OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1937, to June 30, 1938

RICHMOND:
DIVISION OF PURCHASE AND PRINTING
1938
Letter of Transmittal

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 21, 1939.

HONORABLE JAMES H. PRICE,
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 have been conducted for the Division of Motor Vehicles, by the Assistant Attorney General attached to that Division, some fifty odd hearings in connection with the administration of the State Financial Responsibility Act. There have been instituted, through this office and local attorneys, two hundred and forty condemnation cases in the various circuit courts of the Commonwealth to acquire rights of way for the Highway Commissioner. Deeds from the Commonwealth conveying the property in three sections of the Blue Ridge Parkway to the United States have been prepared and approved by this office, and approximately six hundred and ten parcels of property involved in this Parkway from the Roanoke-Floyd County line to the North Carolina line have been secured.

For the Alcoholic Beverage Control Board, hearings have been held in connection with applications for six hundred and sixty licenses and proceedings for the revocation of two hundred and seventeen. Assistance has also been rendered from time to time to attorneys for the Commonwealth in trial court proceedings pertaining to the alcoholic beverage control act.

Since the last annual report the case of the Atlantic Refining Company v. Commonwealth of Virginia, which was then pending in the Supreme Court of the United States, and in which a reargument was ordered by the court, has been decided favorably to the Commonwealth. There were at that time pending about forty applications for refunds of entrance fees paid by foreign corporations which had been admitted to the State during the pendency of that suit. As a result of the decision, nearly all of these applications have been withdrawn or dismissed.

The suit of the Highland Farms Dairy, Incorporated, and others, against the Milk Commission, which was also pending in the Supreme Court of the United
States as shown by my last annual report, has likewise been decided in favor of the Commonwealth, the decision sustaining the constitutionality of the Virginia Milk Control Act.

The case of *Mary T. Ryan v. Commonwealth of Virginia*, which was a suit for a refund of about $9,000 of income taxes paid to the Commonwealth, involving the constitutionality of Virginia's tax on income derived from sources outside of the State, was shown by my last annual report to be pending in the Supreme Court of Appeals in Virginia. That Court decided the case in favor of the Commonwealth, and the Supreme Court of the United States granted a writ of *certiorari* to the taxpayer. The matter was argued in that Court in October, 1938, and the Supreme Court of the United States likewise decided the case in favor of the Commonwealth, sustaining the State's power to tax income derived from sources outside of its borders.

There have also been thirty-one criminal cases argued in the Supreme Court of Appeals of Virginia, the results of which are shown in the table hereto appended.

Two suits for damages for alleged breach of contract were instituted against the State Highway Commission in the Circuit Court of the City of Richmond, involving approximately $22,000. The decision of the circuit court was favorable in each case, as was also the decision in the Supreme Court of Appeals which reviewed both of these decisions of the circuit court.

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 tax hearings before the State Corporation Commission, consultations with the Governor, State Treasurer, Comptroller, the Superintendent of Public Instruction, Commissioner of Public Welfare, Commissioner of Labor, and other department heads and public officers of the State, relating to matters arising in their respective offices.

Respectfully submitted,

ABRAM P. STAPLES,
*Attorney General.*
Personnel of the Office
(Postoffice address Richmond)

<table>
<thead>
<tr>
<th>Name</th>
<th>County</th>
<th>Official Title</th>
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<tbody>
<tr>
<td>ABRAM P. STAPLES</td>
<td>Roanoke city</td>
<td>Attorney General</td>
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<tr>
<td>EDWIN H. GIBSON</td>
<td>Culpeper</td>
<td>Assistant</td>
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<td>W. W. MARTIN</td>
<td>Henrico</td>
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<tr>
<td>G. STANLEY CLARKE</td>
<td>Henrico</td>
<td>Assistant</td>
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<tr>
<td>D. GARDINER TYLER, JR.</td>
<td>Charles City</td>
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<tr>
<td>S. W. SHELTON</td>
<td>Fluvanna</td>
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<td>Jos. L. KELLY, Jr.</td>
<td>Bristol city</td>
<td>Assistant</td>
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<tr>
<td>WALTER E. ROGERS</td>
<td>Richmond city</td>
<td>Law Clerk</td>
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<td>NERHEA S. EVANS</td>
<td>Charlotte</td>
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<tr>
<td>EVA E. KIBLER</td>
<td>Augusta</td>
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<td>LOIS B. KRUG</td>
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Attorneys General of Virginia
From 1776 to 1933

