I am of opinion that this part may be destroyed as well as the additional copy of part 1.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**MAYORS—Preliminary Examination of Accused Persons—Felony Cases.**

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

MR. B. E. WHITE, *Mayor,*  
Waverly, Virginia.

MY DEAR MR. WHITE:

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

"Upon a warrant charging that a felony has been committed within the jurisdiction of the town, does the mayor have authority to examine such charge? If so, upon examination he finds probable grounds for removal, should such removal be made to the circuit court of Sussex county, or to the trial justice court of said county?"

The jurisdiction of a mayor to try criminal cases is set out in subsection 12 of section 4987-f of the Code, as amended in 1936 (Acts 1936, page 622). I am assuming that the defendant mentioned in your inquiry is charged with a violation of a State law. You will note from the above cited subsection that the jurisdiction of a mayor is limited in the trial of cases "involving violations of city and town ordinances."

Therefore, in the case you present I am of opinion that the mayor has no jurisdiction, but that the preliminary examination should be conducted by the trial justice of the county.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**MEDICAL EXAMINERS—Hearing as to Revocation of License—Procedure, Quorum, etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 29, 1937.

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

MY DEAR DR. PRESTON:

I have your letter of January 26, in which you ask the following questions in connection with section 1614a of the Code, relative to a preliminary hearing, as distinguished from the final hearing before the whole board, where the State Board of Medical Examiners determines whether or not a prima facie case has been made out against a practitioner of medicine, looking toward the revocation of the license of such practitioner by the board:

- "1. Whether it be legal that the Executive Committee, in the preliminary hear the charges and pass upon them.
- "2. In case of a called meeting of the Board for a preliminary hearing, whether it be necessary for any specifically designated number to be present more than a quorum in order to act."

In view of the fact that the section provides that, if "the said board is of the opinion that a prima facie case has been made out, the board shall appoint a time and a place for a hearing thereon \* \* \*," I am of the opinion that it would be much safer for the board to act than the executive committee. I think it would probably be held that this character of statute must be strictly construed and literally complied with. Therefore, I am of opinion that your first question must be answered in the negative.

In answer to your second question, I call your attention to section 1610 of the Code, which provides that five members of the board shall constitute a quorum. In view of this provision, I think that at the preliminary hearing five members will be sufficient. I think this is clear when it is considered that at the final hearing the statute specifically calls for nine members, but there is no such stipulation as to the preliminary hearing.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MOTOR VEHICLE LAWS—Arrests for Violations—Officers Not Wearing Uniforms of State Motor Vehicle Patrolman.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 4, 1937.

HONORABLE W. R. BROADDUS, JR.,  
*Attorney for the Commonwealth,*  
*Martinsville, Virginia.*

MY DEAR MR. BROADDUS:

I have your letter of January 30, relative to section 4825a of the Code, which provides that uniforms designated by the Attorney General and the State Highway

Commissioner shall be worn by certain officers in making arrests on the public highways of the State. You desire to know if three county police who are not uniformed may receive fees for arrests for violation of the State traffic laws.

I call your attention to another section of the Code, which requires all officers enforcing the provisions of the motor vehicle code to be uniformed. See section 2154 (55).

It is clear, therefore, that these two statutes specifically require uniforms in such cases. I further call your attention to the fact that section 2154 (55) prohibits any officer making an arrest for violation of the motor vehicle code "to accept the benefit of any fine or fee resulting from the conviction of an offender \* \* \*."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**MOTOR VEHICLES—Driving While under Influence of Intoxicants—Conviction as Bar to Driving Other Vehicle in Course of Employment.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 10, 1937.*

MR. FRED L. STEELE,  
*Chief of Police,*  
*Richlands, Virginia.*

DEAR MR. STEELE:

I have your letter of the 8th instant, in which you request my opinion as to whether a person convicted of operating his private automobile while intoxicated would be deprived of his right to operate some other motor vehicle incident to his employment with some firm, corporation, or the State of Virginia.

While I can only advise you unofficially, I refer you to chapter 144 of the Acts of the General Assembly of Virginia of 1934, which reads in part as follows:

Section 1. "It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, etc., \* \* \*"

Section 2. "Any person who violates any provision of this act shall be guilty of a misdemeanor, \* \* \*"

Section 3. "The judgment of conviction if for a first offense under this act, or for a similar offense under any city or town ordinance, shall of itself operate to deprive the person convicted of the right to drive or operate any such vehicle, conveyance, engine or train in this State for a period of one year from the date of such judgment, and if for a second or other subsequent offense, for a period of three years from the date of the judgment of conviction thereof."

From the wording of the statute above quoted, it is evident that the conviction of a person for operating a motor vehicle while intoxicated would render it unlawful for him to operate any other motor vehicle, regardless of whether it is in the course of his employment or not, during the statutory period of revocation.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MOTOR VEHICLE LAW—Revoking License for Failure to Satisfy Judgment—Retroactive Effect.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *November 27, 1936.*

HONORABLE JOHN Q. RHODES, JR., *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

MY DEAR MR. RHODES:

This letter is written pursuant to your request that I advise you whether, in my opinion, the provisions of chapter 272 of the Acts of 1932, as amended, could be made to apply to a case where a judgment for damages resulting from an automobile accident was obtained prior to the enactment of this statute, my attention being called to the following language embraced in said statute:

*"Section 2. (a) The operator's or chauffeur's license and all of the motor vehicle registration certificates and motor vehicle licenses of any persons shall in the event of his failure to satisfy any final judgment or judgments rendered against him by any court of competent jurisdiction in this or any other State, for damages on account of personal injury, or damage to property, resulting from the ownership or operation of a motor vehicle heretofore or hereafter by him or his agent, be forthwith suspended by the director of the division of motor vehicles \* \* \*."*

Upon examination of the wording of the statute, I do not believe that it was the intention of the Legislature to embrace cases where the judgment itself was obtained prior to the passage of the law. This question was considered in a California case of *Watson v. State Division of Motor Vehicles*, 298 Pac. 481. In that case the Supreme Court of California went so far as to hold that although the judgment had been obtained subsequent to the enactment of the statute, yet by reason of the judgment being based on damages resulting from an accident which occurred prior to the date of the statute, that the statute did not apply.

It is, therefore, my opinion that the Virginia Statute would not apply to judgments obtained prior to its enactment.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**NATIONAL PARKS—Shenandoah—Federal Jurisdiction Within.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 22, 1937.*

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

DEAR GOVERNOR PEERY:

I have before me your letter of the 16th instant, requesting my opinion upon the memorandum prepared by attorneys for the National Park Service, relating to the jurisdiction of the United States over lands embraced within the Shenandoah National Park area.

The letter refers to the Act of March 22, 1928 (Acts 1928, p. 983), and also to the Act of March 28, 1936 (Acts 1936, p. 608). The following question is raised by the memorandum: whether or not the 1936 Act, by implication, repeals the Act of 1928, relating to the Shenandoah National Park.

It appears that prior to the passage and approval of the 1936 Act there had been delivered to and accepted by the United States the deed from the Commonwealth of Virginia and the State Commission on Conservation and Development, conveying the lands in the Shenandoah National Park area. It is my opinion that the jurisdiction and rights of the United States were fixed when this deed

was accepted, and that the 1936 Act in no way affects the jurisdiction of the United States over lands embraced in said deed.

I call your attention also to the fact that the Act of 1936 contains the following provision:

"\* \* \* the Commonwealth of Virginia hereby cedes to the United States the power and jurisdiction to regulate traffic over all highways maintained by the United States thereon, to protect the said lands and all property thereon belonging to the United States from damage, depredation or destruction and to operate and administer the said lands and said property thereon for the purposes for which same shall be acquired by the United States. \* \* \*"

It is my opinion that the foregoing language cedes to the United States such powers as are reasonably necessary to successfully operate any park lands which hereafter may be acquired by the United States for park purposes.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### NOTARIES—Eligibility—Residence.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 31, 1936.*

HONORABLE PETER SAUNDERS,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR SIR:

This is in reply to your letter of the 23rd instant, in which you request my opinion upon the question whether a person living in West Virginia is eligible to be appointed as a notary public in Virginia.

You enclose a letter from the clerk of the Corporation Court of Winchester, Virginia, from which it appears that the case presented to you involves a person who lives in West Virginia but works in Winchester and commutes each day. Such person, however, is not assessed with any taxes in Virginia. The letter from the clerk states that this person is a resident of the State of West Virginia.

Section 2850 of Michie's 1936 Code of Virginia contains this provision:

"\* \* \* The removal of a notary from the county or city in which said notary resided when appointed, unless said removal be into another county or city for which said notary may have been appointed, shall be construed as a vacation of said office, and the clerk of the circuit court of said county or corporation court of said city shall at once inform the governor of the fact, \* \* \*."

It is my opinion that, in view of the foregoing provisions, the person you refer to is not eligible to be appointed a notary public in Virginia.

I am returning herewith the letter from the clerk of the Winchester court.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### NOTARIES—Territorial Scope of Commission—Residence.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 26, 1937.*

COLONEL PETER SAUNDERS,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR COLONEL SAUNDERS:

I have your letter of January 25, requesting the opinion of this office on the following two questions:

"1. If a person desires to act as a Notary Public for the City of Richmond and County of Henrico, is it necessary for such person to pay fees for two commissions and qualify in both the city and county, or does qualification of a Notary in the City of Richmond entitle that Notary to act in said county? (and vice versa)

"2. Is a person who works in a city, but who is a resident of the county in which that city is located, entitled to qualify as a Notary Public for said city upon the issuance of a commission by the Governor for said city?"

In reply to the first of these, it seems clear, under Virginia Code (Michie 1936), section 2850, that a person appointed as notary for any city may act in any county in which that city, or any part thereof, lies, upon the payment of a single fee. Correspondingly, a notary appointed for any county may act in any city lying partially or wholly within said county without the payment of an additional fee.

As to your second question, by plain implication of the statute referred to, it would be improper to appoint as notary for a city any person not a resident of such city. For purposes of the case which you suppose, however, the question would seem to be largely academic since a resident of a county, duly appointed as notary for such county, may act in any city lying wholly or partially within its boundaries.

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

**OFFICES—Incompatibility of—Member of School Board as Clerk of Same.**

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

DR. SIDNEY B. HALL,  
*Superintendent Public Instruction,  
 State Office Building,  
 Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of September 16, enclosing one from Mr. T. Ryland Sanford, Jr., Division Superintendent of Schools of Warwick and York Counties.

You desire the opinion of this office on the question of whether or not a member of the school board may serve as clerk of such board. It is stated that this has been the policy in York county for some years, and Mr. Sanford says that he assumes that this practice is followed in other divisions.

Section 708 of the Code, as amended in 1936 (Acts 1936, page 514), provides:

"It shall be unlawful for any member of the State Board of Education, division superintendent of schools, member of the school board or any other school officer, principal or teacher in a public school, except by permission of the State Board of Education evidenced by resolution spread on the minutes of said board, to have any pecuniary interest, directly or indirectly, in any contract for building a public school house, or in furnishing material to a contractor for building such schoolhouse, or in supplying books, maps, school furniture or apparatus, or to sell or write or solicit insurance on any school building; to the public schools of this State, or act as agent for any other publisher, book seller, or dealer in any such furniture or apparatus, or directly or indirectly to receive any gift, emolument, reward, or promise of reward, for his influence in recommending, or procuring, the use of any book, map, school furniture, or apparatus of any kind in any public school of this State, nor shall the board or the division superintendent employ any of its members in any capacity. \* \* \*

You will observe that all of the acts specified in the section are prohibited except by permission of the State Board of Education. I am, therefore, of opinion that the section prohibits a member of the school board from acting as clerk of the board "except by permission of the State Board of Education evidenced by resolution spread on the minutes of said Board."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICERS—Contracts—With State Agency—Superintendent of Public Welfare Rendering Medical Services under Relief Act.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 10, 1936.*

HONORABLE ARTHUR W. JAMES,  
*Commissioner of Public Welfare,  
Richmond, Virginia.*

MY DEAR MR. JAMES:

I am in receipt of your letter of September 2, in which you refer to chapter 223 of the Acts of 1936, appropriating money to assist counties and cities in providing assistance to and for destitute persons in this State in need of public relief.

You then state:

"In Prince George County the recently elected superintendent of public welfare is Dr. W. C. Webb, a physician. Dr. Webb, as superintendent of public welfare, is a statutory officer, elected pursuant to authority of section 1902-n of the Code, with the duties outlined in section 1902-o of the Code.

"Our field supervisor reports that Dr. Webb wishes to issue purchase orders to himself for services rendered as a physician to relief clients, or persons on the county relief rolls. There is no question but that the cost of medical services to relief cases is a proper relief expenditure; the question is whether or not it is legal for a salaried, full-time superintendent of public welfare, who happens to be a physician, to issue purchase orders to himself for services rendered as a physician to relief cases under his care as superintendent of public welfare."

Unquestionably, it would appear that the superintendent of public welfare so appointed is a county officer.

I invite your attention to section 2707 of the Code, forbidding supervisors and other county officers having an interest in any contract made with any officer or person acting on behalf of the supervisors. This section reads in part as follows:

"No supervisor, superintendent of the poor, or overseer of the poor, constable, special police, or any paid officer of the county, shall become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors \* \* \*"

After a careful consideration of this section, I am of the opinion that, when the purposes intended to be accomplished are borne in mind, the contract you describe is contrary to the provisions of the section.

In 22 Ruling Case Law, at page 460, it is stated that it is a well settled rule that a public officer cannot lawfully, on behalf of the public which he represents, contract with himself for the performance of services, and, if he renders such services and the express contract of payment is void by reason of public policy, he will not be permitted to recover on a quantum meruit.

There may be some doubt as to the existence of an actual contract in this case, but, when the language of the section is considered along with the fact that the practice of a public officer dealing with himself is generally considered to

be against public policy, I am of opinion that the section should be liberally construed to effectuate its manifest intent.

Yours very truly,

ABRAM P. STAPLES, *Attorney General.*

**OPTOMETRY—State Board of—Authority to Issue Temporary Permits.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 2, 1936.*

DR. B. R. BELL, *President,*

*State Board of Examiners in Optometry,*

*Culpeper, Virginia.*

DEAR MR. BELL:

I am in receipt of your letter of October 1, in which you desire the opinion of the Attorney General's office as to the authority of your board to issue temporary permits for the practice of optometry by persons who have failed to pass the regular examination provided for in section 1629 of the Virginia Code.

I have very carefully examined the entire Optometry Act, and the only authority I find for the issuance of temporary permits is contained in section 1636 of the Code, which is taken from chapter 24, page 31, of the Acts of 1924.

This Act authorizes the board, in its discretion, to issue to a person employed by a practitioner of optometry, in case of vacancy in a position which had theretofore been filled by an employee of a person practicing optometry, a temporary permit to practice optometry until examined by the board. In the authority given to the board to issue such a permit, it is expressly provided that it shall not issue a permit to a person who has failed in an examination before the board, nor to one whose application for examination has been rejected. Even as to a person employed to fill a vacancy, the granting of a temporary permit to such a person is optional, and such permit can only be granted until he shall have been examined by the board.

Yours very truly,

EDWIN H. GIBSON,

*Assistant Attorney General.*

**ORDINANCES—Driving While Intoxicated—Prosecutions Under—Effect of Town Ordinance in County Having County Ordinance.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 24, 1937.*

HONORABLE E. PEYTON TURNER,

*Attorney for the Commonwealth,*

*Emporia, Virginia.*

DEAR MR. TURNER:

Replying to your letter of February 22, I beg to advise that, in my opinion, prosecutions for drunken driving in the town of Emporia, which has enacted an ordinance under the provisions of chapter 425 of the Acts of 1936 (later amended at the special session in December, 1936, prohibiting such drunken driving), may be instituted at the election of the prosecuting officer either under the town ordinance, or under the State statute, where an arresting officer has not already sworn out a warrant. This is the practice usually followed where town or city ordinances parallel State statutes. Where a State motor vehicle officer makes the arrest the prosecution must be under the State law, as he has no authority to arrest for violation of local ordinances.

It is further my opinion that the county ordinance would not be operative in the town of Emporia, where the town itself has adopted an ordinance.

In the county outside of the town, however, a similar situation would prevail and a prosecuting officer might prosecute under either the State statute or county ordinance.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,

*Attorney General.*

**ORDINANCES—Driving While Intoxicated—Prosecution under, When Arrest Is by State Motor Vehicle Officer—Fees—Trial Justice—Taking Recognizance to Keep the Peace.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 14, 1937.

HONORABLE W. E. HOGG,

*Trial Justice,  
Yorktown, Virginia.*

MY DEAR MR. HOGG:

I am in receipt of your letter of January 12, in which you advise that the board of supervisors of York county has adopted an ordinance paralleling the State law, under the authority of chapter 425 of the Acts of 1936 (Acts 1936, page 1015), prohibiting the driving of motor vehicles while drunk.

In this connection I refer you to an Act of the Special Session of 1936 correcting an apparent defect in the original Act.

You desire my opinion as to whether a person arrested by an officer of the Division of Motor Vehicles or of any other division of the State government, charged with driving an automobile while drunk, shall be tried under the county ordinance or the State law.

In my opinion, and I have heretofore so ruled, such an officer only has authority to arrest for violations of the State laws, and, therefore, when the arrest is made by one of the officers you describe, I am of opinion that the offender should be tried for a violation of the State law. You will observe that chapter 425 is permissive only, and I do not think that an ordinance adopted thereunder could reasonably be construed to supersede the State law.

You also ask whether subsection 4 of section 4987m of the Code, as enacted in 1936 (Acts 1936, page 626), prescribing the fee of a trial justice for admitting any person to bail, including the taking of the necessary bond, can be construed so as to allow the fee where the trial justice takes a recognizance to keep the peace.

I assume, of course, that bond is given. While there may be some doubt about the question, I am of opinion that the provision allowing the fee is broad enough to cover the case you mention. It seems to me that, where the trial justice actually takes a bond in a criminal case, this action comes within the real meaning of the fee provision.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**OYSTER BEDS—Leases of—Effect of Agreement with United States Releasing Liability for Damage in Dredging.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., January 12, 1937.

HONORABLE G. A. MASSENBURG,

*Member of House of Delegates,  
Hampton, Virginia.*

DEAR MR. MASSENBURG:

In reply to your inquiry of January 9, I am of the opinion that the new lease, in September, 1934, of oyster lands lying between Old Point Comfort and Hampton to Mr. M. C. Armstrong is subject to the Act of February 15, 1934 (Acts 1934, chapter 18, pages 16-17), which provides:

“\* \* \* the Commonwealth of Virginia will and doth hereby release the said United States of America, and any contractor for or agent of the United States of America engaged in such work, from all claims for damages to

the oyster or other public interests belonging to the State that may result from the prosecution of said work \* \* \*."

While I do not have the terms of the new lease to Mr. Armstrong before me, my opinion as to this lease, and other leases of a similar character, is based on the following reasons:

1. Subsection (13) of section 3193 of the Code of Virginia (Michie 1936) provides that, upon the renewal of a lease, it shall be "subject to any such laws or regulations as the General Assembly may enact or prescribe, and to such rental as may be then fixed by law." It would seem that the above language expressly covers the provisions of an Act of the General Assembly of the nature of the one passed in February, 1934.

2. Agreements between the Commonwealth, or its agencies, and a private person or corporation are interpreted in the same way as those between individuals in cases where there is no general public interest to be safeguarded.

3 Williston on Contracts (Rev. Ed.), section 626;

*Hawes & Co. v. Trigg Co.*, 110 Va. 165, at pages 193-194 (1909).

3. The general rule as to the adoption of existing law in contracts is that such form a part of the contract and are incorporated in it.

3 Williston on Contracts (Rev. Ed.), section 615;

*Hawes & Co. v. Trigg Co.*, *supra*.

Applying these general principles to cases where a lease is merely renewed under subsection (13) of section 3193 of the Code, it would seem that the purpose and language of this section cover an enactment by the General Assembly doing away with liability for damages to oyster lands resulting from dredging operations by the United States government. Non-liability is even clearer in a case where there is a new lease after the statute has taken effect. The lease to Mr. Armstrong would seem to fall clearly in this category, inasmuch as it was only for a portion or part of the original acreage under his old lease.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PARDONS—Conditional—Credit on Sentence.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 8, 1936.*

HONORABLE GEORGE C. PEERY,

*Governor of Virginia,  
Richmond, Virginia.*

DEAR GOVERNOR PEERY:

This is in reply to your letter of December 5, in which you ask my opinion as to whether, under the facts detailed in your letter, Sam Craig is entitled to a credit upon his sentence of one year in the penitentiary for the time served by him pursuant to the conditions of the pardon granted him by Honorable Harry F. Byrd on January 8, 1930, coupled with the condition that Craig should "be immediately transferred to the Virginia Industrial School for Boys, at Maidens, Va."

In my opinion, the Craig case is covered by the opinion of Judge Gunn in the Travis Mabry case. Craig was and is entitled to a credit of nineteen months on his penitentiary sentence, and, as his confinement of nineteen months in the Virginia Industrial School for Boys was for a much greater length of time than he would have, but for his conditional pardon, served in the State penitentiary, his sentence of confinement in the Virginia penitentiary was fully satisfied by his confinement in the Virginia Industrial School for Boys.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PARDONS—Effect of on Liability for Costs.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *April 13, 1937.*

HON. E. F. HARGIS, *Clerk,*  
*Circuit Court of Russell County,*  
*Lebanon, Virginia.*

DEAR MR. HARGIS:

I have your letter of April 10, in which you state that a defendant who was convicted in your court and sentenced to a term in the penitentiary has been pardoned by the Governor and now claims that this pardon extinguishes his liability for the costs of prosecution assessed against him. You further state that in your opinion this man is still liable for the costs and that he could be relieved from paying them only by an act of the legislature. You ask whether this office concurs in your opinion.

It has long been settled in Virginia that a pardon does not of itself operate to extinguish a defendant's liability for costs. *Anglea v. Commonwealth*, 10 Gratt. (51 Va.) 696.

In my opinion, therefore, the defendant is still liable for the costs.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PHARMACY—Grounds on Which License May Be Withheld.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 22, 1937.*

VIRGINIA BOARD OF PHARMACY,  
*105 State Office Building,*  
*Richmond, Virginia.*

GENTLEMEN:

This is in reply to your request for an opinion upon two questions presented by letter addressed to Mr. A. L. I. Winne, Secretary of the Board, by Mr. Joseph H. Webber, a Virginia Registered Pharmacist.

Mr. Webber protests against the issuance of a Pharmacy Permit to "Kay's" Pharmacy, located at 18 East Campbell Avenue, Roanoke, Virginia. He advances the following two grounds of objection:

(1) That the store has no Pharmaceutical equipment and is in no way prepared to furnish Pharmaceutical service conducive to the health and well-being of the people in the vicinity of Roanoke.

Section 1682(b) provides as follows:

"Every registered pharmacy must be equipped with proper pharmaceutical utensils so that prescriptions can be properly filled and United States Pharmacopoeia and National Formulary preparations properly compounded. The Virginia Board of Pharmacy shall prescribe the minimum of such professional and technical equipment which a pharmacy shall at all times possess, and such list shall include the latest revisions of the United States Pharmacopoeia and the National Formulary. No permit shall be issued or continued for the conduct of a pharmacy until or unless the provisions of this paragraph (b) have been complied with."

You will observe from the above quoted provision of the statute that it is the duty of the Virginia Board of Pharmacy to prescribe the minimum professional and technical equipment for a pharmacy and that no permit shall be issued or continued unless such equipment is at all times possessed by the pharmacist.

(2) The second ground of objection advanced by Mr. Webber is that a sufficient number of duly licensed and adequate equipped pharmacies are already en-

gaged in business in the City of Roanoke and that therefore the licensing of an additional pharmacy will tend to cripple and adversely affect those already engaged in the business.

It is my opinion that the Board of Pharmacy does not have the authority to refuse a permit upon this second ground of objection.

Section 1682(e) of the Code provides as follows:

"Any person, firm or corporation may own and conduct a pharmacy, as herein defined, provided the same is conducted and operated under the personal supervision of a registered pharmacist, but during the temporary absence of such registered pharmacist, a registered assistant pharmacist may act in place of said registered pharmacist."

It follows from the foregoing that unless there is some valid objection to the equipment or qualifications of the person operating and conducting, or who proposes to operate and conduct, a pharmacy, the Board has no authority to refuse a permit to any person or corporation applying for same.

The case of *Liggett Drug Co. v. Board of License Commissioners of North Adams*, 4 N. E. (2d) 628, referred to in Mr. Webber's letter, has no application to our statute, since the legislative powers therein referred to are not delegated by our statute to the Virginia Board of Pharmacy. In fact, as above pointed out, the Virginia statute expressly provides that any person or corporation is entitled to a permit upon complying with the requirements of the statute.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PUBLIC BUILDINGS—Approval of Art Commission.**

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

SENATOR MORGAN R. MILLS,  
210 East Franklin Street,  
Richmond, Virginia.

DEAR SENATOR:

This is in reply to your request for my opinion upon the construction of chapter 242, pages 393 and 394, of the Acts of Assembly for 1936, and upon the question hereinafter stated.

Section 582 of the Code provides that no construction or erection of any building of any nature which is to be paid for, either wholly or in part by appropriation from the State treasury, shall be begun, unless the design and proposed location thereof shall have been submitted to the Art Commission and its artistic character approved in writing by the majority of the members of the Commission, or unless the Commission shall have failed to disapprove same within thirty days after its submission.

You inquire whether or not, in my opinion, it is necessary to secure the approval of the Art Commission before the Governor would have authority to accept a deed from the City of Richmond to the Ford lot referred to in the Act aforesaid.

I am of opinion that the approval of the Art Commission is not necessary. The Act itself, in effect, approves the suitability of the property therein described for the purpose of erecting thereon the proposed library building, and, in my opinion, to that extent amends or supersedes the provisions of section 582 insofar as that property is concerned.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC FUNDS—Deposits to Meet Bond Maturities—Security Required.**

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

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

DEAR MR. DOWNS:

I am in receipt of your letter of August 18, from which I quote as follows:

"A number of the counties throughout the Commonwealth have designated some bank or banks as their agent for paying bonds on maturity dates. Usually a sum is deposited with the bank to the credit of the county for this purpose and the bank pays the bonds when they are presented for payment and charges the account of the county. This money at times is in bank from one to three or four weeks. In a number of instances the amount on deposit exceeds the insurance protection afforded by the Federal Deposit Insurance Corporation. In a particular instance a bank has refused to put up collateral to protect these funds in the event of insolvency.

"The question has arisen as to whether or not funds deposited with banks in this manner are required to be protected under section 350 of the Tax Code as amended. Will you please advise us if this section requires collateral for the protection of such funds deposited?"

I have read section 350 of the Tax Code, as amended, and can find no exception therein for such a deposit as you describe. It seems to me, therefore, that county funds deposited in the manner you suggest should be protected as required by section 350.

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

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**PUBLIC FUNDS—Security—Federal Housing Administration Bonds As.**

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

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

DEAR MR. DOWNS:

I am in receipt of your letter of September 2, in which you ask if Federal Housing Loans are acceptable, under section 350 of the Tax Code, as amended, to secure the funds of a county on deposit in a banking institution.

Section 350 of the Tax Code, subsection (d), provides, among other things, that securities of the character described in section 5431 of the Code of Virginia, as amended, with certain exceptions, are acceptable. Subsection 19 of section 5431 designates as approved securities "first mortgage real estate loans insured by the Federal Housing Administrator."

Therefore, assuming that the Federal Housing Loans mentioned by you are such as described in the aforesaid subsection 19, I am of opinion that they are acceptable.

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

**PUBLIC OFFICERS—Contracts—Insurance on School Building Written by Company of Which Member of School Board Is President.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

HONORABLE M. A. COGBILL,

RICHMOND, VA., *January 4, 1937.*

*Commonwealth's Attorney,*

*Chesterfield Courthouse, Virginia.*

DEAR MR. COGBILL:

I have your letter of December 31, requesting my opinion upon the question whether or not a contemplated insurance policy between Chesterfield County School Board and the Farmers' Mutual Benefit Association of the State of Virginia, covering a fire insurance contract for the Bellmeade School in the sum of \$3,000, is permissible under the laws of Virginia.

Your letter raises the question whether or not the contract is in violation of section 708 of the Code of Virginia, in view of the fact that a member of the School Board is president of the insurance association. Said section prohibits the making of contracts in which any member of the School Board has any pecuniary interest, directly or indirectly, provided, however, that the section shall not apply to the writing of insurance policies in mutual companies where such mutual insurance carries no assessment liability.

You will note from the examination of the policy, a copy of which you sent to me, that the policy does carry an assessment liability.

I do not deem it necessary to pass upon the question whether or not this policy would be in violation of section 708 of the Code for the reason that this office has already held that neither the State nor any of its agencies may enter into contracts of this type where the amount of the assessment is unlimited. I am enclosing you herewith a copy of an opinion of this office upon this question.

You will note that Article 22 of the By-Laws, appearing on the policy here proposed to be contracted for, provides for assessments to pay losses, but does not contain any limitation upon the amount of such assessments. While, as you will note from the enclosed opinion, the statute permits the writing of insurance by State agencies in mutual insurance companies where the amount of the assessment is limited to one annual premium, there is no statutory authorization for contracts of the nature contained in the policy here involved.

Our statutes provide for different types of mutual insurance companies, but there is no provision authorizing the State or its agencies to become a member of an association of this type.

I am returning herewith the policy which you sent me.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

**PUBLIC OFFICERS—Contracts—Sales by Merchant Chairman of Board of Supervisors to County for Use of Town.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *December 8, 1936.*

MR. J. GORDON BENNETT,

*Assistant Auditor of Public Accounts,  
Richmond, Virginia.*

MY DEAR MR. BENNETT:

I am in receipt of your letter of November 30, in which you advise me that the chairman of the board of supervisors of Prince Edward county is a merchant, with his place of business in the town of Farmville. You desire to know whether or not this gentleman, in view of the provisions of section 2707, may sell supplies to the county, such supplies being purchased with funds appropriated by chapter 223 of the Acts of 1936 for direct relief.

You enclose a letter from Honorable A. D. Watkins, Commonwealth's At-

torney for Prince Edward County, in which he states that the particular purchases he has in mind are made for the poor in the town of Farmville, and that, although the board of supervisors approves the bills for such purchases, separate books are kept and the town of Farmville reimburses the county of Prince Edward for the amount of supplies purchased for the poor of the town.

I call your attention to the following provision from section 4 of the Act making the appropriation (Acts 1936, page 376) :

"The board of supervisors or other governing body shall on the request of the council of any town in such county and with the approval of the State Commissioner of Public Welfare, allocate and distribute to any town therein having a population of one thousand or more inhabitants according to the last preceding United States census such proportionate part of the funds paid to such county and the local funds appropriated by such county to match the said State funds as the population of such town bears to that of the entire county, in which event the said funds so allocated and distributed to the said town shall be expended and disbursed by the council of such town, in lieu of the board of supervisors or other governing body of the said county, in the manner and for the purpose herein set forth. \* \* \*"

If this method has been adopted in Prince Edward county and Farmville, then I am of opinion that unquestionably purchases for the poor in the town of Farmville may be made from the store operated by the chairman of the board of supervisors of Prince Edward county, for that officer in this case would not be selling supplies to the county at all.

However, if the statutory method of allocating the funds has not been followed, then I am of opinion that under the state of facts presented by you the supplies are being sold to the county, and the chairman of the board of supervisors should not be interested in these sales under the provisions of section 2707. Although it may be from the facts stated in your letter and that of Mr. Watkins that the application of section 2707 to this particular case works somewhat of a hardship, yet I am of opinion that, in view of the tenor of this section of the Code, a dangerous precedent would be established by holding that it did not apply to this case, which certainly comes within the letter of the statute.

I am returning Mr. Watkins' letter to you.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PUBLIC OFFICERS—Garnishment of Salaries, Fees, etc.—Sheriffs.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,

MR. J. B. ALLMAN,  
*Trial Justice,*

RICHMOND, VA., January 7, 1937.

*Rocky Mount, Virginia.*

MY DEAR MR. ALLMAN :

I am in receipt of your letter of December 31, in which you ask the following questions :

"1. If the salary paid the sheriff of Franklin county by the board of supervisors of Franklin county is subject to attachment or garnishment.

"2. If his fees due by the State for jail fees and feeding prisoners is subject to attachment or garnishment.

"3. If the fees due the sheriff of Franklin county for attending court, for summoning grand jurors and petit jurors is subject to attachment or garnishment."

The wages and salaries of State officers, as distinguished from employees, are not subject to garnishment. See section 6559 of the Code. A sheriff is unquestionably a State officer. *Burch v. Hardwicke*, 30 Grat. 24; *Board of Supervisors v. Lucas*, 142 Va. 84, 91.

It is equally true, however, that a sheriff also acts as and is in some respects a county officer. By sections 6560 and 6561 the wages and salaries of all officers of cities, towns and counties are subject to garnishment.

It follows from the above that your first question must be answered in the affirmative and your second and third questions must be answered in the negative.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC OFFICERS—Incompatible Offices—Member of Town Council as Oyster Inspector.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., May 22, 1937.

HONORABLE RICHARD ARMSTRONG,

*Commissioner of Fisheries,  
Newport News, Virginia.*

MY DEAR MR. ARMSTRONG:

I am in receipt of your letter of May 21, in which you ask if a member of a Town Council may also be an oyster inspector.

I can find no statute prohibiting one person from holding these two positions and I am, therefore, of opinion that your question must be answered in the affirmative.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC OFFICERS—Indemnification of Out of Public Funds.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., September 22, 1936.

HONORABLE CARL H. NOLTING, *Chairman,*

*Commission of Game and Inland Fisheries,  
Richmond, Virginia.*

DEAR MR. NOLTING:

You request an opinion from this office as to whether or not your Commission has authority to make a contribution out of the Game Fund to the defense of certain civil suits pending against two officers of the Commission of Fisheries. It seems that these two officers *in the pursuit of their official duties as oyster inspectors*, discovered one Wilson Smith in the act of violating the Game and Inland Fish Laws. They arrested him and prosecuted him before a trial justice, but he was acquitted and has brought civil action against the officers for false imprisonment and malicious prosecution.

In view of your expressed desire to assist these men, I have examined the law very carefully in an effort to find some authority for the disbursement of public funds in their behalf, but regret to say that I can find nothing which would justify you in making this use of public monies. I know of no authority for the indemnification of officers in such cases, except the rule that permits a branch of the government to defend suits brought against its own officers for acts done in the performance of their duties. •See 22 R. C. L. 478. Hence it would seem that, at least so far as the Commission of Game and Inland Fisheries is concerned, these officers are in the same position as would be any private citizen who took it upon himself to make an arrest for a violation of the Game Code.

It is, therefore, the opinion of this office that your Commission is without authority to make any contribution of public funds towards the defense of these suits, as the defendants are not officers of your Commission.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC OFFICERS—Interest in Contracts—Member of School Board Furnishing Supplies and Insurance.**

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

MR. BLAKE T. NEWTON,  
*Superintendent of Schools,  
Hague, Virginia.*

MY DEAR MR. NEWTON:

I have your letter of July 11, in which you ask the following questions:

"1. Has a member of a school board, who is a merchant, the right to sell supplies to the schools in the regular course of his business?"

"2. Has a member of a school board, who is an agent of an insurance company, either stock or mutual, the right to insure school property in his county?"

I call your attention to section 708 of the Code of Virginia, as amended in 1936 (Acts 1936, page 514), which contains certain prohibitions as to a member of the State Board of Education, a division superintendent of schools, a member of a school board, or any other principal, officer or teacher in a public school, except by permission of the State Board of Education evidenced by resolution spread on the minutes of the Board, being interested in a contract for a school building, or for furnishing books, materials, maps, school furniture or apparatus, or selling, writing or soliciting insurance on any school building, etc. The concluding sentence of this section, however, reads as follows:

"\* \* \* But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sell either books selected and adopted by the State Board of Education, or supplies used in the schools and by the pupils, nor shall they apply to the writing of standard or mutual insurance policies at the regular rate on any school building, or other school property; provided, such mutual insurance carries no assessment liability."

It seems that the language of the sentence above quoted is plain and in terms answers your questions.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC OFFICERS—Terms; and When Office Vacant—School Superintendents.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, May 13, 1937.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

DEAR DR. HALL:

I have your letter of May 11, from which for purposes of reply I quote as follows:

"Naturally Judge Gunn's decision has created a situation among the superintendents concerned that needs to be adjusted in the proper way and as early as possible.

"I should like to have your opinion as to the status of the division superintendents now in office, and who have been duly elected by their local boards for the next term; in other words, do these men continue in office and perform the functions thereof until their successors are appointed, or until

the case can be settled satisfactorily and properly in the courts? It is important that I get this information to the superintendents at an early date, and I shall therefore appreciate your giving this your immediate attention for us."

Your reference is to the decision of the circuit court of the city of Richmond that incumbent superintendents must possess an M. A. degree to render them eligible to reappointment.

The appointment of division superintendents of schools is provided for by sections 132 and 133 of the Constitution. Section 33 of the Constitution, relating to the terms of officers, reads as follows:

"Unless otherwise prescribed by law, the terms of all officers elected under this Constitution shall begin on the first day of February next succeeding their election, unless otherwise provided in this Constitution. All officers elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

I am of the opinion that this section of the Constitution which I have quoted above is perfectly plain, and that as applied to those division superintendents of schools now in office it means that they continue in office until their successors have qualified, which means, of course, until the final disposition of the case, on appeal, if an appeal is allowed.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PURCHASE AND PRINTING—Distribution of Bound Acts of Assembly.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 17, 1936.

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

DEAR MR. OSBORNE:

I have your letter of July 10, referring to me a letter addressed to Mr. Carlton from Honorable John M. Whalen, Clerk of the Circuit Court of Fairfax county. Mr. Whalen requests that you send him, in addition to the copies already received by him, copies of the 1936 Acts for each of the following officers: Justices of the Peace other than Trial Justices, Substitute Trial Justice, Chief Deputy Clerk, and certain other officers. You ask the opinion of this office as to whether you should grant Mr. Whalen's request.

The only provisions of law under which you are authorized to distribute copies of the Acts seem to be those contained in section 388 of chapter 376, Acts 1936, at page 598.

This section undertakes to specifically designate the various officers of the cities, counties and State to whom copies of the Acts shall be furnished, and does not contain any general provision vesting in your department any discretion as to supplying copies to additional persons. I do not find examiners of records, commissioners of accounts, or deputy clerks, among the officers to whom said section provides copies of the Acts shall be sent.

The section provides that a copy of the Acts shall be sent to each "justice having trial jurisdiction." While county justices of the peace do not have trial jurisdiction in ordinary civil and criminal cases, our Supreme Court of Appeals has held that they do possess jurisdiction to institute, conduct, and try proceedings relating to the commitment of epileptic, feeble-minded, inebriate and insane persons to the State hospital provided for their care. A proceeding of this kind involves a determination of the question of the mental status of the persons

before the justice of the peace, or the commission constituted by him before whom such persons are being tried.

The purpose of supplying a copy of the Acts is to advise the officer of the statutes applicable to the performance of his duties, and I am of the opinion that a justice of the peace possesses trial jurisdiction within the meaning of the said section and is entitled to receive a copy of the Acts.

A Substitute Trial Justice is, in my opinion, "a justice having trial jurisdiction" within the spirit and meaning of the statute and such officers should therefore receive free copies of the Acts.

It is the opinion of this office that, while you are not authorized to distribute copies of the Acts to Deputy Clerks, the clerk would be justified in buying such additional copies as are required for the deputies, and charging them as an expense of his office in his report to the State Compensation Board.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**PURCHASE AND PRINTING—Duty of Director in Case of Tie Bids—Preferential Treatment of Local Concerns.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 27, 1936.

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

DEAR MR. OSBORNE:

This will acknowledge your letter of July 23, referring to this office letters from the Richmond Hardware Company and the Tower Binford Electric and Manufacturing Company, relating to the letting of certain contracts.

From this correspondence and the statements in your letter it appears that you are about to let a contract for the purchase of a year's supply of electric lamps at a cost of several thousand dollars; that all dealers will supply lamps of the same quality at identical prices; that there are several dealers in a position to furnish the lamps, but that some of these dealers are corporations doing business in the State either as Virginia subsidiaries of large foreign companies or otherwise under such circumstance as to suggest that they are essentially creatures of foreign capital. You request the opinion of this office as to whether you may properly discriminate against dealers of this class in favor of purely local concerns.

Under the provisions of Virginia Code (Michie 1930) section 585(4), you are required to let such contracts through competitive bidding, and award them to the lowest responsible bidder. Hence your question will become academic unless, as you seem to anticipate, you receive several identical bids.

Our statutes make no specific provision for the case of tie bids. In my opinion, this necessarily leaves entirely to your own discretion the selection of a dealer in such a case. Hence you may legally make any reasonable choice you see fit, so long as you do not act arbitrarily or upon considerations not germane to the interests of the State.

That you may consider in this connection, among other things, the extent to which a particular dealer may be said to be a non-resident, seems clear, since section 585(6) of the Code expressly authorizes the preference of local concerns "so far as may be practicable."

As to the weight which you may choose to give such considerations the law affords no guide, and it is clearly not within the province of this office to express an opinion. As already stated, the actual selection of a dealer in any particular case is left entirely to your own good judgment, in the exercise of which the law merely requires that you act reasonably and for the best interests of the State as you see them.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC WELFARE—Certification of Costs of Prisoners—Delegating Duties As To.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 31, 1936.*

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

DEAR MR. JAMES:

I am in receipt of your letter of July 28, in which you ask me whether you have any authority to delegate the Director of Public Welfare of the city of Norfolk, the duty placed upon you by section 10 of chapter 380 of the Acts of 1936 (Acts 1936, page 604), in connection with vouchers covering cost of food, clothing, and so forth, required for prisoners in jail. You also refer to a similar duty imposed upon you by section 3510 of the Code.

I note that you do not construe the duty placed upon you by these statutes as an auditing function, but as a means of assisting the comptroller in determining the accuracy of jail charges against the criminal expense account on the basis of the penological information supplied the Department of Public Welfare by the jailers. In other words, you state that you check the expense accounts against the population reports furnished by the Department of Public Welfare.

Inasmuch as chapter 380 of the Acts of 1936 applies primarily to the city of Norfolk, I shall only refer to that act. The purpose of section 10 is to have you certify to the comptroller the proportion of the expenses of prisoners which should be borne by the Commonwealth. Therefore, I do not think it was the intention of the General Assembly that you should delegate this duty to a city official.