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<td>EDMUND RANDOLPH</td>
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<td>JAMES INNES</td>
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<td>ROBERT BROOKE</td>
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<td>JAMES ROBERSON</td>
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<td>SIDNEY S. BAXTER</td>
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<td>WILLIS P. BOCOCK</td>
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<td>THOMAS RUSSELL BOWDEN</td>
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<td>CHARLES WHITTLSEY (military appointee)</td>
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<td>JAMES C. TAYLOR</td>
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<td>RALEIGH T. DANIEL</td>
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<td>SAMUEL W. WILLIAMS</td>
<td>1910-1914</td>
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<tr>
<td>J. D. HANK, JR.</td>
<td>1918</td>
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<tr>
<td>JOHN R. SAUNDERS</td>
<td>1918-1934</td>
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<tr>
<td>ABRAM P. STAPLES</td>
<td>1934-1936</td>
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*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


Cases Pending in the Supreme Court of Appeals of Virginia

7. Sutherland, Morgan v. Commonwealth. From Circuit Court of Dickenson County. ABC Act.

**Cases Decided in Supreme Court of the United States**


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


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

3. Board of Supervisors Elizabeth City County v. State Highway Commission. Suit to force Commission to open a portion of Route 169. Circuit Court of Elizabeth City County.
38. Scott, Fred W., Jr. v. Commonwealth. Hustings Court City of Richmond. State tax on intangible personal property.


43. Stringfellow, Blair B. v. Commonwealth. Hustings Court City of Richmond. State tax on intangible personal property.


47. Wagoner, Claude B. v. State Highway Commission. Suit to force Commission to open a portion of Route No. 169. Circuit Court of Elizabeth City County.


49. Weatherill & Co. Inc., v. Commonwealth of Virginia. Department of Highways. Suit to have sums of money restored which were forfeited on account of failure of plaintiff to deliver material on time. Settled.


OPINIONS

ABC ACT—Confiscation of Automobiles—Advertising Sales.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 14, 1938.

HONORABLE LAWRENCE W. I'ANSON,
Attorney for the Commonwealth,
Portsmouth, Virginia.

MY DEAR MR. I'ANSON:

I am in receipt of your letter of May 11, in which you inquire if the sale of automobiles declared to be forfeited under the provisions of section 4675 (38a) of the Code has to be advertised in a newspaper or in any other special manner by the Sheriff who is charged with the duty of making the sale.

I can find no statute requiring an advertisement in the daily newspaper, and am of opinion that, if the provisions of section 2382 of the Code are complied with, it will be sufficient. That section simply requires the posting of certain notices.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ABC ACT—Confiscation of Automobiles—Procedure Where Title Hopelessly Encumbered.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 14, 1938.

HONORABLE R. NORMAN MASON,
Commonwealth's Attorney,
Accomac, Virginia.

DEAR MR. MASON:

I have your letter of May 13, in which you request my advice as to the desirability of proceeding to confiscate an automobile which was seized while engaged in illegally transporting alcoholic beverages. You state that the Universal Credit Company has a lien upon the property for more than its value and that there is no equity out of which the Commonwealth could hope to obtain any benefit.

It is my opinion, therefore, that in this case the proper procedure is to release any claim to the car which the State might have by reason of its right to confiscate the equity over and above the lien since there is no such equity.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 9, 1937.

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

DEAR MR. COMBS:

I have your letter of July 17, with regard to the distribution of profits of the Alcoholic Beverage Control Board as applied to Elizabeth City County, the point being whether you should be controlled by "the last preceding United States census" or whether you should add to the census figures the population of government military reservations in the county.

It is not entirely clear from the correspondence whether the census figures include the population on the military reservations or not. However, this is a question of fact. I can only advise you that, in view of the provisions of section 4675 (16) of the Code, these profits must be distributed "to the several counties, cities and towns of the Commonwealth on the basis of the population of the respective counties, cities and towns of the Commonwealth according to the last preceding United States census." It seems to me, therefore, that you are bound in making the distribution by "the last preceding United States census."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Interstate Commerce—Shipments Passing Through the State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 27, 1937.

HONORABLE J. E. QUILLEN,
Sheriff of Scott County,
Gate City, Virginia.