I see no reason, of course, why the Director of Public Welfare of the city of Norfolk should not audit the bills covering supplies for prisoners, but it seems that the General Assembly intended that you, or one of your immediate assistants, should approve the proportion of the expenses of these prisoners which should be borne by the Commonwealth.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC WELFARE—Delinquent Children—Hospitalization of—How Paid For.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 31, 1936.*

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

DEAR MR. BRADFORD:

I am in receipt of your letter of July 17, in which you ask if it is proper for necessary hospital expenses of delinquent children committed to the State Board of Public Welfare, under the provisions of chapter 78 of the Code, to be paid out of the appropriation made for criminal charges.

As you state, section 1914 of the Code provides that in these cases "the same fees or allowances shall be paid by the State for children boarded out or held in a detention home as are now paid for prisoners confined in jail."

I note from the letter of Mr. Arthur W. James addressed to Governor Peery, which you enclosed, that one of my predecessors has ruled that the costs of the maintenance of these children in detention homes may be paid out of the appropriation for criminal charges. This statement of Mr. James is confirmed by a letter written February 19, 1925, by Honorable John R. Saunders, to Mr. C. Lee Moore, then Auditor of Public Accounts.

Section 4960 of the Code is the authority for the payment of necessary hospitalization of prisoners confined in jail.

If we could look alone to sections 1914 and 4960 of the Code, I should say that the language I have quoted from section 1914 is broad enough to cover the expenses referred to. However, I am advised that for the past several years the Department of Public Welfare has included in its budget and the Legislature has appropriated a sum specifically intended to cover these hospital expenses.

In view of this fact, I am constrained to advise you that it must have been the intention of the General Assembly that these hospital expenses should be paid out of this appropriation made for that purpose, and not out of the appropriation for criminal charges. I do not see how any other reasonable construction can be placed upon the statutes involved.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**PUBLIC WELFARE—Power of Commission over Local Boards.**

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

MR. W. L. PAINTER, *Director,*  
*Children's Bureau,*  
*Department of Public Welfare,*  
*1014 East Clay Street,*  
*Richmond, Virginia.*

DEAR MR. PAINTER:

I have your letter of August 5, referring to this office certain correspondence between your office and the Federal Social Security Board, from which it appears that you are required to furnish opinions of this office on each of the following questions:

1. May local boards of public welfare be discontinued at the will of local authorities?
2. Can the State Department promulgate rules and regulations which are legally binding and enforceable upon local boards?
3. May such rules and regulations pertain specifically to the way in which funds are to be expended and to qualifications of local personnel?
4. Does the State agency have the same supervisory authority over existing departments of public welfare in cities of the first class as over local boards established by the State Department?

These will be answered in their numbered order.

1. I can find no provision of law empowering local authorities to discontinue a local board of public welfare; it is the opinion of this office that no such power exists.

2. To answer this question categorically, if possible at all, would inevitably be misleading: no statute expressly authorizes the State Board to promulgate rules and regulations having the force and effect of law, and it is therefore doubtful whether the Board may make rules and regulations which are legally enforceable *as such*. On the other hand, the Board is authorized—indeed, it is required—to compel local boards to administer the funds in question according to law, and in a large measure to dictate their policies in construing the law and as to details not particularly covered by it. This plainly appears from the broad powers of supervision and direction conferred on the State Board (Acts 1927, chapter 105, sections 6, 7 and 9; Acts 1936, section 10), coupled with its absolute power to approve or disapprove every grant or refusal thereof (Acts 1936, chapter 325, sections 14 and 3) and its full control over the selection and removal of personnel (Acts 1922, chapter 105, section 12).

It is the opinion of this office that the State Board is authorized to set forth

in advance the policies to be effected by it, and to enforce compliance with these policies, as well as with the law itself, by exercising its powers of review and of appointment and removal.

3. It is the opinion of this office that the control of the State Board over local boards of public welfare includes the power to regulate the manner in which funds are to be spent and the qualifications of personnel.

4. Under the express provisions of section 9 of chapter 325, Acts 1936, all the supervisory powers over local boards conferred on the State Board by that Act are made effective as to existing welfare agencies in cities of the first class.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**PUBLIC WELFARE—Power of Commission over Local Boards in Administration of "Mothers' Aid" Funds.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 28, 1936.*

MR. W. L. PAINTER, *Director,*  
*Children's Bureau,*  
*Department of Public Welfare,*  
*1014 East Clay Street,*  
*Richmond, Virginia.*

DEAR MR. PAINTER:

This will acknowledge receipt of your letter of September 9, referring to this office a letter from Mr. Geoffrey May, Acting Director of the Federal Social Security Board.

The first two paragraphs of Mr. May's letter are as follows:

"It is suggested that you furnish a statement of the Attorney General giving a more specific opinion whether, under the State law as a whole, the State Board has full legal authority to supervise (*i. e.*, to control and direct) the administration of the plan by county and city boards, and if it has, whether or not the law can be construed by implication to authorize the State Board to effect its supervision by promulgating rules and regulations. The Attorney General has stated that in his opinion the State Board is authorized to set forth, in advance, the 'policies' to be effected by it, and to enforce compliance with these 'policies' by exercising its powers of appointing and removing personnel, and withholding State reimbursements.

"As you know, the Federal Act requires that the State agency be able to prescribe such methods of administration as may be found necessary for the efficient operation of the plan. One element of this is the power to establish standards for the selection of local employees. It would seem that the authority to make rules and regulations is essential to this."

In the earlier opinion to which Mr. May refers, I attempted to make it clear that under our law the State Board of Public Welfare, with its broad powers to select and remove local board members, to enforce or prohibit disbursements in particular cases, and to require such reports from the local boards as it may see fit, is in a position virtually to dominate the local boards; that the State Board can certainly "control and direct" the administration of the Social Security plan by county and city boards through the exercise of these broad powers; that to this end it may indicate in advance the requirements upon which it will insist, by the promulgation of "rules and regulations."

From Mr. May's letter, I take it that he wishes a more categorical answer to the question whether the State Board may promulgate formal rules and regulations having the force and effect of law, particularly in the matter of establishing standards for the selection of local employees. The answer to this question is

that under our law the State Board is not authorized to make rules and regulations which of themselves have the force and effect of law.

Mr. May's letter further raises the question whether local boards have complete discretion to deny assistance in a particular case. It is the opinion of this office that no such discretion exists.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **RECORDATION—Lien of Special Assessment for Sidewalks.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 3, 1937.*

HONORABLE HOWARD S. ZIGLER,  
*Timberville, Virginia.*

MY DEAR MR. ZIGLER:

I am in receipt of your letter of February 1, in which you ask the following questions arising under section 3071 of the Code of Virginia:

"Are sidewalk assessments entitled to be recorded in the clerk's office?  
"Is it necessary that a judgment first be secured to entitle such recording?"

In view of the language of the section to which you refer, in my opinion, the first question must be answered in the affirmative and the second question in the negative. The statute expressly provides that "as against a purchaser for value and without notice, such assessment or tax shall not be a lien except and until an abstract of such resolution or ordinance is recorded in the judgment docket of the clerk's office in which deeds conveying real estate in such city, town or county are required by law to be recorded \* \* \*." This language appears to me to be clear.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **REGISTRAR—City Charter Making Town Recorder Ex Officio Registrar—Constitutionality of.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 23, 1936.*

MR. J. J. FAISON, *Chairman,*  
MR. PHILIP FREEMAN, *Secretary,*  
*Electoral Board of Sussex County,*  
*Petersburg, Virginia.*

DEAR SIRS:

This is in reply to your inquiry as to the constitutionality of that provision in the charter of the town of Waverly, Virginia, contained in Acts of the General Assembly of 1926, pages 801-802, in which it is provided that the town recorder shall act as town registrar.

Section 31 of the Constitution of Virginia, 1928, provides for an electoral board of three members for each county and city, and authorizes such board to appoint judges, clerks and registrars of election for its county or city.

In my opinion, section 31 of the Constitution covers the appointment of registrars and excludes authority in the General Assembly to make any such provision for the appointment of registrars as is contained in the charter of the town of Waverly. Therefore, in my opinion, that provision of the charter is inoperative, and the electoral board of Sussex county not only has authority, but it is its duty,

to appoint a registrar for the town of Waverly, and such an appointee is the legal registrar of said town.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**RES ADJUDICATA—Sufficiency of Plea under Certain Circumstances.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *February 18, 1937.*

HONORABLE M. B. COMPTON,

*Trial Justice,*

*Gate City, Virginia.*

DEAR MR. COMPTON:

I am in receipt of your letter of recent date, in which you ask the following question:

"A brings suit on a warrant in debt vs. B due by Tenn. judgment. The case is set for trial before a Va. Trial Justice. When the case is called the justice finds that the proceedings in the Tenn. court have not been properly authenticated or at least the records of the Tenn. court have not been properly brought before the Va. Trial Justice. In view of this fact the Atty. for A (the plaintiff) asks for the case to be dismissed without prejudice. The Trial Justice dismisses the case, but fails to insert 'without prejudice.' A comes before the Trial Justice with another warrant with the proceedings of the Tenn. court properly attested, and in due form the attorneys for B (the defendant) asks for a dismissal on the grounds that in dismissing the first warrant the Trial Justice failed to insert in the judgment (without prejudice). Can the Trial Justice correct the error of omission in the first case and render judgment on the 2nd warrant, no other defense is offered in the case."

For a plea of *res judicata* to be sustained, it must appear, among other things, that the previous case was decided on its merits. (*Richmond v. Sitterding*, 101 Va. 354).

Such an order as you describe, simply dismissing a suit, cannot be said to have passed on the merits of the case. (*Payne v. Buena Vista Extract Company*, 124 Va. 296). It is exceedingly doubtful in such a case as you present that a plea of *res judicata* should be sustained.

I also infer from your letter that the trial justice in dismissing the original warrant did so "without prejudice", but that he overlooked setting out this fact on the warrant. If my assumption is correct, I suggest that this defect could now be cured by a *nunc pro tunc* order. (*Duncan v. Carson*, 127 Va. 306).

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ROADS—Condemnation for Secondary Roads—In Whose Name Proceedings Brought.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 20, 1936.*

HONORABLE S. L. WALTON,

*Attorney for the Commonwealth,*

*Luray, Virginia.*

DEAR MR. WALTON:

This is in reply to your letter of October 16, in which you ask whether the

condemnation proceedings to acquire rights of way for the secondary systems of State highways should be brought in the name of the county, pursuant to section 2039, subsection 1, or in the name of the State Highway Commissioner.

Section 7, chapter 415, Acts 1932, designated as section 1975nn of Michie's Code, provides that the Highway Commissioner can condemn for rights of way in the secondary system in the same manner as is provided for the acquisition of rights of way for the primary system.

Land can also be condemned for rights of way for the secondary system in the name of the board of supervisors, as the local road authorities, pursuant to section 8, chapter 415, Acts 1932, (section 1975oo of the Michie's Code,) continue to have the powers vested in them for the establishment of *new* roads.

I am advised by the Highway Department that it is their practice to co-operate in every way with county authorities in the condemnation of rights of way for new secondary highways. It may be that where the proceedings are conducted by the local authorities, the rights of way can be secured at a cheaper price than where the condemnation is in the name of the State. In either event, the county is required by the statute to bear the costs of the acquisition of the rights of way.

I call your attention to the fact that new secondary roads can be taken into the highway system only with the approval of the State Highway Commission and it would be advisable, in my opinion, before proceeding to acquire any new rights of ways to secure, in advance, the approval of the Commission for the addition of such new road to the system.

It is customary for the Commission to leave it to the choice of the local authorities whether the condemnation proceedings shall be conducted by the local authorities or in the name of the Highway Commissioner.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **SCHOOLS—Bonds—Redemption of Before Maturity.**

##### **COMMONWEALTH OF VIRGINIA,**

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *June 29, 1937.*

M. B. JOYNER, ESQ.,

*Superintendent of Schools,  
Dendron, Virginia.*

DEAR MR. JOYNER:

Complying with your request, I am writing to advise you in connection with the proposed redemption of the district school bonds to which you refer.

You state that there are outstanding against your district certain bonds which, under their own provisions, are callable on July 25 of this year; that there has accumulated in the Sinking Fund a surplus sufficient to cover the redemption of the bonds and coupons at face value as of July 25; that the holder of all the bonds is willing to surrender them immediately only on payment of principal and interest up to the call date—July 25; that the school board wishes to redeem these bonds immediately on these terms in order to improve the appearance of its June 30 financial statement. You request the opinion of this office as to the school board's authority to do so.

I assume that the Sinking Fund is invested, as is usually the case, in a savings account or a certificate of deposit or otherwise in such manner as to draw at least some slight amount of interest.

I know of no provision of law authorizing a school board thus to purchase its own bonds at a premium, however slight, for the sole purpose of improving the appearance of its financial statement.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—District Bonds and Levies for Erecting Building.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 2, 1937.

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

DEAR MR. HITE:

I am in receipt of your letter of January 29, from which I quote as follows:

"A question has arisen in this county as to whether the Board of Supervisors has the authority to lay a levy in a certain district of the said county for the purpose of erecting a high school building in that district.

"Section 673 in connection with sections 2738-39-40 and 41 provide how such funds shall be raised. But construing those sections with section 698 it would seem that the Board of Supervisors of the county, for capital expenditures may levy a special district tax, not exceeding 25c on each \$100.00 taxable value. Does the Board of Supervisors have the authority in section 698 to levy such district taxes for the purpose of erecting a school building in said district?"

It seems clear that section 673 of the Code, as amended in 1936 (Acts of 1936, page 497) contemplates that a school building may be erected at the expense of a particular school district in which the building is located. This section further affords authority for the levying of a special district tax to pay the interest on bonds issued, and to create a sinking fund to redeem the bonds.

I also direct your attention to section 653 of the Code, which was also amended in 1936. This section contains this statement: "\* \* \* provided, however, nothing in this section shall be construed to prohibit the levying of a district tax to provide interest and sinking fund for a district bond issued as provided in section six hundred and seventy-three, \* \* \*." Again, therefore, it is contemplated that a school building may be erected at the expense of a particular district.

It is true that in section 698 it is provided that a special district tax not to exceed twenty-five cents on one hundred dollars may be levied "for existing district indebtedness created prior to September first, nineteen hundred and thirty-six," but you will observe that this provision only refers to "existing district indebtedness"; in my opinion it does not limit the authority contained in section 673 to which I have already referred.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—Division Superintendents—Payment of Salaries—How Apportioned.**

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

MR. A. W. YOWELL,  
*Division Superintendent of Schools,  
Madison, Virginia.*

MY DEAR MR. YOWELL:

I have your letter of July 6, in which you ask the following question:

"The board of supervisors of Madison county recently passed a resolu-

tion which, in effect, is calling on the county school board of Madison county to pay that part of the salary of the division superintendent usually paid by the board of supervisors, out of the county school funds. I am asking you, therefore, to render an opinion, first, as to whether this would be lawful; and, second, would it be legal, should the school board so decide to transfer that stipulated amount to the board of supervisors, for payment by them to the division superintendent."

I call your attention to section 615 of the Code of Virginia, as amended in 1936 (Acts 1936, page 499), which specifically provides that one half of the salary determined to be payable to the division superintendent of schools "shall be paid by the city council or county board of supervisors out of the general fund of the city or county."

I am of opinion that this provision is plain and requires the payment of one-half of his salary out of the general fund of the county or city.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOLS—Election of Division Superintendent—Division Comprising Two Counties.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 10, 1937.*

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

DEAR MR. CURTIS:

I have your letter of February 6, concerning the election of a school superintendent when the school division is composed of two counties.

By sections 132 and 133 of the Constitution of Virginia, the election of division superintendents was transferred from the State Board of Education to the local boards. Section 649 of the Code of Virginia provides that the State Board of Education must "publish on the first of February of the year in which such election is to take place, a statement showing the minimum qualifications for the position of division superintendent of schools, which statement shall be furnished to all applicants." Then it is provided:

*"Within sixty days before May first, nineteen hundred and thirty-three and every four years thereafter there shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. The salary and conditions of appointment shall conform to section six hundred and fifteen. Any vacancy in the office of division superintendent shall be filled by the school board or boards of the division. In the event that the local school board fails to elect a division superintendent within the time prescribed by this section, the State board of education shall appoint such division superintendent.*

*"Where a school division is composed of a city and one or more counties, or two or more counties, the school boards composing the division must meet jointly and a majority vote of the members present shall be required to elect a superintendent."* (Italics supplied.)

It can be seen from this section that the election must be held between March 1 and May 1, or else the State Board of Education shall appoint the division superintendent. There must be a joint meeting, and "a majority vote of the members present" is sufficient for election.

Members of a county school board are elected by the school trustee electoral

board of that county, and "The county school board shall consist of *one member appointed from each school district in the county* by the school trustee electoral board, provided in towns constituting separate school districts and operated by a school board of three members, one of said members shall be designated by the town board as a member of the county school board" (section 653 of the Code; italics supplied). Under section 133 of the Constitution, "*Each magisterial district shall constitute a separate school district*, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly." (Italics supplied.)

Applying these provisions to the case stated, where the board of one county consists of four members and the other county only has three, the rights of the two counties at the joint board meeting are not equal if every member of the respective boards is present.

The proper method of calling the joint meeting would be for the chairmen of both boards to act together, setting the date and giving notice to all the members, but, failing this, a majority of the combined boards (4) may perform this function. Proper notice of the time, date and place of meeting must be given to all members before the joint meeting will be valid. This is the general law for special meetings of boards of this nature. Section 655 of the Code was designed to cover this matter, but because of the unfortunate wording of the last paragraph it cannot be cited as controlling here.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOLS—Employing Relatives of Board Members—"In-Laws."**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 2, 1937.*

HONORABLE MAITLAND H. BUSTARD,  
*Member of the House of Delegates,*  
*Danville, Virginia.*

DEAR MR. BUSTARD:

I am in receipt of your letter of January 30, in which you refer to that provision of section 786 of the Code making it unlawful for a school board of a city to pay any teacher from the public funds if the said teacher is the father, mother, brother, sister, wife, son or daughter of any member of the board. You ask whether or not the prohibited relationships include "any in-law of the said board", such as a sister-in-law.

Inasmuch as the statute specifically designates the relationships prohibited, I am of the opinion that the Legislature intended to cover the whole subject, and that these are the only relationships prohibited. The result is that, in my opinion, the language I have referred to in the statute does not include an "in-law" such as a sister-in-law. In other words, my opinion is that the law, as enacted, contemplates the exclusion only of those specifically designated in the statute.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—Falls Church Separate School District.**

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

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

DEAR DR. HALL:

I am in receipt of your letter of August 22, in which you ask my opinion as to the status of the town of Falls Church as a separate school district. You call my attention to various Acts of the General Assembly amending the charter of the town and to other Acts of the Assembly, all designating Falls Church as a separate school district. It is of particular interest to note that as late as 1933 the town of Falls Church was by the General Assembly continued as a separate school district (Acts 1933, page 94).

Section 653 of the Code provides that all special school districts and special town school districts, with certain named exceptions, "are hereby expressly abolished." An exception is made for special town school districts "which are located in more than one county, which last mentioned districts are hereby expressly retained as they exist at the present time."

You inform me that by court decree the territorial limits of the town of Falls Church have been reduced so that the town now lies in the county of Fairfax. My information is that this decree has been effective since May 1, 1936, subsequent to the last session of the General Assembly.

The principle to be applied in determining whether a general statute has repealed a special or local statute is admirably stated in *Trehy v. Marye*, 100 Va. 40, 43, 44, as follows:

"It is a principle that a general statute, without negative words, will not repeal by implication, from their repugnancy, the provisions of a former one which is special or local, unless there is something in the general law, or in the course of legislation on its subject matter, that makes it manifest that the Legislature contemplated and intended a repeal. When the legislator frames a statute in general terms, or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation to the details of which he had previously given his attention, applicable to a part of the same subject, unless the general act shows a plain intention to do so. Sutherland on Stat. Const., sec. 157.

"The well-settled doctrine derived from all authorities is that laws special and local in their application, are not repealed by general legislation, except upon the clearest manifestation of an intent by the Legislature to effect such repeal, and, ordinarily, an express repeal by some intelligible reference to the special act is necessary to accomplish that end. \* \* \*

Applying the principle thus enunciated by our court, I am of opinion that it was not the intention of the General Assembly to abolish the status of the town of Falls Church as a separate school district and that, therefore, the town now occupies this status. I do not see how this conclusion can be escaped when the history of the statutes involved is considered.

Section 653 of the Code was amended in 1936 (Acts 1936, page 502), but, so far as the status of Falls Church is concerned, there is nothing in the amended section different from the section as it existed in 1930. As I have stated, it is most significant that by a special Act since 1930 the General Assembly expressly recognized the status of Falls Church as a separate school district. And when the General Assembly was in session in 1936 Falls Church was located in more than one county, and, therefore, no change was made in the section so far as Falls Church is concerned.

It seems to me, therefore, that the conclusion is irresistible that it was the manifest intention of the General Assembly, and in construing a statute the intention of the legislative body must be maintained if possible, to retain Falls

Church as a separate school district. Therefore, I do not think that this plain intention is nullified by the action of the court since the General Assembly met in 1936. If there had been no special Acts on the subject, the argument for the change in the status of the town would be strong, but when the General Assembly has time after time in special Acts, the last one as late as 1933, retained Falls Church as a separate school district, and has also attempted to preserve this status by general law, I am of opinion that this intention should prevail in the light of the principles laid down in *Trehy v. Marye*, *supra*.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—General Management of, Under County Executive Form of Government.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *January 27, 1937.*

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,*  
*Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of January 21, enclosing correspondence with Mr. C. M. Garnett, Chairman of the Albemarle County School Board. Mr. Garnett's letter goes into some detail in connection with the powers of the School Board of Albemarle County in the light of the fact that that county has adopted the county executive form of government as authorized by chapter 109-D of the Code (Michie's Code of Virginia, 1936). The effect of Mr. Garnett's letter, however, is to inquire as to the general power of the County School Board under the county executive form of government. This involves the construction of a number of constitutional and statutory provisions:

Section 133 of the Constitution provides that:

"The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law \* \* \*"

Section 136 of the Constitution provides that each county, city or town may raise additional (to the State appropriation authorized in section 135 of the Constitution) sums by a tax on property subject to local taxation not to exceed a rate of levy to be fixed by law, such sums to be apportioned and expended by the local school authorities in establishing and maintaining such schools as in their judgment the public welfare may require.

For a discussion of the powers of the local school board, see the recent case of *School Board v. Shockley*, 160 Va. 405.

The powers and duties of local school boards are set out in the general law and notably in sections 655, 656, 657 and 660 of the Code. It is not necessary to discuss these sections in detail except to say that their effect is to carry out the mandate of the Constitution that the supervision of the schools shall be vested in a school board.

Section 2773 (38) of the Code sets up the Department of Education in the county executive form of government. It provides, among other things, that the county school board shall be composed of not less than three nor more than seven trustees, who shall be chosen by the board of county supervisors to serve at the pleasure of the said board. This method of selecting a school board differs from that provided by general law, but the Constitution (section 133) expressly provides that the manner of selecting, the term and number of members of the school board shall be provided by law. Section 2773 (38) further provides that: "Except as herein otherwise provided, the county school board and the division superin-

tendent of schools shall exercise all the powers conferred and perform all the duties imposed upon them by general law."

In view of the Constitution and the statutory provisions to which I have referred, it is my opinion that under the county executive form of government it is plainly contemplated that the management of the schools shall be vested in the school board, and that the duties of this board shall continue to be as provided in the sections of the Code to which I have referred. It follows from what I have said that, so long as the school board remains within the bounds of its budget, it alone has the final authority to determine how and for what purposes the funds at its disposal shall be spent.

So far as the purchasing of supplies is concerned, it seems to me that this is also the function of the school board, but, where the county has a purchasing agent, I should say that, as a matter of policy, it would be an economical thing for the school board to have the purchasing agent purchase its supplies upon requisition of the school board or by some other mutually satisfactory method.

In view of the fact that the powers and duties of the school board are so plainly set out by statute, I do not deem that you desire me to go into any further detail.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

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**SCHOOLS—Incorporated Towns—Tax to Increase Teachers' Salaries or Extend Term.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 25, 1937.

DR. SIDNEY B. HALL,

*Superintendent of Public Instruction,*

*State Board of Education,*

*Richmond, Virginia.*

DEAR DR. HALL:

I have your letter of March 15, enclosing a letter from Mr. L. M. Hulvey, Dayton, Virginia, dated March 11, in which he asks if incorporated towns may, with their taxing authority, add to teachers' salaries or extend school terms.

Section 698 of the Code of Virginia (Michie, 1936) provides in part:

"\* \* \* Councils in the incorporated towns in any county in the State are authorized to levy an additional tax of not more than one dollar on the one hundred dollars taxable values of property in said town subject to taxation by the local town authorities \* \* \*."

I am of the opinion that it is within the power of the councils of incorporated towns to levy additional taxes, and that these additional monies may be used for increasing the salaries of teachers in the schools within the towns or to extend the terms of said schools.

Yours very truly,

ABRAM P. STAPLES,

*Attorney General.*

**SCHOOLS—Textbooks—Requiring Parents to Provide.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 24, 1937.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,*  
*Richmond, Virginia.*

DEAR DR. HALL:

I have your letter of March 16, enclosing inquiry of Mr. G. L. H. Johnson, Superintendent of Schools at Danville, Virginia. The question as stated by Mr. Johnson is:

"If a parent refuses to buy the prescribed textbooks and also refuses or fails upon request to apply for 'free' books in the manner prescribed by the School Board, what lawful steps can be taken to meet the need?"

I am of the opinion that there are no legal steps whereby the recalcitrant parent can be forced to supply textbooks for his child, or sign the papers required by the local school board in the case of indigents.

Other steps which the school board might take to supply this need must be determined by the local school board, for such are purely local matters.

Sections 663 and 786 of the Virginia Code (Michie 1936) bear out the conclusion that the local school board decides what children are entitled to free textbooks by reason of the poverty of their parents. Section 692 of the Virginia Code places the determination of furnishing free textbooks to all pupils in public schools within the discretion of the local school board.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—Towns Constituting Separate School District—Representation on County Board Where Town Lies in Two Counties.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 4, 1937.

MRS. MARY K. COOLEY, *Chairman,*  
*Carroll County School Board,*  
*Hillsville, Virginia.*

MY DEAR MRS. COOLEY:

I am just in receipt of your letter of March 3, which for purposes of reply I quote in full:

"Division Superintendent for Carroll County is to be elected by Carroll County School Board on March 6. The town of Galax is located partly in Carroll County and Grayson County. They have in the town of Galax a school board made of three trustees for the town district. They have not designated any member of this board, as provided by section 653, to be member of Carroll County School Board. However, they are sending as their representative their Town Manager, who is not even a member of their school board, who proposes to vote in the election of the Division Superintendent. None of the school trustees live in Carroll County, but in Grayson County, as also does the Town Manager. The said trustees are also members of the Town Council.

"Approximately 85 per cent of the district is in Grayson County, and the Galax teachers' certificates are endorsed by the Division Superintendent

of Grayson County. Carroll County merely pays for the pupils that attend the Galax School from Carroll County.

"The question has been raised as to whether or not under the foregoing statements of facts does the representative from the town of Galax have a right to vote in our meeting in the election of Division Superintendent. As Chairman of said Carroll County School Board, I am asking your opinion as to this. If possible, I would like your reply before or by March 6. The election will be in the afternoon of March 6."

Section 653 of the Code provides in cases of special town school districts that one member of the town school board shall be designated as a member of the county school board. Inasmuch as you state that the Town Manager of Galax is not a member of the Galax School Board, it is clear that he may not be designated as a member of the Carroll County School Board, with the privilege of voting as a member of said board for any purpose.

Section 644a of the Code clearly contemplates that a member of a county school board shall be a resident of the county on whose board such member serves. The reason for this provision is obvious. The county school board has important duties to perform, such as passing on the school budget, and the entire management, control and operation of the schools in the county. The situation would be indeed unique if a resident of one county, with no direct interest in another county, probably not even a taxpayer therein, should have a voice in the management of the fiscal and other important school affairs of the second county. I am sure that the Legislature never intended that such an eventuality should arise.

Therefore, construing sections 644a and 653 together, I am of the opinion that, in order for a member of a special town school board to be a member of the school board of the county in which the town or a part thereof lies, such town school board member must be a resident of that portion of the town lying in the county on whose school board he is designated to serve. Any other construction of these statutes would, it appears to me, result in an absurd situation.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **SCHOOLS—Transportation—Duty of County to Furnish—Children from Another County.**

#### COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *March 4, 1937.*

DR. SIDNEY B. HALL,

*Superintendent of Public Instruction,  
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of March 2, enclosing one from Mr. T. Ryland Sanford, Jr., Superintendent of Warwick and York County Schools.

As I understand the situation presented, it is that certain residents of York county have elected to send their children to an elementary school in Williamsburg and to pay the tuition imposed by the city of Williamsburg. It appears from Mr. Sanford's letter that York county provides an elementary school which these children may attend and provides transportation for the pupils attending that school.

My opinion is desired on the question of whether or not the County School Board of York County is under any obligation to furnish transportation to these York county children whose parents have elected to send them to the Williamsburg school.

Section 656 of the Code provides that the county school board shall "provide

for the consolidation of schools and for the transportation of the pupils whenever such procedure will contribute to the efficiency of the school system."

I do not think that by any reasonable interpretation of this language it could be held that a county is required to furnish transportation to pupils whose parents elect to send them to schools in another county or city, especially where the county furnishes adequate school facilities for the children of its residents. To illustrate the unsoundness of such a proposition, if the parents elected to send their children to a school in Richmond and paid tuition therefor, surely no one would contend that the county was obligated to furnish free transportation to Richmond for those children.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOLS—Trustee Electoral Board—Appeal from Action of.**

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

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

DEAR MR. JONES:

I am in receipt of your letter of July 13, in which you ask if there is a right of appeal to the circuit court from the action of a school trustee electoral board.

As I understand it, a school trustee electoral board only has the duty of appointing the county school board, and I know of no statute providing for an appeal from the action of the school trustee electoral board. In the absence of a statute specifically allowing an appeal, I am of opinion that there is none.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOLS—Tuition—Business Courses in Public Schools.**

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

HONORABLE THOS. H. LION,  
*Attorney for the Commonwealth,*  
*Manassas, Virginia.*

MY DEAR MR. LION:

I am in receipt of your letter of November 11, in which you inquire if a county school board has a right to charge a fee or tuition for students who desire to take a bookkeeping or commercial course. You state that this course is not required by the State Board of Education, but is permitted by the Board to be taught.

Section 672 of the Code, as amended in 1936 (Acts 1936, page 786) provides that "no tuition shall be charged for pupils attending high school" except in certain designated cases, which are not material here. The section further provides that the State Board of Education shall provide rules and regulations governing the conduct of high schools.

In view of the authority given the State Board of Education, it seems to me that the commercial course could not be given unless it was permitted by the Board, even though it may not be a required subject. This being one of the courses authorized by the State Board of Education, I cannot see any escape from the conclusion that it comes within the provision against the charging of tuition in high schools and that, therefore, no tuition can be charged for this subject. In other words, the subject cannot be taught unless authorized by the State Board of Education and, having been so authorized, no tuition can be charged therefor in view of the language of the statute.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

P. S.—While it has no bearing on the construction of section 672 of the Code, I call your attention to section 682 of the Code, which provides that a school board may charge tuition to persons between the ages of twenty and twenty-five years, under regulations to be prescribed by the State Board of Education.

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**SCHOOL BOARDS—Compensation and Remuneration of Members, Chairman.  
Contracts—Interest of Members in.**

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

MR. G. TYLER MILLER,  
*Superintendent of Schools,  
Front Royal, Virginia.*

DEAR MR. MILLER:

I am in receipt of your letter of August 21, in which you ask a number of questions. I shall repeat each question and then express my opinion thereon.

"1. Is it permissible under the law to pay expenses of school board members serving as delegates to the annual meeting of the Virginia School Trustee Association in Richmond, provided an itemized statement of such expenses is submitted to the board and approved in meeting?"

If the school board determines that such expenses are necessary in the successful operation of the school system of the county, I am of opinion that they may be allowed.

"2. Is it permissible under the law to pay any other necessary expenses incurred by board members in attending to business for the school board?"

The answer to this question is included in my answer to your first question.

"3. Is it permissible under the law to purchase gas, oil and repairs for school busses from a firm of which a member of the school board is part owner without permission of the State Board of Education, provided he does not solicit this business? If the State Board of Education approves the above arrangement, does this make it legal?"

I call your attention to section 708 of the Code, as amended in 1936 (Acts 1936, page 514), dealing with contracts for school buildings and school supplies, etc., and especially the last part thereof, which states that the prohibitions of the section "shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected or adopted by the State Board of Education or supplies used in the school and by the pupils."

I am of the opinion that certainly the spirit of this language is broad enough to cover the sale of gas and oil to the school busses, although such sales are not covered by the specific language of the section. I do not think that the exception can be said to cover repairs to school busses. In view of the penalties imposed by the statutes, in my opinion, it would be the prudent thing for transactions of this character to be approved by the State Board of Education, as authorized by the section.

"4. Is it permissible under the law to pay a school board member, who is a civil engineer, for making surveys, plats, etc., of school lots and other school property without approval by the State Board of Education of such employment? If the State Board of Education approves the above arrangement, does this make it legal?"

Such work as you describe is not in terms embraced in the prohibitions contained in section 708 of the Code, but it seems to me that it is included in the spirit of the section and, in my opinion, it would also be more prudent in this case to secure the consent of the State Board of Education.

"5. Is it permissible under the law to compensate the chairman of the school board for extra services in signing warrants and other papers and for transacting other school business between meetings of the board?"

Section 653 of the Code, as amended in 1936 (Acts 1936, page 502) provides in part:

"The county school board may in its discretion provide for a per diem not exceeding five dollars per day and mileage not to exceed five cents per mile for each mile of travel on each day of such attendance by most direct route in going to and returning from the place of meeting for each member for each day he is in attendance upon meetings of the board, not to exceed thirty days in any one year, such per diem to be paid as other school expenses are paid.

I am of opinion that this section covers the entire matter of compensation of members of the board and that there is no authority for additional compensation to the chairman, as suggested in your question.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOL BOARDS—Expenditures by—Requirements as to Budget, Appropriations, etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 4, 1937.*

HONORABLE S. J. THOMPSON,  
*Commonwealth's Attorney,*  
*Rustburg, Virginia.*

DEAR MR. THOMPSON:

I have your letter of the 1st instant, replying to my inquiry as to whether or not there is any fund in the possession of the School Board of Campbell County available for the purpose of building an auditorium at New London Academy. You state there is no fund available for this purpose.

The public school laws of this State provide for an annual budget to be submitted to the board of supervisors for the purpose of the operation of the county public school system during the coming year. If the board of supervisors approves the budget and appropriates money for that purpose, it is not permissible that this fund so appropriated shall be used for purposes other than those disclosed in the budget. Under these circumstances, it is my opinion that the School

Board would not have the power to expend this money for the construction of an auditorium at the New London Academy.

As I wrote you in my letter of December 29, I know of no way in which the board of supervisors can be compelled to provide this money other than by the filing of a petition for a writ of mandamus to compel same.

It is well settled that, although a general statute provides for the payment of certain moneys by a government agency, nevertheless, the money must be first raised by taxation and appropriated by the proper authority before the mandates of the statute can be carried out.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOL BOARDS—Sale of School Property—How Conducted.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 17, 1936.*

HON. W. O. FIFE,  
*Commonwealth's Attorney,  
Charlottesville, Virginia.*

DEAR MR. FIFE:

I have before me your letter of the 16th instant, in which you request my opinion upon the question as to whether, under the provisions of section 678 of the Code, the school board is required to sell at public auction school property which the board desires to sell.

Section 678 confers upon the school board the same power to sell, exchange and convey the real and personal property held by the school board as the board of supervisors of the county has in reference to the power to sell, exchange and convey other county property.

Section 2723 of the Code confers upon the board of supervisors the power to sell at public or private sale the corporate property of the county provided, however, that no sale shall be made without the approval and ratification thereof by an order of the circuit court or by the judge thereof in vacation entered of record.

Section 678 contains the proviso that the school board may sell property not exceeding \$500 in value at public auction after the required advertising. It is my opinion that the effect of this proviso is to dispense with the necessity of having the court approve a sale of such property not exceeding \$500 in value where sold at public auction after the required advertising. Where the school board desires to sell property in excess of \$500, it is my opinion that it is optional with the board to sell same either at private or public sale, but in either case I think the approval of the court or the judge in vacation is necessary.

With best wishes, I am

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARDS—Term of Office under County Manager Form of Government.**

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

MR. J. MILTON SHUE,  
*Division Superintendent of Schools,  
Henrico Court House,  
Richmond, Virginia.*

MY DEAR MR. SHUE:

I am in receipt of your letter of July 10, in which you say:

"Section 653 of the Virginia School Code says that county school board members shall be appointed before July 1 of the year 1928 and each four years thereafter.

"Under the county manager form the appointing of school board members is placed in the hands of, and it indicates that the school board member shall serve at the will and pleasure of, the county board of supervisors.

"The question in my mind is whether the county manager act supersedes the general school law in this case, and that there is no definite period of holding office by the school board member."

Under the county manager form of government there is a Department of Education. Section 2773 (64) of the Code, setting up this Department, provides that it shall consist of the county school board, the division superintendent of schools and the officers and employees thereof. The section further provides that, except as therein provided, the county school board and the division superintendent of schools shall exercise all the powers conferred and perform all the duties imposed upon them by general law. However, the section contains this language:

"\* \* \* The county school board, shall be composed of not less than three nor more than seven trustees, who shall be chosen by the board of county supervisors to serve at the pleasure of the appointing board. \* \* \*"

It seems to me that the quoted language is plain and to that extent supersedes the provisions of section 653 of the Code, to which you refer.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARDS—Validity of Agreement for Financing City School for Use of County and City Pupils.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 25, 1937.

HONORABLE B. D. PEACHY,  
*Commonwealth's Attorney,  
Williamsburg, Virginia.*

DEAR MR. PEACHY:

Your letter presents the following statement of facts:

"For a number of years the City of Williamsburg has been maintaining, in said city, a colored school, to which the colored pupils of the county have

been admitted upon the payment by the county of an agreed portion of the operating expenses. The county has been contributing nothing towards the maintenance of the school property. The building is now in great need of repair, and the two bodies estimate that it will require about \$8,000.00 to place the building and other property in suitable condition. The city school board is willing to pay the entire cost of these repairs and to allow the county to continue to send its colored pupils to the school, upon condition that the county will agree to reimburse the city for a certain portion of such expense, based on the ratio of pupils from the county and the city; reimbursement to be made in annual installments extending over a period of several years. The county board is willing to do this but wishes a provision to be inserted whereby the city board, when and if this school property is sold, will reimburse the county for the amount expended, on some suitable basis to be agreed upon. \* \* \*

You request the opinion of this office as to the authority of the two school boards to enter into such an agreement.

I quite concur in your opinion that, under sections 656, 715 and 786 of the Code (Michie 1936), the two school boards are authorized to incur, for the repair of this building, such expenses as are provided for in their respective budgets. I also agree with you that neither board can properly assume the further obligations involved in the proposed agreement, as I am unable to find any authority under which school boards may bind the school property, or succeeding boards, in such manner.

Your attention is directed to section 682 of the Code, providing that:

"\* \* \* The State Board of Education shall have power, and it shall be its duty, to make regulations whereby the children of one county may attend school in an adjoining county, or an adjoining city."

Under this statute the State Board of Education has adopted the following regulation:

"Children within the legal school age residing in one county may attend the public schools of an adjoining county or city either on the prepayment of an amount not exceeding the total per capita cost of tuition and maintenance in the division to which pupils are sent, or upon the conditions of any mutual agreement reached between the two county school boards or the county and city school boards concerned." (Regulations relating to local school boards, paragraph 18.)

As already indicated, I do not think this statute and regulation authorize school boards to make such an agreement as the one you describe, or any other agreement violating the statutory restrictions on their powers with reference to incurring costs and expenses. However, I call attention to section 682 and the regulation quoted from in the hope that, under their provisions, the two school boards may be able to devise an agreement adequate to their purposes and consistent with their general powers.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SENTENCE AND PUNISHMENT—Suspension of Sentence—Jail Sentence for Driving after License Revoked.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 26, 1937.*

HONORABLE R. PAGE MORTON,  
*Commonwealth's Attorney,*  
*Charlotte Court House, Virginia.*

DEAR MR. MORTON:

I have your letter of April 23, requesting the opinion of this office as to whether a trial justice has the power to suspend jail sentences imposed by sections 2154(198) and 2154(206) of the Code (Michie 1936), dealing with the offense of driving a motor vehicle after suspension of the driver's license. You state that you are under the impression that the jail sentence in such cases is mandatory.

Section 1922b of the Code permits any court having jurisdiction in any criminal case to suspend the execution of sentence, or commitment, "if there be circumstances in mitigation of the offense, and if it appear compatible with the public interest."

I find nothing in the statutes to except cases under sections 2154(196) and 2154(206) from the operation of section 1922b, or to indicate that the jail sentence prescribed by those sections is mandatory except in the sense that it is the minimum sentence which may be imposed.

You also ask whether a conviction under either of these sections operates to suspend the defendant's license for an additional period. This question is answered in terms by Code section 2154(186), paragraph (b), which is as follows:

"The division upon receiving a record of the conviction of any person upon a charge of operating a motor vehicle while the license of such person is suspended or revoked, shall immediately extend the period of such first suspension or revocation for an additional like period."

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**SEWAGE—Hampton Roads Sewage Disposal Commission—Functions in General.**

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

HONORABLE A. E. S. STEPHENS,  
*Member of the House of Delegates,*  
*Smithfield, Virginia.*

DEAR MR. STEPHENS:

I have your letter of November 10, in which you request my opinion as to what powers the Hampton Roads Sewage Disposal Commission possesses. This Commission was created by an act of the General Assembly of Virginia, Acts of 1936, page 562.

The powers conferred upon the Commission are very broad. It is made a body corporate, with power to acquire by purchase, gift, condemnation or otherwise, and to construct, maintain and operate trunk, intercepting and outlet sewers, pumping and ventilation stations, treatment plants or works, and such other plants and structures as the Commission may deem advisable for relieving the waters of the Hampton Roads-Chesapeake Bay area from pollution and for preventing such pollution.

The Commission is further authorized to enter into contracts and agreements with counties, cities, and towns, providing for the disposal of sewage and wastes which contribute, or are likely to contribute, to the pollution of said waters, and to charge and collect fees in compensation for such services. The counties, cities and towns located in the area are likewise authorized to enter into such contracts and to pay such fees and charges.

The Commission is also authorized to borrow money and to secure the same, and to apply to the United States for grants of money, and to accept and receive gifts, grants and contributions for the purpose of carrying out the provisions of the act.