DEAR MR. QUILLEN:

This is in reply to your inquiry of the 23rd instant as to whether or not a person transporting whiskey in interstate commerce through the State of Virginia is guilty of a violation of the Virginia laws.

There is a regulation of the Alcoholic Beverage Control Board which requires a person transporting whiskey for hire to give bond that he will continue with the transporting through the State. Our Supreme Court of Appeals, however, very recently declared that this regulation was invalid, and that, where the whiskey is being transported in interstate commerce through Virginia, Virginia has no power to impose this regulation.

I know of no provision of the law which would require such a shipment to be consigned to a licensed dealer in the state of its destination.

I suggest that you discuss this matter with your Commonwealth's Attorney if you desire information in more detail.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
MR. THOMAS J. CHEWNING,
Probation Officer,
Juvenile and Domestic Relations Court,
Newport News, Va.

DEAR MR. CHEWNING:

I have your letter of November 19, asking whether or not you should report to the Virginia Alcoholic Beverage Control Board juveniles convicted in the Juvenile and Domestic Relations Court of violating the alcoholic beverage control laws.

I am of the opinion that such reports should be made.

The pertinent provisions of the alcoholic beverage control act are found in section 4675 (64) of the Code of Virginia (Michie 1936), which provides as follows:

"It shall be the duty of the clerk of each circuit and corporation court and of each justice and mayor in this State on the first day of each calendar month to report to the Board every case tried in such court or before such justice or mayor during the preceding month, for violations of the provisions of this act. Said report shall contain the full name and address of the defendant, a brief statement of the charge, and the judgment thereon. Whenever any clerk, justice or mayor shall fail to make such report he shall be subject to a penalty of twenty-five dollars, and it shall be the duty of the attorney for the Commonwealth of such county or city to institute and conduct the proper civil proceedings to recover said penalty." (1934 Acts of Assembly, p. 133.)

In sections relating to Juvenile and Domestic Relations courts, I find the following provisions relating to the secrecy to be given to proceedings before said courts:

"From the hearing or trial of all cases, matters or proceedings under the provisions of this chapter there shall be excluded all persons except officers of the court, attorneys and witnesses in the case, and the accused or his relatives or guardian or custodian. Any hearing or trial may be had in chambers." [Section 1950 Code of Virginia (Michie 1936)].

"* * * The records of the court shall be under the control of said special justice and shall not be removed or examined by any person without his consent, except by persons authorized by law to make such examinations" [Section 1951 Code of Virginia (Michie 1936)]. See 1922 Acts of Assembly, p. 829.

Section 1945 providing for the establishment of Juvenile and Domestic Relations courts in cities of 25,000 or more inhabitants states that there shall be elected "a special justice of the peace * * * to be known as the judge of the juvenile and domestic relations court * * *." It also allows the appointment of "the civil or police justice to act as judge of such juvenile and domestic relations court * * *." Throughout chapter 81 (sections 1945-1953m) of the Virginia Code, relating to Juvenile and Domestic Relations courts, the judge of such court is always referred to as a "special justice." Also section 49871 of the Virginia Code (1936 Acts of Assembly, at p. 626) provides that "The trial justice shall also be judge of the juvenile and domestic relations court in each county and city in his terri-
Therefore, the answer to your question involves the interpretation of the scope and meaning of the words “each justice” contained in section 4675(64), supra, and their relation to sections 1945, et seq., and 49871 of the Virginia Code, as well as a determination of the import of the provisions quoted from sections 1950 and 1951, supra, relating to the secrecy of proceedings in the Juvenile and Domestic Relations courts.

Construing section 4675(64), supra, liberally, I am of the opinion that “each justice” includes the judges of Juvenile and Domestic Relations courts and they must report liquor law violations to the Alcoholic Beverage Control Board. This view harmonizes with all the acts relating to judges of Juvenile courts from 1922 through 1936. The Board uses these reports for ascertaining the practical workings of the liquor laws and such affords them a basis for determining future policies. These reports are confidential, are not published and persons named therein as guilty of liquor violations are not blacklisted. The provisions found in sections 1950 and 1951, supra, were enacted for the purpose of allowing a procedure in the Juvenile and Domestic Relations courts that is less formal and more parental than that of the regular criminal courts, and to protect the child from publicity. However, I cannot see how the reports involved here violate in any manner sections 1950 and 1951 of the Virginia Code or the purpose and spirit of the Juvenile and Domestic Relations courts. In my opinion the policy of the statutes referred to preserve these reports from public inspection or examination and require that they be accorded the same confidential status in the records of the Board as is provided for in those of the Juvenile and Domestic Relations courts.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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ABC LAW—Local Ordinances Paralleling or Conflicting With.