The only limitation I can find upon the general powers of the Commission is the restriction that it shall not exercise any powers conferred by section 5 in any county, city or town until the board of supervisors, council or other governing body shall have assented thereto by a resolution adopted by a majority of the members thereof.

The act expressly provides that the Commission shall have no power or authority to create any indebtedness for or on behalf of the State, and that any bonds, notes or other obligations which may be issued by the Commission shall not constitute a debt of the State.

It is my opinion that the Commission is authorized to formulate plans, acquire properties, install and operate the necessary machinery to carry out the purposes of the act, and may borrow money or enter into contracts with counties, cities and towns, or receive grants or gifts for this purpose.

This letter is necessarily very general in its terms as your question is also general. If there are any specific plans in contemplation about which you or the Commission are in doubt, I shall be glad to answer any specific inquiries which you may refer to me.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SHERIFFS—Duty to Arrest Patients Furloughed from State Hospitals.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *October 8, 1936.*

J. V. WATTS, ESQUIRE,  
*Sheriff of Rockbridge County,*  
*7 South Main Street,*  
*Lexington, Virginia.*

DEAR MR. WATTS:

This will acknowledge receipt of your letter of October 2. You state that you and your deputies are frequently called upon by representatives of the Western State Hospital to arrest persons who have been committed to the hospital as inebriates and released on furlough, and whose return to the hospital is required by the superintendent because of their subsequent conduct; that these representatives are sometimes not armed with a warrant. You request the opinion of this office as to whether it is your duty, and that of your deputies, to make such arrests.

Under section 1041 of the Virginia Code (Michie 1936), the superintendent of a hospital may treat as "an escape" any patient who fails to return to the hospital when required by him. Under section 1044 of the Code, the superintendent is authorized to issue a warrant for the arrest of any escaped patient, and any officer authorized to make arrests is expressly required to execute such warrants.

It is therefore the opinion of this office that it is your duty, and that of any of your deputies, to execute any such warrant as may be issued to you by the superintendent. I find nothing in the law which requires you to make such arrests without a warrant.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SHERIFFS—Fees and Mileage—Executing and Attempting to Execute Warrants and Search Warrants.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., November 12, 1936.

HONORABLE JOE W. PARSONS, *Clerk,*  
*Circuit Court of Grayson County,*  
*Independence, Virginia.*

MY DEAR MR. PARSONS:

I am in receipt of your letter of November 10, in which on behalf of the Sheriff of Grayson County you ask several questions.

Your first question is:

"If he has a warrant in his hands for the arrest of a man fifteen miles from this place, is he entitled to mileage in going this distance in case he does not arrest or find the party he has a warrant for?"

I know of no statutory provision for mileage in this case.

Your second question is:

"Also, in case he does find the party he is after, is he then entitled to his mileage for his trip after the prisoner and bringing him back to jail, which in the above case would be thirty miles?"

Section 3508 of the Code provides that "for carrying a prisoner to jail under order of a justice" the officer is entitled to mileage "for each mile traveled of himself in going and returning." This office has heretofore ruled, in view of this provision, that the officer is entitled to mileage for himself for the entire number of miles traveled in going and returning, and in the case you mention the total mileage would be thirty.

I also call your attention to the fact that this section further provides that in such a case the officer is also entitled to mileage "for each mile traveled of the prisoner in carrying him to jail, where the distance is over ten miles \* \* \*."

Your next question is:

"Also, is he entitled to mileage in executing a search warrant, where no arrest is made?"

In this case I have found no statute authorizing the charge for mileage, the fee being fixed at \$1 by section 3508 of the Code.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SHERIFFS AND SERGEANTS—Fees—Transporting Prisoner to Jail.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., October 26, 1936.

HONORABLE C. N. SPECK,  
*Sergeant,*  
*Waynesboro, Virginia.*

DEAR MR. SPECK:

This is in reply to your letter of October 20, in which you request information as to the compensation allowed sergeants for carrying prisoners to jail under the 1936 Act.

Chapter 338, page 545, of the Acts of the General Assembly of 1936, amends section 3487 of the Code so that the Ninth Clause thereof reads as follows:

"For carrying a prisoner to or from jail, and every mile of necessary travel an amount equivalent to the necessary toll and ferry charges incurred by the officer, if any, and five cents per mile, which shall be charged and taxed as a part of the court costs."

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**SLOT MACHINES—Confiscation—When Authorized.**

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

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

MY DEAR MR. JOHNSON:

I am in receipt of your letter of July 18, in which you ask my opinion on the following question:

"Will you kindly advise me whether or not the sheriff of a county has the authority under the present slot machine law, to remove or cause to be removed a slot machine from a public place, store or business house when no complaint has been made and there is no evidence of gambling, save only the fact that the machine pays off in nickels or other coins of value, without first being ordered to do so by the court or Commonwealth's Attorney?"

It seems to me that your question is specifically answered by sections 4676 and 4685 of the Code and the sections mentioned therein. I can find no authority for the seizure of the machine in the circumstances related by you. The methods by which the machines may be seized are clearly set out in the sections I have mentioned.

In this connection I call your attention to the new slot machine act of 1936 (Acts 1936, page 397), which act, however, does not go into effect until December 31, 1936.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**SLOT MACHINES—Legality of Operating Certain Machines.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 1, 1937.

HONORABLE A. D. WATKINS,  
*Attorney for the Commonwealth,*  
*Farmville, Virginia.*

MY DEAR JUDGE WATKINS:

I am in receipt of your letter of February 25, in which you ask my opinion on the legality of the following described slot machines:

"These machines are operated on the nickel-in-the-slot principle. When the player deposits the coin, he is entitled to shoot five balls. If these balls

hit certain lights, a number will appear on a recording instrument. Therefore one person may make a larger score than another. This machine does not have the familiar 'kitty' or 'jackpot'; no token or anything of value is returned to the player directly or indirectly. The owner of the machine receives only the nickel that is deposited."

You further state that these machines do not give any merchandise or coins, but are used solely, the owner claims, for the purpose of amusement. I assume from your letter that the player of the machine may not even secure an additional right to play the machine, and I, of course, assume that the machines are not kept for the purpose of gaming.

As you know, there are a number of statutes dealing with slot machines and, without going into detail as to their provisions, I may say that, in my opinion, such a machine as you describe and used as set out in your letter is not forbidden by any of these statutes.

Of course, it is unnecessary for me to say that this opinion is limited to the facts in this particular case.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **SLOT MACHINES—Legality of Operating Certain Machines.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 1, 1937.*

HONORABLE W. R. BROADDUS, JR.,  
*Attorney for the Commonwealth,*  
*Martinsville, Virginia.*

MY DEAR MR. BROADDUS:

I have your letter of January 25, in which you ask if any law of the State of Virginia is violated by an individual who is operating as follows:

"The machine in question is a table and is operated by means of balls, five of which are obtained for 5 cents. The person using the machine can only make a score and receives nothing directly from the machine. However, each person who plays the machine has his score listed. At the end of each day the person making the highest score receives a prize. In some instances this prize is rather substantial."

As you know, the last General Assembly passed a rather comprehensive statute prohibiting the operation and manufacture of certain slot machines. (Acts 1936, page 397). This Act consisted of adding a new section to the Code to be numbered 4496a.

However, it seems to me that, in the case you present, it is not necessary to pass on the question of whether the slot machine act is being violated, for the reason that I do not think there can be any serious question but that this operation constitutes a violation of section 4693 of the Code prohibiting lotteries. See *Maugh's v. Porter* 157 Va. 415.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**SLOT MACHINES—"Pin Games"—Offering Weekly Prizes.**

## COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

HONORABLE R. NORMAN MASON,  
*Attorney for the Commonwealth,  
Accomac, Virginia.*

RICHMOND, VA., *March 18, 1937.*

DEAR MR. MASON:

This is in reply to your letter of March 9, in which you request my opinion upon the interpretation of chapter 247 of the Acts of 1936, being section 4694a of the Code of Virginia, as applied to a case where the operator of a pin table slot machine offers to give a daily or weekly prize for the high score made by a player of the machine.

The statute in question provides that it is unlawful for any person to have a slot machine in his possession except for sale outside of the State. A slot machine within the meaning of the statute is defined as any machine that is adapted for use in such a way that, as a result of an insertion of any piece of money or coin, such machine is caused to operate in such a manner as to cause the user or player to receive or become entitled to receive any piece of money, credit, or thing of value. It seems to me to be clear that, where the operator offers a prize as indicated in your letter, depending upon the unpredictable operation of the machine, this comes within the terms of the language above referred to.

The only exception to the above language is where the unpredictable operation of the machine is dependent upon the skill of the operator, and the only reward the player receives is the automatic right to play the machine for amusement only without the insertion of any further slug, coin or token.

After all, questions of this kind are usually questions of fact, depending upon all of the circumstances in the case, and generally may be said to present questions for a jury.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE COLLEGES AND UNIVERSITIES—Residence of Students.**

## COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

DR. SAMUEL P. DUKE, *President,*  
*The State Teachers College,  
Harrisonburg, Virginia.*

RICHMOND, VA., *November 9, 1936.*

MY DEAR DR. DUKE:

I am in receipt of your letter of October 31, in which you ask if a daughter of an employee of the Federal government, such employee now living in the Canal Zone, would be entitled to the rates accorded Virginia students at your institution, in view of the provisions of chapter 331 of the Acts of the General Assembly of 1936.

You state that the father of the young lady formerly was a resident of this State, living at Lawrenceville, Virginia, and has been employed as keeper of the Gatun Locks of the Panama Canal for the past several years. However, you assume that the father has not abandoned his legal residence in Virginia and still retains his Virginia citizenship.

The question of the domicile of the father in this case is controlled by the facts. It seems to me that in a situation such as you describe it would be proper before admitting the daughter under the circumstances to investigate as to whether or not the father is retaining his legal residence and citizenship in Virginia. For example, the father's own statement as to the fact of residence and

his intention in connection therewith should be secured, and it might be well also to ascertain whether or not he is continuing to pay taxes in this State, such as income taxes and property taxes, if he is liable therefor, and also capitation taxes. Any other pertinent facts as to the legal residence should be secured.

If the facts should disclose that the father has not abandoned his legal residence in Virginia but, on the contrary, is retaining his residence and citizenship here, then I am of the opinion that there is nothing in chapter 331 of the Acts of 1936 to prohibit the daughter from being treated as a Virginia student.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE EMPLOYEES—Compensation—When Governor's Consent Necessary for Increase, etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 30, 1936.*

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

DEAR MR. COMBS:

I have before me your letter of September 29, in which you refer to section 3477a of the Code and section 2 of the 1936 Appropriation Act (Acts 1936, p. 962).

Section 3477a is as follows:

"The salary of no State officer or employee which is payable by the State and which is not specifically fixed by law, and the salary of no officer or employee of any State institution, board, commission or agency which is not specifically fixed by law, shall be hereafter increased, or authorized to be increased, without prior authorization of said board or commission *and the consent of the governor first obtained in writing in each case.* Any violation of this section shall constitute misfeasance in office. Provided, however, that nothing herein contained shall apply to teachers in the elementary or high schools of the Commonwealth, or to employees receiving compensation *not in excess of one hundred dollars per month.*"

Section 2 of the Appropriation Act contains this provision:

"\* \* \* The compensation of each official and employee who enters the service of the State during the period beginning January 1, 1936, and ending June 30, 1938, shall be fixed *for the aforesaid biennium* at such rate as shall be approved by the Governor, \* \* \*."

You request my opinion upon the question whether your duties as Comptroller require you to approve payment of payroll vouchers, without the written consent of the Governor, in the following cases:

1. Where the salary of an employee who was employed by the State or its agency prior to January 1, 1936, is increased, and the salary, after the increase, is not in excess of \$100 per month.

In such cases, I am of opinion that the provisions of section 3477a control, and the Governor's consent is not necessary to make the increase effective.

2. Where the salary of an employee who was employed by the State or its agency after January 1, 1936, is increased, and the salary, after the increase, is not in excess of \$100 per month.

A case of this kind, in my opinion, is also governed by the above quoted provisions of section 3477a, and the Governor's approval is not required.

3. Where such a new employee is employed to fill a position made vacant by death, resignation or other cause, and the salary of the position is already fixed.

In my opinion the approval of the Governor is necessary under the above quoted provisions of section 2 of the Appropriation Act.

4. Where an employee is promoted to a position with a fixed salary in excess of the salary of his or her former position.

Whether the employee entered the service of the State prior to or after Janu-

ary 1, 1936, I do not believe the Governor's approval is necessary. (Op. Attorney General, 1931-1932 Report, p. 154.)

5. Where persons are employed to do temporary work.

It is my opinion that the Governor's consent is not required for temporary employees. Section 2 of the Appropriation Act contemplates employees with a permanent salary status.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE HOSPITALS FOR THE INSANE, EPILEPTIC, ETC.—Deceased Patient's Estate—Right of Hospital to Share In.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 24, 1937.

DR. J. S. DEJARNETTE, *Superintendent,*  
*Western State Hospital,*  
*Staunton, Virginia.*

DEAR DR. DEJARNETTE:

I have your letter of June 18, requesting the opinion of this office as to whether your institution is entitled to share in the distribution of the estate of one Charley Horsley. You state that the decedent was admitted to the hospital in 1882 and remained a patient there until the time of his death in March of this year, and that he made no payment for his care and treatment from 1882 to 1908, during which time the law required of patients who were able to do so, that they make certain payments to defray the costs of their maintenance.

Your question seems to be expressly answered by the unambiguous language of Virginia Code (Michie 1936) section 1058, which is in part as follows:

"The estate of any person committed to any hospital for the insane or colony for the epileptics or the feeble-minded shall not be charged with any expense incident thereto or for his maintenance therein. \* \* \*"

Assuming, then, that the patient was a regularly committed insane person—not admitted as an inebriate, or as a voluntary patient, or as an ex-service man,—in the absence of some express contract with the patient's committee, it is the opinion of this office that the law gives the hospital no right to share in the distribution of this estate.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE INSTITUTIONS—Payment of Fees By—Fee of Clerk for Recording Certain Papers.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 8, 1937.

DR. J. S. DEJARNETTE, *Superintendent,*  
*Western State Hospital,*  
*Staunton, Virginia.*

MY DEAR DR. DEJARNETTE:

I have your letter of March 4, in which you state:

"In all of our sterilization cases we have to make application to the court in Staunton for appointment of guardian. We make the forms and fill them in. (Enclosed is a sample of the forms we use and fill in for them). The charge is \$1.25 for recording these in the court. As this is a State institution, please advise me if the clerk of the court is entitled to a fee for recording these cases. These fees amount to about \$150 per year."

Inasmuch as the clerk of the court is not a salaried officer and the fee which you describe is imposed to compensate him for services rendered, I am of opinion that it is a proper charge.

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

**STATE PROPERTY—Disposition of—Power of Governor with Respect To.**

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

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

DEAR GOVERNOR PEERY:

This is in reply to your request for an opinion as to the authority of the Governor to authorize the construction, with funds derived from the Works Progress Administration of the United States, of an archives building on the lot owned by the Commonwealth of Virginia located immediately east of the Library Building.

I find that this property was acquired by the State pursuant to the provisions of chapter 58, sections 10 to 13, inclusive, pages 68-69, of the Acts of 1930. The act simply authorizes the purchase and acquisition of the title to the property by the Commonwealth, and does not undertake to define the purpose for which the property was acquired.

I can find in the statutes no general authority vested in the Governor to prescribe the uses for which said property may be employed, and I am of opinion that this authority resides exclusively within the General Assembly.

It follows, therefore, that it is my opinion that the Governor does not possess the authority to authorize the construction of an archives building upon the lot in question.

Sincerely yours,  
 ABRAM P. STAPLES,  
*Attorney General.*

**STATE UNIVERSITY—Colored Persons—Act to Provide Equal Facilities Elsewhere—Construction.**

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

DR. GEORGE O. FERGUSON, JR.,  
*Dean of the College,*  
*University of Virginia,*  
*University, Virginia.*

DEAR DOCTOR FERGUSON:

I am in receipt of your letter of August 1, which is as follows:

"There are many universities of high rank which students may attend next session with payments by us of \$100, or less, under the recent Act of the General Assembly providing for such payments. Indeed, a considerable number of universities are less expensive than the University of Virginia. We have agreed to make payments to individual students in amounts ranging from \$50 to \$150. In no case has a qualified student been refused assistance. These payments, in our opinion, will insure educational facilities equal to those of the University of Virginia under the provisions of the law.

"However, the difference between the cost of attending the University of Virginia and the cost of attending a few other universities is between \$300 and \$400, or more. A student wishes to attend one of these universities under

the provisions of the Act, and claims that she should be paid the full amount of the difference in cost instead of the \$150 which we have offered her. She claims that she is entitled to choose the university she will attend and to receive the full differential cost regardless of its amount.

"In our opinion, the sum of \$150 is ample to enable her to obtain equal educational facilities as contemplated by the Act. We believe we are not required to pay her more than \$150 under the Act, and indeed that we may legally pay her less. But since the operation of the law is in its initial stages, and this particular case will doubtless set a precedent, I am writing to ask your opinion of the correctness of our position."

I concur in the opinion expressed by you that the Board of Visitors is under no legal duty, either under the 1936 Act or otherwise, to give a person whose application is denied his unlimited choice of any other university he may name, regardless of its expensiveness, and to send him there at a cost to him not greater than the cost of attending the University, so long as there are available other institutions offering facilities deemed fully equal by the Board.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### SUNDAY LAWS— Legality of "Flying Circus."

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 17, 1936.

HONORABLE JOHN A. BLAKEMORE,  
*Commonwealth's Attorney,*  
*Abingdon, Virginia.*

DEAR MR. BLAKEMORE:

I have your letter of July 15, requesting the opinion of this office as to whether the holding of a so-called "Flying Circus" on Sunday in your county would violate the Sunday laws of this State.

Section 4570 of the Code (Michie, 1930, 1932 Supplement) in terms prohibits any person from laboring on Sunday "at any trade or calling except household or other work of necessity or charity." (The statute contains certain specific exceptions not relevant here.)

Unquestionably, the performers and others connected with the proposed exhibition will be "laboring at a trade or calling", but the question of whether this may be deemed a "work of necessity" within the meaning of the law presents much more difficulty.

The phrase, "work of necessity", as used in such statutes, has acquired a technical meaning peculiar to its use in this connection—one quite distinct from and quite unlike its ordinary connotation. In an effort to effectuate the spirit and purpose of the statute, which is to establish a periodic day of rest from ordinary labor (and not to enforce the tenets or beliefs of any religion, which the State cannot constitutionally do), our Supreme Court of Appeals and the courts of most other jurisdictions have construed the word "necessity" to mean in this connection "not a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of each particular case." See *Pirkey Brothers v. Commonwealth*, 134 Va. 713, 723, 114 S. E. 764; *Lakeside Inn Corporation v. Commonwealth*, 134 Va. 696, 700, 114 S. E. 769.

Thus the maintenance of places of public recreation and amusement (*e.g.*, operating a public swimming pool, as in the *Lakeside Inn* case, or exhibiting a lighted cave or grottoes, as in the *Pirkey Brothers* case), if deemed "morally fit and proper", may be properly held "public necessities" for the moral and recreational good of the community.

The application of this highly flexible standard to a specific case—*i.e.*, the determination of whether a particular place of amusement is "morally fit and proper" and of a kind to be classed as a recreational necessity—is left to the virtually unrestricted discretion of the jury "as the representative of the morality of

the community." See Judge Burks' opinion in the *Lakeside Inn* case, 134 Va. at pp. 700-701.

It follows, of course, that much depends upon the conventional standards of the particular community. As expressly recognized by the opinion in the *Pirkey Brothers* case, "What may be a necessity in one case may not be in another."

In view of this state of law, it seems clear that this office is in no position to give a dogmatic answer to your question. We can do no more than call your attention to the nature of the test by which the legality of the proposed "air circus" must be determined, leaving to your own judgment the question of its application in your community.

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

#### SUNDAY LAWS—Moving Pictures.

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

HONORABLE ALBERT V. BRYAN,  
*Commonwealth's Attorney,*  
*Alexandria, Virginia.*

DEAR MR. BRYAN:

I have your letter of the 1st instant, with reference to the Virginia laws relating to the operation of moving picture theatres on Sunday.

A test case was tried before a jury in the City of Richmond which resulted in acquittal of the motion picture operator and since that time the local authorities have acquiesced in the view that working in motion picture theatres on Sunday is regarded as necessary work in the City of Richmond.

I saw from the newspapers that a different conclusion was reached in the City of Danville in a test case there.

As I understand the views taken by the courts, the question is largely one of fact to be determined in each particular case. You will find a number of Virginia cases on the subject in Volume 9 of Michie's Digest of the Virginia and West Virginia's Reports, pages 376, et seq. So far as I know there has been no decision on this particular question by the Supreme Court of Appeals.

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

#### SUSPENDED SENTENCES—Sentence to Pay Fine for Failure to Obtain Dog License Where License Obtained before Time of Trial.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 11, 1937.*

HONORABLE R. NORMAN MASON,  
*Attorney for the Commonwealth,*  
*Accomac, Virginia.*

DEAR MR. MASON:

I have your letter of March 6, requesting the opinion of this office as to whether sentence may be suspended upon a conviction of failing to obtain a dog license as required by sections 3305(62) and 3305(63) of the Code (Michie, 1936).

Section 1922b of the Code gives all courts power to suspend execution of sentence in all criminal cases upon certain stated conditions. This office has previously held that suspension of sentence, as permitted by this section, includes suspension of a sentence requiring the payment of a fine.

The portion of section 3305(63) to which you refer, providing that a defendant's payment of the license tax after service of a summons shall not relieve him of the penalty prescribed, does not, in my opinion, affect the court's power

to suspend sentence, but was intended only to make it clear that the full penalty might be imposed regardless of whether the accused should have purchased a license at the time of his trial.

It is, therefore, the opinion of this office that sentence in such cases may be suspended upon the conditions prescribed in section 1922b of the Code.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Boards of Equalization—Power of Counties to Establish.**

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

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

MY DEAR MR. FIFE:

I have your letter of July 3, in which you ask if the county of Albemarle may have a board of equalization to function in that county during the year 1936.

As you state, the matter is controlled by section 344 of the Tax Code of Virginia. As this section stood in 1932, counties were required in the year 1934 and every fourth year thereafter to have a board of equalization. It was optional with the counties to have such a board in the year 1932 and every fourth year thereafter. The terms of the members of the board appointed in 1934 expired on December 31 and the terms of those appointed in 1932 expired on October 31 of that year. In other words, the terms of the members of the board are of short duration.

Section 344 was materially amended in 1934 (Acts 1934, page 509) so as to do away with the compulsory board of equalization altogether and to provide for an optional board to be appointed in 1934 and every fourth year thereafter. The board authorized in section 344, as it stood in 1932, to be appointed in 1932 and every fourth year thereafter, was not provided for in the amendment of 1934. In other words, in my opinion, as the section now stands, there is no authority for the appointment of a board of equalization in the counties in the year 1936.

It is true that section 344, as amended in 1934, contains language relating to the board appointed in 1932 and every fourth year thereafter, but it contains no language authorizing the appointment of a board in 1936, and, without this specific authority, I do not see that the 1936 board can be appointed.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Delinquent Land—Sale of—How Advertised, etc.**

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

HONORABLE S. L. WALTON,  
*Commonwealth's Attorney,*  
*Luray, Virginia.*

DEAR MR. WALTON:

I have your letter of the 16th instant, with reference to the sale of delinquent lands in the County of Page for the years 1933 and 1934.

The provisions governing the question are contained in Acts 1934, pages 214 and 215 and in section 385 of the Tax Code. These statutes made it the duty of

the treasurer to sell on the second Monday in December, 1935, all delinquent real estate for the year 1933, unless the board of supervisors, by ordinance or resolution approved by a majority by recorded vote, should postpone such sale for a period of time not to exceed three years.

It appears from your letter that no resolution or ordinance has yet been adopted by the supervisors postponing the sale of the 1933 delinquent lands and, therefore, these lands should have been advertised and sold on the second Monday in December, 1935. Since this was not done, however, it is very doubtful if the irregularity can be cured so as to vest in a purchaser at the sale a good title to the lands. My suggestion is that the board of supervisors immediately adopt a resolution postponing the sale of said 1933 delinquent lands until the second Monday in December, 1936, and that the treasurer proceed to advertise and sell same at that time.

It further appears from your letter that the treasurer sold the 1934 delinquent lands in December, 1935, pursuant to an order of the board of supervisors requiring him so to do. In my opinion this sale was in violation of the statute and should be treated as a nullity. The board of supervisors did not possess the authority to direct a sale in violation of the statute.

In this view of the situation with respect to the 1934 delinquent lands, it might be well for the board of supervisors to adopt a resolution setting aside and cancelling the previous one authorizing the sale. While it is not necessary, as the law itself provides for the sale to be held in 1936, it would do no harm for the resolution to embody a provision that the 1934 delinquent lands be sold on the second Monday in December, 1936.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Delinquent Land Taxes—Duty of Treasurer—Recordation—Collection.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 25, 1936.*

HONORABLE C. R. KENNETT,  
*Treasurer City of Roanoke,  
Roanoke, Virginia.*

MY DEAR MR. KENNETT:

I have your letter of August 20, with reference to chapter 424 of the Acts of 1936 (page 1013).

It seems to me that the first paragraph of the section contemplates that there shall be in your office a separate book known as the delinquent land book, and that the treasurer shall record in this book the list of delinquent real estate. By the use of the word "record" I believe the Legislature intended that the different parcels delinquent shall be separately listed in the book.

With reference to that portion of section 2 of the Act authorizing the council to turn over to delinquent tax collectors the delinquent levies, I am of opinion that, if council did turn over any items to delinquent tax collectors, the treasurer would be relieved of responsibility for the items so turned over until council saw fit to again place them in the hands of the treasurer for collection. In other words, it seems to me that it is proper and that the Legislature doubtless intended to be read into the act the third paragraph of section 394 of the Tax Code, relating to delinquent real estate taxes.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Delinquent Land—Statutes Relieving from Penalties, Interest and Costs—Release as to One of Two Tracts—Fee of Clerk in Such Cases.**

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

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

DEAR MR. CRANK:

I have your letter of the 11th instant, in which you ask my opinion with reference to two questions arising under the provisions of Chapter 55 of the Acts of 1936, pages 80, 81. The questions will be hereafter set out and answered.

"1. If a man owns two tracts of land, both of which are delinquent, under the provisions of said Act where the Board of Supervisors has passed a resolution releasing the interest, penalties and costs in accordance with the provisions of said Act, can such landowner pay the taxes on one tract of land owned by him and obtain the benefits of such release of the penalties, interest and costs, or is it necessary to pay taxes on both tracts in order to be entitled to the benefits of such release?"

It is my opinion that the general purpose and object of the above mentioned section was to encourage payment of taxes and it was not intended to deprive a person, who has not sufficient means to pay the taxes on all real estate he may own, from obtaining the benefit of the provisions of the act as to such parcels of real estate as he may be able to pay the taxes on.

It is my opinion, therefore, that the requirement of the Act that "such release shall be made upon the condition that all such taxes due for the year nineteen hundred and thirty-five and all previous years shall be paid on or before the fifth day of December, nineteen hundred and thirty-six" should be held to apply to each separate parcel of real estate which is separately assessed for taxation and that the landowner is entitled to pay the taxes on one parcel without paying on another and receive the benefit of the ordinance of the board of supervisors.

"2. Where such land has been sold to the Commonwealth for delinquent taxes and the owner desires to take advantage of the release of the interest, penalties and costs and pays the amount due, is the Clerk entitled to charge his usual fee for making up the statement of such delinquent taxes in his office?"

It is my opinion that the release by the county of the "penalties, interest and costs accrued on any taxes upon real estate \* \* \*, that are unpaid at the time the resolution or ordinance of the board of supervisors or other governing body releasing the same becomes effective", insofar as the costs are embraced in the provisions of the Act, refers to costs which have accrued at the time the ordinance becomes effective. I do not believe it is intended to confer upon the board of supervisors the power to deprive the clerk of compensation thereafter accruing for his future services.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Exemptions—Salaries of V. P. I. Professors.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 8, 1937.*

DR. JULIAN A. BURRUSS, *President,*  
*Virginia Polytechnic Institute,*  
*Blacksburg, Virginia.*

MY DEAR DR. BURRUSS:

I have delayed replying to your letter of January 19, in order that I might give the question you raised careful study.

As I understand the facts, professors at Virginia Polytechnic Institute are employed by the Board of Visitors and no Federal officer or department has any authority to say who shall or who shall not be employed. In other words, the professors are State employees.

The only portion of our State income tax act under which there is any possibility for claim of exemption under that act is subsection (f) of section 24, which excludes from gross income salaries, wages and other compensation received from the United States by officers or employees thereof. I do not see how it could possibly be argued that a professor at Virginia Polytechnic Institute is an employee of the United States simply because a part of his salary may be made available by a donation to the State from the United States.

I must advise, therefore, that in my opinion it is clear that salaries of professors at Virginia Polytechnic Institute in their entirety are subject to the State income tax. I am informed that this has been the uniform rule of the State Department of Taxation for a number of years.

The question that I desired to study particularly was that of the liability of your professors to the Federal income tax on that portion of their salaries which, although paid by the Treasurer of Virginia, was made available by an appropriation from the United States.

Despite what appears to be a regulation of the Department of Internal Revenue to the contrary, I am of opinion that such portion of the salaries of your professors is not subject to the Federal income tax. I do not think there can be any question about the fact that a professor of the Virginia Polytechnic Institute, a State institution, is an employee of the State of Virginia, and that the Virginia Polytechnic Institute is engaged in an essential governmental function. I do not believe it follows that, because the salary of a State employee is in part indirectly attributable to the United States, this makes such employee any less a State employee or makes the department of the State for which he is working engaged in any less an essential State governmental function. I have made an investigation of such authorities as I can find bearing on this matter and believe they support the view I am expressing herein.

As a matter of fact, in 1932 the Department of Taxation had occasion to request the Commissioner of Internal Revenue for an opinion on the liability to the Federal income tax of that portion of the salary of a vocational agricultural teacher in the public school systems of Virginia which was attributable to an appropriation made by the United States. The Commissioner of Internal Revenue ruled that such a teacher was an employee of the State, or political subdivision thereof, and was engaged in the discharge of an essential governmental function of the State and the fact that a part of his compensation was paid from the funds contributed by the Federal government was immaterial and did not render him subject to the Federal income tax on account of such compensation. I enclose for your information a copy of this ruling.

If you will furnish me with a list of your professors and their addresses whose compensation is available in part through an appropriation of the United States, giving in each case the amount of compensation attributable to such appropriation, I shall endeavor to secure a formal ruling from the Federal authorities in Washington.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Exemptions—Recordation of Lease to Post Office Department.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

HON. S. L. FARRAR, JR.,

RICHMOND, VA., April 5, 1937.

*Clerk of the Circuit Court,**Amelia Court House, Virginia.*

MY DEAR MR. FARRAR:

I am in receipt of your letter of April 2, stating that you have for recordation a lease between a local resident and the United States Post Office Department. You inquire whether you should charge the recordation tax prescribed by section 121 of the Tax Code.

If the lease is offered for recordation by a representative of the Post Office Department, I am of the opinion that the tax should not be charged, inasmuch as, generally speaking, the states may not impose a tax upon the United States.

Your question as to the imposition of a tax on any instrument affecting the federal government is too general to be categorically answered. As above indicated, the states may not impose a tax on the United States, but the question in any particular case should be answered only after the determination of the facts and circumstances present. If you desire my opinion on any specific case, I shall be glad to write you.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.***TAXATION—Real Estate Acquired by Federal Government.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

HONORABLE RALPH L. LINCOLN,

RICHMOND, VA., November 17, 1936.

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

DEAR MR. LINCOLN:

I am in receipt of your letter of November 12, relating to the taxation of real estate which may be acquired by the Federal government.

You state that the government takes a six months' option on a tract proposed for sale and, after preliminary investigation and examination of title, the option is sent to Washington for approval. After approval of the option complete abstract of title is made and sometimes it is necessary that condemnation proceedings be had. The result is, you state, that in some cases there is an interval of two or three years between the approval of the option and the actual delivery of the deed. You desire my opinion as to whether or not the land is exempt from taxation from the date of the approval of the option.

In my opinion, the land should be taxed to the record owner thereof until such time as the title actually passes to the government. It may very well be that, even after the approval of the option, the real estate may never be conveyed to the government.

The whole theory of the taxation of real estate as contemplated by our tax laws is that it shall be taxed to the owner of record as of January 1 of each year. (See sections 251 to 280 of the Tax Code of Virginia) 110 Va. 151. See also *Tiller v. Excelsior Coal and Lumber Corporation*. To hold that the real estate is exempt from taxation from the time of the approval of the option is not only directly contrary to the statute on the subject, but will also result in uncertainty and confusion. Section 277 of the Tax Code appears to plainly contemplate that land shall be taxed to the former owner up to the time that "the title was or shall be vested in the United States."

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Recordation Tax—Taxing Recordation of Successive Lease and Sublease as Two Recordations.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

HONORABLE PAUL H. SCOTT, *Clerk,*  
*Circuit Court of Orange County,*  
*Orange, Virginia.*

RICHMOND, VA., *September 21, 1936.*

MY DEAR MR. SCOTT:

I am in receipt of your letter of September 18, in which you state:

"The Bemiss Equipment Corporation, of Richmond, Virginia, entered into an agreement to lease certain construction equipment to Waugh Company, Contractors, Orange, Virginia. After the lease from Bemiss to Waugh had been executed by the parties thereto, Bemiss & Company, for value received, assigned all of its right, title and interest to the Allis-Chalmers Manufacturing Company of Milwaukee. Thereupon the Allis-Chalmers sent both instruments to this office for recordation."

You desire my opinion as to whether or not the recordation tax imposed by section 121 of the Tax Code should be required for the recordation of both instruments.

From the facts stated by you, it seems to me that these two instruments represent two different transactions with different parties. It is, therefore, my opinion upon the facts presented that the regular recordation tax should be imposed for the recordation of each instrument.

It is difficult to pass on a question of this sort without examining the instruments themselves. If you desire me to go into the matter further and will send me the instruments, I will be glad to write you again.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Release of Penalties and Costs—Power of Board of Supervisors to Impose Conditions On.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *July 15, 1936.*

HONORABLE R. NORMAN MASON,  
*Attorney for the Commonwealth,*  
*Accomac, Virginia.*

MY DEAR MR. MASON:

I have your letter of July 9, in which you ask my opinion on the following question:

"The board of supervisors of Accomac county, desiring to take advantage of the opportunity given them under chapter 55, Acts of General Assembly of 1936, approved February 24, expect to pass an ordinance under said chapter at their next meeting. The question having arisen with the board during a previous meeting as to whether or not a condition inserted in the proposed ordinance to this effect would make the ordinance valid or invalid. The condition proposed is: 'that before the taxpayers could avail themselves of a release from the penalties, interest and costs accrued upon real estate in said county or any district thereof for the year 1935, or all years previous thereto, they must pay their personal property tax.' You will recall that this chapter did not provide for the paying of said personal property tax."

The Act to which you refer (Acts 1936, page 80) provides that boards of supervisors "may by resolution or ordinance spread upon the minute book release all penalties, interest and costs accrued on any taxes upon real estate due such county or any district of such county for the year nineteen hundred and thirty-five and all previous years, that are unpaid at the time the resolution or ordinance of the board of supervisors or other governing body releasing the same becomes effective. Such release shall be made upon the condition that all such taxes due for the year nineteen hundred and thirty-five and all previous years shall be paid on or before the fifth day of December, nineteen hundred and thirty-six."

Please note that the statute refers exclusively to real estate taxes and provides that such release "shall" be made upon the condition that all such taxes, referring, of course, to real estate taxes, for the year 1935 and previous years shall be paid. Inasmuch as the statute provides relief that is contrary to the law as it previously existed, I am of opinion that it must be strictly construed and that the board of supervisors may do just what the statute authorizes and no more. My conclusion is, therefore, that the additional condition which you suggest in your letter is contrary to the terms of the statute and may not be imposed.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**TAXATION—Sales of Delinquent Land—Postponement.**

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

HONORABLE R. NORMAN MASON,  
*Attorney for the Commonwealth,  
Accomac, Virginia.*

MY DEAR MR. MASON:

I am in receipt of your letter of December 10, in which you state that, pursuant to the last paragraph of section 2460 of the Code of Virginia, the board of supervisors passed an ordinance postponing the sale of delinquent lands in Accomac on account of delinquent taxes for the years 1932-33. You desire to know whether the postponed sale must be had on the second Monday in December of a particular year or whether it can be set for some other day.

As you know, section 2460 fixes the time for the sale of delinquent real estate as the second Monday in December of the year next after the year in which the treasurers submit their lists. The paragraph to which you refer simply gives counties and cities authority to postpone the sale of delinquent real estate for a period not to exceed three years from the time "hereinabove fixed for the sale thereof." While the paragraph you desire construed is silent on the question you specifically raise, in my opinion, the better view is that the Legislature intended that the postponed sale be on the second Monday in December of any year. The statute as a whole deals not only with the sale of real estate, but with the advertising of it for sale, and the provisions for advertising contemplate that the sale will be on the second Monday in December. Certainly the fixing of one particular day for the sale makes for uniformity throughout the State. I do not think that as at present advised I could go so far as to say that a postponed sale on any other day would be invalid, but certainly it seems to me that the view I am expressing herein represents the better and safer practice.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Sales of Delinquent Lands—Postponement, etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 9, 1937.*

HONORABLE T. FREEMAN EPES,  
*Attorney for the Commonwealth,  
Blackstone, Virginia,*

MY DEAR MR. EPES:

I am in receipt of your letter of February 4, in which you desire my opinion on the following question:

"There has been brought to my attention that the Treasurer of this County advertised to be sold on the second Monday in December lands returned delinquent for the year 1934 under section 2460. On account of the sickness of the Treasurer in the hospital no sale was had at that time and none has yet been had. I also note under the above section that the Board of Supervisors may by resolution postpone the sale of delinquent real estate for any year. No such resolution has as yet been passed. I will be glad if you will advise me if a sale can now be had at any time for the taxes for the year 1934, or if the Board of Supervisors can at this late date pass a resolution postponing such a sale."

Section 2460 of the Code, as you know, provides that, if the sale is not completed on the day fixed in the notice, it shall be adjourned from day to day and proceed during the same hours until it has been completed. From what you say, however, I doubt very much if the record as it exists will show that the sale was adjourned from day to day, and, therefore, it would seem that it would be unwise to attempt to hold the sale now as an adjourned sale.

It seems to me that the next best thing to do is for the Board of Supervisors to act in accordance with the authority granted in the last paragraph of section 2460.

I have heretofore ruled, which ruling has been concurred in by the State Tax Commissioner, that, under the authority given the Board of Supervisors to postpone sales, the sales should be postponed for a year, so that the one you refer to should now be held on the second Monday in December, 1937, under a resolution of the Board. In other words, I have ruled that this authority does not mean that the Board can postpone the sale to any day during the year, but that the sale must be postponed to the second Monday in December.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Tangible Personalty Temporarily Out of State on January 1.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 25, 1937.*

HONORABLE S. A. ELLIS,  
*Commissioner of Revenue,  
Gate City, Virginia.*

MY DEAR MR. ELLIS:

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

"Mr. A owns considerable amount of real estate in this county, and grazes a large number of cattle. He owns no land in Tennessee. Mr. A owns a number of cattle that he has owned for two years. He grazed these cattle in Scott County during the summer of 1936. Last November he sent these cattle across the state line into Tennessee where he hired these cattle to be fed during the winter of 1936-37. These cattle were not assessed for

taxation in Tennessee. This spring, about April, Mr. A brought these cattle back to Virginia, and turned them out on his grass where they are now, and where they have been ever since he has owned them with the exception to the time they were being fed in Tennessee this last winter. Mr. A is a resident of Scott County, Virginia, and has been all of his life. Should these cattle be assessed for taxation in Scott County, Virginia? These same cattle, so I am informed, were assessed for taxation in this county for the year 1936."

Under section 424 of the Tax Code, the status of property of the character you describe is fixed as of January 1, of each year. Section 425 provides that the situs for the assessment and taxation of tangible personal property shall in all cases be the county, district, or city, in which such property may be physically located on the first day of the tax year, namely, January 1.

The length of time the livestock was in Tennessee indicates that it was not in transit, and, if Tennessee has January 1 as its date on which the status is fixed for property taxation, that state would have the right to tax the livestock in question for 1937.

From the facts stated by you, I am of opinion that, the situs of the livestock not being in Virginia on January 1, 1937, it is not assessable in the county of Scott for the tax year 1937.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **TRIAL JUSTICES—Capias Pro Fine—Authority to Issue.**

##### **COMMONWEALTH OF VIRGINIA,**

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 21, 1936.

HONORABLE E. PEYTON TURNER,

*Attorney for the Commonwealth,*

*Emporia, Virginia.*

MY DEAR MR. TURNER:

I am in receipt of your letter of July 18, with further reference to the authority of trial justices to issue a *capias pro fine*.

Section 1922b of the Code is authority for trial justices to suspend the imposition or execution of a sentence, or to place the defendant on probation. This section relates not only to cases of delinquent children, but to criminal cases generally. The section further provides that while on probation a defendant may be required to pay in one or several sums a fine imposed, and also provides that the court may revoke the suspension of sentence and cause the defendant to be arrested and brought before the court at any time within the probation period.

However, I suppose that you refer to cases where sentence was not suspended and the defendant was not placed on probation. In connection with these cases, I call your attention to section 2550, which provides that a justice shall report monthly to the clerk of the court the fines imposed during the next preceding month. After this report is made, I am of the opinion that the trial justice has no authority to issue a *capias pro fine*, this process being issuable then by the court to which the report is made.

The question as to whether a trial justice may issue a *capias pro fine* before he has made his report to the clerk of the court is troublesome. A *capias pro fine* is a common-law writ which has not been repealed in Virginia. Ordinarily, I should say that it was inherently within the power of the tribunal imposing a fine to issue this writ or such other process as might be necessary to collect the fine imposed. However, the trial justice system being comparatively new in Virginia, there is much force to the thought that a trial justice only has such jurisdiction and powers as are specifically conferred upon him by statute.

I should think, however, that where a fine is imposed by a trial justice and not paid at the time imposed, the trial justice could unquestionably invoke the

provisions of section 1922b, so that he would have the power, if the fine was not paid, to "cause the defendant to be arrested and brought before" him.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TRIAL JUSTICES—Duties of—Collection of Judgments.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *September 3, 1936.*

HONORABLE D. W. MCNEIL,

*Trial Justice,*

*Lexington, Virginia.*

DEAR MR. MCNEIL:

This is in reply to your letter of August 31, in which you request my opinion upon the question whether or not the statute imposes upon a trial justice the duty of collecting civil judgments from the defendants against whom such judgments are rendered.

I agree with you that the trial justice is under no such obligation. While in many cases this is done as a matter of accommodation, yet, if the collection is enforced by law, the proper legal procedure is to secure an execution and place it in the hands of the sheriff to be executed. Of course, if the parties settle between themselves, there is no necessity for the execution. Otherwise, the sheriff can enforce the execution out of property of the defendant, if any can be found. There is no duty on the trial justice to collect the judgment.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TRIAL JUSTICES—Fees—Continuances and Dismissed Actions; Proceedings to Exempt Wages.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., *November 17, 1936.*

HONORABLE W. FRANCIS BINFORD, *Secretary and Treasurer,*

*Association of Trial Justices,*

*Prince George, Virginia.*

DEAR MR. BINFORD:

I am in receipt of your letter of November 14, in which you ask a number of questions relating to fees to be charged by trial justices.

Your first question is:

"Does the Trial Justice have a right to charge a continuance fee to the party requesting the continuance, when the case is on the docket and ready for trial?"

The trial justice act was re-enacted in 1936 and amended in several respects (Acts 1936, page 615). Section 4987m of the Code, being a part of the trial justice act, prescribes fees that shall be taxed for services rendered by the trial justice and his clerk in both criminal and civil actions. You will observe that paragraph (b) of the section states that "The trial justice and his clerk shall charge and collect for services rendered by them in civil actions and proceedings the following fees only."

I am aware of the fact that, prior to the act of 1936, I ruled that a continuance fee might be charged. However, I am of opinion that the quoted provision of the new act now limits the fees that may be charged by a trial justice and his clerk to

those specifically enumerated in section 4987m. The section does not contain a provision for a continuance fee and I am, therefore, of the opinion that it may no longer be charged.

Your second question is:

"The second question that we wish you to rule on is, does the Trial Justice have a right to charge a trial fee when he has probably traveled ten or fifteen miles to court to try the case and a motion is made in court by the attorney for the plaintiff to dismiss the pending action? Some of the Trial Justices take the view that hearing this motion is equivalent to a trial and that entering the court order is also the equivalent to the trial."

For the reasons stated in the answer to your first question, I am of the opinion that the trial fee may not be charged in this case. You will observe that section 4987m provides that for "trying and giving judgment on a civil warrant" the fee shall be one dollar. I do not think that a dismissal of the action on request of the plaintiff constitutes trying and giving judgment.

Your third question is:

"The third question we wish to ask is;—under section 6556 of the Code, which provides proceedings for exemption of debtors to have wages declared exempted, there is a fee of fifty cents provided for the certificate that the court gives the judgment debtor. Some lawyers have raised the question that this is not collectible, because it is not embodied in the fees in the 1936 Trial Justice Code. We would very much like to know if we have a right to charge any fees other than those embodied in the 1936 Code, even though they are provided in the general law."

I am of the opinion that the use of the word "only" in section 4987m, prescribing the fees that a trial justice and his clerk may charge for services rendered by them, should be construed as an express provision that this section embraces all the fees that may be charged by a trial justice.

Since the trial justice is not a fee officer, and in as much as the Legislature made a substantial appropriation to assist in the payment of the salaries of the trial justices, it appears to have been the legislative intent to limit the fees charged by this officer and thereby, as far as possible, reduce the cost to the litigants. My conclusion is, therefore, that the fee described in your third question should not be charged.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **TRIAL JUSTICES—Jurisdiction—Distress Warrants.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 1, 1936.*

MR. C. G. ROWELL, *Trial Justice,*  
*Surry, Virginia.*

MY DEAR MR. ROWELL:

I am in receipt of your letter of November 25, in which you ask whether a distress warrant issued by a trial justice should be returned to the clerk's office of the county or whether the trial justice has jurisdiction to try the warrant where defense is made.

Distress proceedings are prescribed in detail by sections 5519 to 5539 of the Code. Section 5528 specifically provides that every officer who may execute warrants of distress shall make a return of his action and file the same with "the clerk of the circuit or corporation court of his county or city."

I am informed that one of the questions considered by the Governor's Advisory Legislative Council last year in connection with proposed amendments to the Trial Justice Act of 1934 was whether or not trial justices should be given jurisdiction to try distress warrants. Mr. W. H. Overby, then President of the Trial Justices Association of Virginia, was one of the members of a sub-committee appointed to consider this Act. It was decided by this sub-committee not

to suggest any changes in the general law relating to distress warrants, one of the reasons being that it would have necessitated material changes in the sections of the Code dealing with distress proceedings.

You will note that the Trial Justice Act of 1936 (Acts 1936, page 615) in section 4987f, specifically gives to trial justices jurisdiction "to try and decide attachments", but nowhere in the Act are trial justices given specific authority to try proceedings under distress warrants.

My conclusion is, therefore, that the provision of section 5528 of the Code making distress warrants returnable to the clerk's office of the circuit or corporation court of the county or city has not been repealed by the Trial Justice Act and that trial justices have no jurisdiction to try such cases.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

### **TRIAL JUSTICES—Process—When May Be Sent Out of County.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 31, 1936.*

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

DEAR MR. OVERBEY:

I have your letter of July 30, in which you state:

"Under your interpretation of the Trial Justice Act of 1934 the trial justice could not send a warrant out of the county, even though it was a tort action and the cause of action arose in this county. The 1936 Act clearly states that this can be done. The question now arises as to whether or not the trial justice may send the warrant out of the county where an automobile accident occurred before the 1936 Act went into effect. It has been suggested that the 1936 Act cannot be retroactive. This is giving us considerable trouble and I will appreciate it very much if you will, as soon as possible, give me your views on the question."

You refer, of course, to subsection 4 of section 4987-f of the Code, as enacted in 1936 (Acts 1936, page 620). As you state, authority is now given the trial justice to direct a warrant to an officer of another county in a tort action. I am of opinion that this provision is now applicable since the 1936 Act has taken effect, even though the cause of action arose before the Act took effect. The additional authority given the trial justice in the new Act does not create a new cause of action.

I do not see how a holding that the trial justice has the authority to send a warrant out of his county after the Act takes effect can be said to be a retroactive construction.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

### **TRIAL JUSTICES—Substitute—Compensation.**

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

MR. D. FRANK WHITE,  
*Substitute Trial Justice,*  
*Accomac, Virginia.*

DEAR MR. WHITE:

I am in receipt of your letter of August 12, in which you refer to mine of

August 1, in which I attempted to answer several questions asked by you. You now ask whether as substitute trial justice you are entitled to a per diem for Sundays.

Inasmuch as section 4987-b of the Code (Acts 1936, page 617) seems to contemplate that a substitute trial justice shall be paid a per diem only for week days on which he is acting as such, I am of opinion that no provision is made for such per diem on Sundays. You will recall that a substitute trial justice receives a per diem equivalent to one-twenty-fifth of the monthly installment of the salary of the trial justice. If it was intended for Sundays to be included in the compensation, then the rather illogical result would be reached that a substitute trial justice, if he acted as such for a month, would receive more compensation than a trial justice for a similar period.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**TRIAL JUSTICES—Suspension of Sentence and Probation.**

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

MR. J. CALLAWAY BROWN,  
*Trial Justice,*  
*Bedford, Virginia.*

MY DEAR MR. BROWN:

I have your letter of July 14, relating to the authority of a trial justice to suspend sentences and to place on probation, pursuant to section 1922b of the Code. You further inquire as to jurisdiction in this respect of "all courts".

Necessarily my reply to your inquiry is confined to your authority and that of other trial justices, inasmuch as the statutes applicable to this office do not authorize me to give you an opinion except insofar as the opinion relates to your duties. See section 374a of the Code, as enacted by the last General Assembly (Acts 1936, page 73).

I do not know that I can add much to my reply to the seventh question in the pamphlet entitled "Opinions of the Attorney General Relating to Trial Justices and Justices of the Peace," wherein I expressly held that section 1922b of the Code gives to a trial justice authority to suspend jail sentences in cases where he feels that the ends of justice would be met by so doing.

Section 1922b of the Code, while it is codified in the chapter relating to delinquent and dependent children, is in reality a part of an independent Act of 1918 (Acts 1918, page 528), which is not amendatory of the Code. In my opinion, the Act relates to the suspension of sentences generally.

You refer to the language of the court in the case of *Richardson v. Commonwealth*, 131 Va. 802, to the effect that it was important that the Act under discussion should be clarified by amendment. As I read the opinion, the court was not in any doubt as to the power granted to suspend sentences, but, in speaking of needed clarification, the court was referring to the authority of the trial judge to revoke a suspension of sentence.

After reading the statute and the case of *Richardson v. Commonwealth*, I do not see how there can be any reasonable doubt about the power of a trial justice to suspend a sentence where he feels that the ends of justice will be met by so doing.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TRUST ESTATES—Commonwealth as Beneficiary of—How Funds Handled.**

## COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 14, 1936.HON. GEORGE C. PEERY,  
*Governor of Virginia.*  
*Richmond, Virginia.*

DEAR GOVERNOR:

I have your letter of the 9th instant, from which it appears that you have received from the Washington Loan and Trust Company, Executor of the Estate of the late John Barton Payne, the sum of \$54,750, which represents a bequest to the Commonwealth of Virginia for the purposes as provided in the last paragraph of clause 10 of Mr. Payne's will. This provision of the will is as follows:

"To the Commonwealth of Virginia Fifty Thousand Dollars to be permanently invested as an endowment and the income therefrom to be used for the acquisition of paintings of real merit by American artists; such pictures to be added to the Payne collection and exhibited in the Museum Building."

You request my opinion as to the manner in which this bequest should be handled. The statutory provisions upon the subject are as follows:

Section 585(69), sub-section (i) of Michie's 1936 Code of Virginia provides:

"The State treasurer shall be charged with the custody of all investments and invested funds of the State or in possession of the State in a fiduciary capacity, and with the keeping of the accounts of such investments.  
\* \* \*

The Virginia Museum of Fine Arts for the use for which this bequest is made was established by chapter 184 of the Acts of the General Assembly for the year 1934 (pages 272-273) which was amended by chapter 199 of the Acts of 1936 (pages 336-338). Section 3 of the Acts, as amended, empowers the trustees of the Museum "to receive and administer on behalf of the Commonwealth gifts, bequests and devises of real and personal property for the endowment of said museum or for any special purpose designated by the donor. And the said trustees are hereby authorized to change from time to time the form of investment of any funds, securities, or other property real or personal, provided the same be not inconsistent with the terms of the instrument under which the same was acquired, \* \* \*."

In view of these statutory provisions, it is my opinion that the Treasurer of Virginia is the proper custodian of the funds and all securities in which same may be invested, and that the management and control of said money and securities and the change of same from time to time is within the authority and power of the trustees of the Virginia Museum of Fine Arts. The Treasurer, while acting as custodian, is subject to the direction of the said trustees and should carry out the orders of the trustees with respect to the investment of said funds.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**VITAL STATISTICS—Furnishing Copies of Records—When No Fee to be Exacted.**

## COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 27, 1937.DR. I. C. RIGGIN,  
*State Health Commissioner,*  
*Richmond, Virginia.*

MY DEAR DR. RIGGIN:

I am in receipt of your letter of January 25, in which you state:

"During the past several months we have been receiving numerous requests from Federal and various State public welfare agencies, which receive State and Federal funds, relative to furnishing copies of records of births and deaths. I am attaching copy of a request.

"I shall appreciate an opinion as to whether we are required to furnish certified copies without fee, Chapter 66, Section 1580, Code of Virginia, and Chapter 172, Acts of General Assembly, 1930."

Section 1580 of the Code provides in part as follows:

"Certified copies of births or deaths may be furnished the pension, war, navy and other departments of the United States or Virginia service without the payment of the usual fee."

Chapter 172 of the Acts of 1930 (Acts 1930, page 459) provides that, when requested, the Registrar of the Bureau of Vital Statistics *shall* furnish without charge certified copies of the records under his control to honorably discharged members of the military or naval forces of the United States, or their dependents, authorized representatives, Commissioner of Pensions of the United States, Director of the United States Veterans Bureau, or Regional Manager of any Regional Office of the United States Veterans Bureau.

In view of these statutory provisions, it is my opinion that you *may* furnish certified copies of births and deaths to any Department of the United States or Virginia, without charge, and that you are *required* to furnish upon request such certified copies to the persons designated in Chapter 172 of the Acts of the General Assembly of 1930.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**WORKMEN'S COMPENSATION—"Employee"—County Agricultural Agent as Employee of County.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., July 22, 1936.

MR. H. B. DERR, *County Agent,*  
*Agriculture and Home Economics,*  
*Fairfax, Virginia.*

MY DEAR MR. DERR:

I am in receipt of your letter of July 7, in which you ask for an opinion as to the status of county agents in the State so far as insurance is concerned, where the county pays all or part of their salaries. I presume, of course, that you refer to liability of the county under the Workmen's Compensation Act.

As I indicated in my former letter to you, the fact as to who is the employer of a county agent primarily controls the answer to your question. I have found that the question has been squarely passed on by the State Industrial Commission in the case of *Derr v. Fairfax*, 12 O. I. C. 423 and 544. In that case it was held that the board of supervisors of the county and not the Virginia Polytechnic Institute was the employer of the county agent of the Extension Division.

While the facts in any particular case control the question of who is the county agent's employer, you do not present any facts which show that your situation differs from that in the case to which I have referred.

Therefore, following the opinion of the Industrial Commission, this office holds that, where the facts are the same as those in *Derr v. Fairfax, supra*, the county is the employer of county agents and, therefore, subject to the provisions of the Workmen's Compensation Act.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*



# INDEX

	Page
<b>ACCOUNTANTS</b>	
Persons holding certificates from other States issued without examination .....	1
<b>AGRICULTURE AND IMMIGRATION</b>	
Bang's Disease—Quarantine—Enforcement .....	2
Expenditure for investigation of freight rates.....	4
Fertilizer—Labels .....	4
Peanut Pickers—Licenses and reports required of.....	5
Regulations affecting enforcement of stock feed laws.....	56
State Board of—Powers with reference to State Lime Grinding Plant .....	6
<b>ALCOHOLIC BEVERAGE CONTROL</b>	
Confiscation of automobiles:	
Compensation of officers.....	7
Duty of Commonwealth's Attorney where car apparently stolen	6
Engaged in unlawful transportation.....	7
Employees of—Whether affected by Federal Social Security Act...	8
Forfeiture of automobile—Fees of Commonwealth's Attorneys....	86
Licenses:	
Beer sales in Shenandoah Park Area.....	9
Licensees under as subject to Sunday Laws.....	10
Local Options—Participation of city in county election.....	11
Powers—To adopt rules and regulations as to Sunday Laws.....	10
With respect to exchanges of merchandise.....	9
Referendum:	
Capitation taxes accessible.....	14
New residents—Eligibility to vote in.....	14
Towns—Selection of election officials.....	11, 12
When necessary .....	13
Who may vote.....	14
Sale of wine and beer on Sunday:	
Legality of .....	15
Power of municipality to regulate.....	15
<b>APPROPRIATIONS</b>	
Confederate Memorial Fund—Purchase of flags.....	16
Counties:	
Contribution to erection of Tuberculosis Hospital.....	46
Promotion of agriculture.....	45
Transfer of .....	16
When payable .....	17
<b>ART COMMISSION</b>	
Approval of—Erection of public buildings.....	130
<b>AUTOMOBILES</b>	
Chauffeur—What constitutes .....	17
Operator's Licenses:	
Effect of commitment to State Hospital as inebriate and drug addict .....	18
<b>BAIL</b>	
Cash deposit—Who may receive.....	18
<b>BAIL BONDS</b>	
Appeal—Necessity for new bond.....	12
Commonwealth's Attorneys—Commission on forfeiture of.....	37

	Page
<b>BANKING</b>	
Validity of certain agreement with Federal Deposit Insurance Corporation .....	19
<b>BLIND COMMISSION</b>	
Acquisitions of concessions in public buildings for blind persons....	21
<b>BOARD OF SUPERVISORS</b>	
Compensation:	
Chairman and members attending Board of Health meetings....	21
Special committee work, etc.....	47
Contribution to Land Terracing Association.....	22
Disbursement of public funds in payment of "Moral Obligations"—	
Duty to plead statute of limitation.....	23
Employment of counsel.....	24
Fixing compensation of county officers—Deputy sheriffs.....	24, 25
Mileage—Chairman—Attending Board of Health meetings.....	21
Powers—To acquire land for use of sanitary district.....	50
To appropriate funds for promotion of agriculture.....	45, 46
To appropriate funds towards erection of Tuberculous Hospital . . . . .	46
To construct private sewer for industrial plant.....	48
To disburse funds for maintenance of roads.....	26
To exempt taxes to encourage establishment of new industries .....	53
To impose conditions on release of penalties and costs on real estate taxes .....	174
To levy special district tax for erection of school building..	52
To use accumulated sewer taxes for building sidewalks....	50
Purchase of building for county offices—Procedure.....	25
Sales by chairman of to county for use of town.....	132
<b>BONDS</b>	
Bail—Necessity for new bond.....	19
Cities and Towns—Requirements as to referendum.....	29
Counties—Necessity for referendum—County as guarantor on school bonds .....	27
Literary Fund Loans:	
Issuance of without referendum.....	51
When interest compounded.....	28
Special Agent—Comptroller—By whom premiums paid.....	28
<b>BUREAU OF INSURANCE AND BANKING</b>	
Inspection of records of.....	29
<b>CATTLE</b>	
See Agriculture and Immigration	
<b>CITIES AND TOWNS</b>	
Authority of incorporated town to levy tax to increase teachers' salaries or extend term .....	149
Bonds—Requirements as to referendum.....	29
Highways—Effect of chapters 317 and 384 of Acts 1936.....	104
Licensing incident of business already licensed.....	118
Officers of—Justices of the Peace as.....	30
Ordinances—Petit larceny .....	31
Towns constituting separate school district—Representation on county board where town lies in two counties.....	150
<b>CLERKS</b>	
Deputies—Signing warrants .....	31
Duties and compensation—Preparing county budget.....	32
Fees:	
Delinquent tax collections .....	86, 171

	Page
Entering certificate of costs where justice acquits.....	33
Local taxes collected by delinquent tax collector.....	33
Payment by State Institution—Recording certain papers.....	165
Recordation—Federal Farm Credit Lien Book.....	34
Reports of marriages to Bureau of Vital Statistics—When made...	34
Right of minority party to select clerks of election.....	68
<b>COMMONWEALTH'S ATTORNEYS</b>	
Compensation:	
Bringing suits for subjecting delinquent land.....	36
Negotiating loan from United States.....	37
Special services to county.....	35
Special services to school board.....	36, 37
Commisison on forfeiture of bail bond.....	37
Confiscation of automobile—Duty where car apparently stolen.....	6
Duties:	
Negotiating loan from United States.....	37
Fees:	
Cases where defendant pleads guilty.....	84
Cases where several defendants are prosecuted under single war-	
rant .....	84
Forfeiture of automobiles under ABC Law.....	86
How paid by accused after Commonwealth's Attorney has col-	
lected from State under fee system.....	85
Information Proceedings—Confiscation of automobiles.....	7
<b>CONFISCATION</b>	
Automobiles under Alcoholic Beverage Control Act—See Alcoholic	
Beverage Control.	
<b>CONSTABLES</b>	
Issuance of process to—Where may be executed.....	38
Service of process—Territorial jurisdiction.....	39
<b>CORONERS</b>	
Fees—Collection where claims refused.....	39
Proceedings—How paid .....	40
<b>COSTS</b>	
Coroners' Proceedings—How paid.....	40
Criminal Cases:	
Taxing costs of venire and fees of defendant's witnesses.....	40
Taxing costs of venire.....	40
Maintenance of prisoners convicted under ordinances—By whom paid	43
Ordinance cases—Fees for summoning witnesses.....	42
Sheriffs—Transportation of convict to penitentiary after sentence...	43
Taxability of—Arresting officers—Fee in cases of Motor Vehicle	
Law offenses .....	39
Transportation of accused to State Hospital for observation—How	
fixed and by whom paid.....	43
Where defendant is charged with felony and convicted of misde-	
memeanor only—Cost of assembling venire.....	44
<b>COUNTIES</b>	
Appropriations:	
Contribution to erection of Tuberculosis Hospital.....	46
Promotion of agriculture.....	45, 46
Bonds—Refunding Literary Loans without referendum.....	51
Budget—Preparation—Duties and compensation of Clerks.....	32
Duty to furnish transportation to schools of children from another	
county . . . . .	151
Expenditures—Use of accumulated sewer taxes for building sidewalks	50

	Page
Powers—To establish board of equalization.....	169
To levy special district tax for erection of school building.	52
Referendum as to government—How certain ballots counted.....	74
Taxation—Exemptions to encourage establishment of new industries	53
<b>COUNTY AGENTS</b>	
Status of—Workmen's Compensation Law.....	183
<b>COUNTY FARMS</b>	
Governing Board—Removal of members.....	53
<b>CREAMERIES</b>	
Licenses—Of whom required.....	55
<b>CRIMINAL PROSECUTIONS</b>	
Expenditures—Employing shorthand reporter.....	55
Venire:	
Taxing costs of.....	40
<b>DAIRY AND FOOD DIVISION</b>	
Regulations affecting enforcement of stock feed laws.....	56
<b>DEEDS OF TRUST</b>	
Recordation—Federal Farm Credit Lien Book.....	34
<b>DEPOSITS</b>	
Federal Housing Administration bonds as security.....	131
To meet bond maturities—Security required.....	131
<b>DOG LAW</b>	
Licenses—Where and to whom issued.....	56
Suspension of sentence for failure to obtain dog license where license obtained before time of trial.....	168
<b>DRY CLEANING LAW</b>	
Identification of licensee.....	57
Licenses—Grounds for denying.....	58
Operation in county in which no cleaning business operated.....	59
<b>ELECTIONS</b>	
Absent voters:	
Disposition of unused ballots.....	59
Alcoholic Beverage Control:	
Local Option—Participation of city in county election.....	11
Referendum—Capitation taxes assessable.....	14
Eligibility of new residents to vote in.....	14
When necessary .....	13
Who may vote in.....	14
Towns—Selection of election officials.....	11, 12
Ballots:	
Electoral Boards placing posters near polls instructing voters as to marking of.....	61
How marked—Rubber stamps.....	60
How marked .....	60, 63
Candidates:	
Expense account—Inclusion of filing fees.....	63
Requirement as to notice of candidacy—	
Convention nominees .....	62
Requirements for getting name printed on ballot.....	63
Capitation Taxes:	
Naturalized aliens .....	66
Tax bills—How sent.....	66
When to be paid.....	65
Clerks of—Right of minority party to select.....	68

	Page
<b>Electoral Boards:</b>	
Employing persons to affix seal on ballots; id.—Mileage.....	69
Furnishing rubber stamps.....	69
Placing rubber stamps in booths.....	70
Filling vacancies—Informal primary under exclusive supervision of party committee .....	70
<b>Primaries:</b>	
Ballots—Disposition of unused.....	72, 73
Referendum as to county government—How certain ballots counted.	74
<b>Registration:</b>	
Closing books .....	75
Effect of registration in 1902 only.....	73
Transfer of—List of qualified voters— Finality of .....	76
<b>Registrars:</b>	
Compensation—Copying mutilated books.....	68
Constitutionality of city charter making town recorder ex-officio registrar .....	141
Duties—Cities annexing territory.....	67
Qualifications of .....	77
Residence .....	77, 78
<b>Secretary of Commonwealth:</b>	
Certification of name of (1) deceased candidate (2) new candi- date who files notice within time limit.....	78
Duties as to notifying electoral boards of candidacies.....	79
<b>Special:</b>	
Eligibility of persons becoming of age to vote in.....	82
How called and when held.....	81
<b>ESTATES</b>	
Right of State Hospital to share in deceased patient's.....	165
<b>EXTRADITION</b>	
Necessity for presence in State.....	83
<b>FEDERAL DEPOSIT INSURANCE</b>	
Validity of certain agreement with banks.....	19
<b>FEDERAL FARM CREDIT ACT</b>	
Loans from associations, etc., organized under.....	83
Provisions as to recordation of instruments—Constitutionality.....	83
<b>FEDERAL JURISDICTION</b>	
Shenandoah National Park.....	122
<b>FEES</b>	
Clerks:	
Delinquent tax collections .....	33, 86, 170
Entering certificate of costs where justice acquits.....	33
Payment by State Institutions—Recording papers.....	165
Clerk of House of Delegates—Furnishing copies of bills, etc.—Spe- cial sessions .....	88
Commonwealth's Attorneys:	
Cases where defendant pleads guilty.....	84
Cases where several defendants are prosecuted under single war- rant .....	84
Forfeiture under ABC Law.....	86
How paid by accused after Commonwealth's Attorney has col- lected from State under fee system.....	85
Coroners—Collection where claims refused.....	39
Jailors—Prisoners committed for violation of ordinances.....	108
Justices of the Peace.....	88
Taking bond of person appealing from trial justice.....	89

	Page
Warrants in civil cases—Amount in controversy.....	92
<b>Officers:</b>	
Motor vehicle law offenses—Taxability of.....	39
Where several make arrest together.....	95
Serving process, etc., civil and criminal cases—What statutes applicable .....	90
Physicians—Medical officials of State Hospital serving on lunacy commission .....	54, 90
<b>Sergeants:</b>	
Summoning witnesses in criminal cases.....	93
<b>Sheriffs:</b>	
Executing and attempting to execute warrants and search warrants .....	160
Single arrest for several offenses.....	91
Summoning witnesses in criminal cases.....	93
Transporting prisoner to jail .....	160
<b>Trial Justices:</b>	
Filing papers with clerk.....	93
Garnishment proceedings .....	94
Single trial on several charges.....	91
Taking recognizance to keep the peace.....	127
Witnesses—Defendant's—Criminal cases .....	49
<b>FEES AND COSTS</b>	
Officers—Where several make arrest together.....	95
Payment of in Commonwealth's suit to enjoin public nuisance.....	94
Witnesses in criminal cases—Where accused is tried for several offenses .....	95
<b>FERTILIZER</b>	
Labels .....	4
<b>FIDUCIARIES</b>	
Amortization and accumulation of bonds bought at premium or discount .....	95
<b>FINES</b>	
Violation of county ordinance—How disposed of.....	97
<b>FINES AND COSTS</b>	
Extinguishment of judgment for by serving time for non-payment of .....	96
Persons committed for non-payment of—Time allowed for good behavior .....	114
Right of election between paying and serving time.....	96
<b>FORFEITURES AND PENALTIES</b>	
How disposed of.....	97
<b>FREIGHT RATES</b>	
Investigation of—Expenditure of funds by Department of Agriculture and Immigration .....	4
<b>FUNDS</b>	
Confederate Memorial—Expenditure of for purchase of flags.....	16
“Mother's Aid”—Power of Commission of Public Welfare over local boards in administration of.....	140
<b>GAMBLING</b>	
Forfeiture of stakes “Private Poker Game”.....	98
<b>GAME AND INLAND FISHERIES</b>	
Crabs:	
Dredging for in Tidewater Virginia.....	99
Interstate Commerce—Inspection of in hands of carrier.....	105
Dip net permits—Who may acquire.....	99

	Page
Licenses:	
Hunting—Son-in-law of resident landowner.....	100
Trespassing hunters .....	100
<b>GARNISHMENTS</b>	
Fee of Trial Justice.....	94
Salaries, fees, etc., of sheriffs.....	133
Time within which summons must issue—Fee.....	101
Venire .....	101
<b>GENERAL ASSEMBLY</b>	
Majority of members.....	103
<b>GOVERNOR</b>	
Jurisdiction over person committed to Department of Public Welfare and Industrial Schools.....	103
Power with respect to disposition of State property.....	166
<b>HIGHWAYS</b>	
Cities and Towns—Effect of chapters 317 and 384 of Acts 1936.....	104
<b>INEBRIATES</b>	
Furloughs—Arrests .....	104
<b>INSANE, EPILEPTIC, FEEBLE-MINDED AND INEBRIATE</b>	
Racial segregation—Effect of commission's finding as to race.....	105
<b>INTERSTATE COMMERCE</b>	
Oyster and Shellfish Laws—Inspection of crabs in hands of carrier.	105
<b>JAILORS</b>	
Compensation—Prisoners committed for violating ordinances.....	108
<b>JAILS AND PRISONERS</b>	
Allowance for good conduct while held in jail under penitentiary sen- tence .....	109
Convicts:	
Property of—Subjection to claims of creditors.....	109
Maintenance of prisoners convicted under ordinance—By whom costs paid .....	42
Management of jails in general—Duties delegated to employee.....	111
Misdemeanants confined at State Farm—Credit for time served....	110
Sentence and Punishment:	
Convicts at State Farm for women—Transfer to State Hos- pitals—Credit for time in hospital.....	111
Suspension of after commitment.....	113
Time allowed for good behavior.....	113
Time allowed for good behavior—Persons committed for non-pay- ment of fines and costs.....	114
<b>JUDGMENTS</b>	
Collection of—Duties of trial justices.....	178
Error of omission—Correction of.....	141
<b>JURY</b>	
Cost of assembling where defendant is charged with felony and con- victed of misdemeanor.....	44
Criminal cases—Taxing costs of.....	41
<b>JUSTICES OF THE PEACE</b>	
Collection of accounts—Authority to appoint special officer.....	115
Fees . . . . .	88
Warrants:	
Civil cases—Amount in controversy .....	92

	Page
Jurisdiction—Criminal warrants . . . . .	115
Officer of cities and towns . . . . .	30
Power to take bond of person appealing from trial justice . . . . .	89
Warrants—Where may be issued . . . . .	116
<b>JUVENILE AND DOMESTIC RELATIONS COURT</b>	
Offenses against children—Indecent exposure in child's presence as . . . . .	116
<b>LABOR AND INDUSTRY</b>	
Department of—United States employment service—Compensation of State appointees out of Federal funds . . . . .	116
<b>LICENSES</b>	
Alcoholic Beverages:	
Beer—Shenandoah Park Area . . . . .	9
Subject to Sunday Laws . . . . .	10
Automobile:	
Operator's—Effect of commitment to State Hospital as inebriate or drug addict . . . . .	18
Revocation of for failure to satisfy judgment . . . . .	122
Who required to have—Secretary of Foreign Minister . . . . .	117
Cities and Towns—Licensing incident of business already licensed . . . . .	118
Creameries—Of whom required . . . . .	55
Dogs—Where and to whom issued . . . . .	56
Dry Cleaners—	
Grounds for denying . . . . .	58
Identification of licensee . . . . .	57
Hunting—Son-in-law of resident landowner . . . . .	100
Palmistry—When required . . . . .	118, 119
Peanut Pickers . . . . .	5
Pharmacy—Grounds on which license may be withheld . . . . .	129
<b>LITERARY FUND LOANS</b>	
Interest on loans—When compounded . . . . .	28
Issuance of bonds for refunding without referendum . . . . .	51
<b>LUNACY COMMISSIONS</b>	
Fees of physicians—Medical officials of State Hospitals . . . . .	54, 90
<b>LUNATICS</b>	
Commitments—Disposition of records . . . . .	119
<b>MARRIAGES</b>	
Reports of to Bureau of Vital Statistics—When made . . . . .	34
<b>MAYORS</b>	
Preliminary examination of accused persons—Felony cases . . . . .	119
<b>MEDICAL EXAMINERS</b>	
Hearing as to revocation of license—Procedure, Quorum, etc . . . . .	120
<b>MILEAGE</b>	
Arresting officer transporting prisoner . . . . .	89
<b>MOTOR VEHICLE LAWS</b>	
Arrests for violations—Officers not wearing uniforms of State motor vehicle patrolman . . . . .	120
Driving while under influence of intoxicants—Conviction as bar to driving other vehicle in course of employment . . . . .	121
Revoking of license for failure to satisfy judgment—Retroactive ef- fect . . . . .	122
<b>MUNICIPALITIES</b>	
Power to regulate sale of wine and beer on Sunday . . . . .	15
<b>NATIONAL PARKS</b>	
Shenandoah—Federal Jurisdiction within . . . . .	122

	Page
<b>NOTARIES</b>	
Eligibility—Residence .....	123
Territorial scope of commission.....	123
<b>OFFICERS</b>	
Compensation—Confiscation of automobile.....	7
Contracts with State agency—Superintendent of Public Welfare rendering medical services under Relief Act.....	125
Fees:	
Serving process, etc.—Civil and criminal cases.....	90
Where several make arrest together.....	95
Mileage:	
Arrest officer transporting prisoner.....	89
Motor Vehicle Patrolman—Uniforms to be worn when making arrests .....	120
<b>OFFICES</b>	
Incompatibility of—	
Member of school board as clerk of same.....	124
Member of town council as oyster inspector.....	134
<b>OPTOMETRY</b>	
Authority of State Board to issue temporary permits.....	126
<b>ORDINANCES</b>	
Cities and Towns—Petit larceny.....	31
Driving While Intoxicated:	
Effect of town ordinance in county having county ordinance....	126
Prosecutions under .....	126
Prosecutions under, when arrest is by State Motor Vehicle officer..	127
<b>OYSTER BEDS</b>	
Leases of—Effect of agreement with United States releasing—Liability for damage in dredging.....	127
<b>PALMISTRY</b>	
License—When required .....	118, 119
<b>PARDONS</b>	
Conditional—Credit on sentence.....	128
Effect of on liability for costs.....	129
<b>PEANUT PICKERS</b>	
Licenses and reports required of.....	5
<b>PHARMACY</b>	
Grounds on which license may be withheld.....	129
<b>PHYSICIANS</b>	
Fees—Medical officials of State Hospitals serving on Lunacy Commission .....	54, 90
<b>PUBLIC BUILDINGS</b>	
Approval of Art Commission.....	130
<b>PUBLIC FUNDS</b>	
Deposits to meet bond maturities—Security required.....	131
Security—Federal Housing Administration bonds as.....	131
<b>PUBLIC OFFICERS</b>	
Contracts:	
Insurance on school building written by company of which member of school board is president.....	132
Sales by merchant chairman of board of supervisors to county for use of town.....	132
Garnishment of salaries, fees, etc.....	133

	Page
Indemnification of out of public funds.....	134
Interest in contracts—Member of school board furnishing supplies and insurance .....	135
School superintendents—Terms and when office vacant.....	135
<b>PUBLIC WELFARE</b>	
Certification of costs of prisoners—Delegating duties as to.....	138
Delinquent children—Hospitalization of—How paid for.....	138
Powers of Commission:	
Over local boards.....	139
Over local boards in administration of "Mothers' Aid" Funds..	140
Rendering medical services under Relief Act—Contracts with State agency .....	125
<b>PURCHASE AND PRINTING</b>	
Distribution of bound Acts of Assembly.....	136
Duty of Director in case of tie bids—Perferential treatment of local concerns .....	137
<b>RACIAL SEGREGATION</b>	
Insane, Epileptic, Feeble-Minded and Inebriate—Effect of Mental Hygiene Commission's finding as to race.....	105
<b>RECORDATIONS</b>	
Deeds of Trust—Federal Farm Credit Lien Book.....	34
Lien of special assessment of sidewalks.....	141
<b>RECORDS</b>	
Bureau of Insurance and Banking—Inspection of.....	29
Commitment of lunatics—Disposition of.....	119
Vital Statistics—Furnishing copies of—When no fee to be exacted..	182
<b>REGISTRARS</b>	
City charter making town recorder ex-officio registrar—Constitu- tionality of.....	141
<b>RESIDENCE</b>	
Notaries Public .....	123
<b>RES ADJUDICATA</b>	
Sufficiency of plea under certain circumstances.....	142
<b>ROADS</b>	
Condemnation for secondary roads—In whose name proceedings brought .....	142
Power of board of supervisors to disburse funds for maintenance of.	26
<b>SALARIES</b>	
Division superintendents—How apportioned.....	144
Public officers—Garnishment of.....	133
State employees—When Governor's consent necessary for increase, etc. . . . .	164
<b>SCHOOLS</b>	
Authority of board of supervisors to levy special district tax for erec- tion of building.....	52
Bonds:	
County as guarantor.....	27
Erection of school building .....	144
Redemption of before maturity.....	143
District levies for erection of school building.....	144
Division Superintendents:	
Election of—Division comprising two counties.....	145
Payments of salaries—How apportioned.....	144
Terms and when office vacant.....	135
Falls Church separate school district .....	147

	Page
General management of, under county executive form of government.	148
Incorporated towns—Tax to increase teachers' salaries or extend term . . . . .	149
Literary Fund Loans—When interest compounded.	28
Special District Tax—Authority of county to levy for erection of school building . . . . .	52
Textbooks—Requiring parents to provide.	150
Towns constituting separate school district—Representation on county board where town lies in two counties.	150
Transportation—Duty of county to furnish—Children from another county . . . . .	151
Trustee Electoral Board—Appeal from action of.	152
Tuition—Business courses in public schools.	152

**SCHOOL BOARDS**

Compensation and remuneration of members, Chairman.	153
Compensation—Commonwealth's Attorney—Special services to board . . . . .	36, 37
Contracts—Interest of members in.	153
Employing relatives of members of—"In-laws".	146
Expenditures by—Requirements as to budget, appropriations, etc.	154
Insurance on school building written by company of which member of board is president.	132
Member of as clerk of same.	124
Member of furnishing supplies and insurance.	135
Sale of school property—How conducted.	155
Term of office under county manager form of government.	156
Validity of agreement for financing city school for use of county and city pupils . . . . .	156

**SENTENCE AND PUNISHMENT**

Convicts at State Farm for Women—Transfer to State Hospitals—Credit for time in hospital.	111
Suspension of Sentence:	
After commitment . . . . .	113
Jail sentence for driving after license revoked.	158
To pay fine for failure to obtain dog license where license obtained before time of trial . . . . .	168
Time allowed for good behavior.	113, 114

**SERGEANTS**

Fees—Summoning witnesses in criminal cases.	93
---	----

**SEWAGE**

Hampton Roads Sewage Disposal Commission—Functions in general	158
---	-----

**SHERIFFS**

Compensation—Transportation of convict to penitentiary after sentence . . . . .	43
Deputies—Authority of board of supervisors to fix compensation.	24, 25
Duty to arrest patients furloughed from State Hospitals.	159
Fees:	
Confiscation of automobile.	7
Single arrest for several offenses.	91
Statute of Limitations.	23
Summoning witnesses in criminal cases.	93
Transporting prisoner to jail.	160
Fees and Mileage:	
Executing and attempting to execute warrants and search warrants . . . . .	160
Garnishment of salaries, fees, etc.	133

	Page
<b>SLOT MACHINES</b>	
Confiscation—When authorized .....	161
Legality of—Operating certain machines.....	161, 162
“Pin Games”—Offering weekly prizes.....	163
<b>SOCIAL SECURITY</b>	
Whether employees of ABC Board are affected by Federal Act....	8
<b>STATE COLLEGES AND UNIVERSITIES</b>	
Colored Persons—Act to provide equal facilities elsewhere—Con- struction . . . . .	166
Residence of students .....	163
<b>STATE EMPLOYEES</b>	
Compensation—When Governor's consent necessary for increase, etc.	164
<b>STATE HOSPITALS</b>	
Deceased patient's estate—Right of hospital to share in.....	165
Payment of fees by—Fee of clerk for recording papers in steriliza- tion cases . . . . .	165
<b>STATE LIME GRINDING PLANT</b>	
Powers of State Board of Agriculture and Immigration with refer- ence to . . . . .	6
<b>STATUTE OF LIMITATION</b>	
Claims against the State .....	33
<b>STATE PROPERTY</b>	
Disposition of—Power of Governor with respect to.....	166
<b>SUNDAY LAWS</b>	
Legality of “Flying Circus” to perform.....	167
Licensees under ABC Act as subject to .....	10
Moving Pictures . . . . .	168
Powers of Alcoholic Beverage Control Board to adopt rules and regulations as to Sunday Sales .....	10
Sale of wine and beer:	
Legality of . . . . .	15
Power of municipality to regulate .....	15
<b>TAXATION</b>	
Boards of Equalization—Power of counties to establish.....	169
Capitation:	
Naturalization aliens .....	66
Tax bills—How sent . . . . .	66
When to be paid .....	65
Delinquent Land:	
Duty of treasurer—Recordation—Collection .....	170
Release as to one of two tracts—Fee of clerk.....	171
Sale of—How advertised .....	169
Sales of—Postponement .....	175
Statutes relieving from penalties, interest and costs.....	171
Exemptions:	
Recordation of lease to post office department.....	173
Salaries to V. P. I. professors.....	172
To encourage establishment of new industries .....	53
Incorporated towns—Authority to levy tax to increase teachers' sala- ries or extend term .....	149
Real Estate acquired by Federal government.....	173
Recordation Tax—Recordation of successive lease and sublease as two recordations . . . . .	174

	Page
Release of penalties and costs—Power of board of supervisor to impose conditions on .....	174
Special district tax—Erection of school building.....	52
Tangible personalty temporarily out of State on January 1.....	176
<b>TREASURERS</b>	
Duty—Recordation and collection of delinquent land tax.....	170
<b>TRIAL JUSTICES</b>	
Capias Pro Fine—Authority to issue.....	177
Duties of—Collection of judgments .....	178
Fees:	
Continuances and dismissed actions; Proceedings to exempt wages	178
Filing papers with clerk .....	93
Garnishment proceedings .....	94
Single trial on several charges .....	91
Taking recognizance to keep the peace.....	127
Jurisdiction—Distress warrants .....	179
Process—When may be sent out of county.....	180
Substitute—Compensation . . . . .	180
Suspension of sentence and probation .....	181
<b>TRUST ESTATES</b>	
Commonwealth as beneficiary of—How funds handled.....	182
<b>VENIRE</b>	
Cost of assembling where defendant is charged with felony and convicted of misdemeanor.....	44
Criminal cases—Taxing cost of . . . . .	41
<b>VITAL STATISTICS</b>	
Furnishing copies of records—When no fee to be exacted.....	182
<b>WARRANTS</b>	
Authority of deputy clerk to sign .....	31
Criminal—Jurisdiction of justices of the peace.....	115
Distress—Jurisdiction of Trial Justice .....	179
Issuance of by justice of the peace .....	116
<b>WITNESSES</b>	
Fees:	
Criminal cases—Where accused is tried for several offenses....	95
Taxing of in criminal cases .....	40
Summoning of in criminal cases—Fees .....	92
<b>WORKMEN'S COMPENSATION</b>	
"EMPLOYEE"—County agricultural agent as employee of county..	183