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

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

MY DEAR LEWIS:

I have your letter of November 3, in which you request my opinion upon the question whether or not a provision contained in the charter of the town of Urbanna, prohibiting any person or persons from selling spiritous liquors in the corporate limits of the town, or within one mile thereof, would operate to prohibit the Alcoholic Beverage Control Board from establishing a State store in Urbanna.

I call your attention to section 68, sub-section 2(c), page 136, Acts of 1934, known as the alcoholic beverage control act. This provision is as follows:

“All acts and parts of acts, general, special, private and local, including charter provisions and ordinances of cities and towns, inconsistent with any of the provisions of this act, are hereby repealed to the extent of such inconsistency.”

Section 65 of said act (Acts 1934, pages 133 and 134) prohibits any county, city or town from passing or adopting any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking use, advertising or dispensing of alcoholic beverages in Virginia. The only exception to this prohibition is contained in section 26 of the act, which permits cities and towns to fix certain license charges and collect the same from
licenses of the Alcoholic Beverage Control Board who are licensed to sell wine and beer.

The alcoholic beverage control act, section 4(c) (Acts 1934, page 104) expressly authorizes the said Board "To determine the localities within which government stores shall be established and operated and the location of such stores."

I am of opinion, therefore, that the provisions contained in the charter of the town of Urbanna prohibiting any person from selling alcoholic beverages in the town is clearly in conflict with the provisions above referred to contained in the alcoholic beverage control act, and that such charter provisions are expressly repealed by section 68, subsection 2(c) above quoted (Acts 1934, page 136).

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Local Option Elections—Registration—Voters.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 11, 1937.

MR. W. M. SMITH,
Altavista, Virginia.

MY DEAR MR. SMITH:

I am in receipt of your letter of July 29, in which you state that a special election has been called for September 21 to determine whether the people of the town of Altavista desire an A. B. C. store or to have wine and beer sold in the corporate limits of Altavista.

You then ask:

"Shall the poll books be opened up to the day of the election? If not, when shall they be closed?"

Section 4675 (30) of the Code provides that local option elections held under the Alcoholic Beverage Control Act shall be conducted "in such manner as is provided by law in other elections in so far as the same is applicable."

I am of opinion, therefore, that the time of opening and closing the registration books is controlled by section 98 of the Code of Virginia, with which, of course, you are familiar. This section provides in effect that a person may register at any time up to thirty days before the November election. Inasmuch as your election is to be held on September 21, it would appear that the registration books may be kept open up to and including the day of the election.

As to who is eligible to vote in this election, I call your attention to section 83 of the Code of Virginia, which provides that at any special election held after the second Tuesday in June in any year any persons shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. Of course, if the election has been called for the town of Altavista alone, then only those persons who are voters in Altavista are eligible.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
HONORABLE J. H. BRADFORD, Director,
Division of the Budget,
Governor's Office,
Richmond, Virginia.

Dear Mr. Bradford:

This is in reply to your letter of April 15, in which you request my opinion upon the question whether or not the State Corporation Commission is authorized to use a part of the appropriation of $114,800 contained on pages 812 and 813 of the 1938 Acts of the General Assembly for the purpose of paying rent for office space outside of the State Office Building.

The appropriation is based on certain items contained in the budget, among which is an item of $2,500 for the payment of rent. It is my opinion, therefore, that the State Corporation Commission has authority to expend this sum of money for rent, subject to this limitation, however, that the purpose for which any such office space is used must be restricted to the purposes for which the taxes were levied from which the fund of $114,800 was derived. The appropriation is not made from the funds of the general treasury, but from a special fund set up out of a special service tax or charge imposed upon certain public service corporations to defray the expenses of certain investigations, examinations and proceedings with reference to the supervision and regulation of said companies.

The Supreme Court of the United States has recently held that, where a tax is levied for a purpose in the nature of a service charge, it may not be diverted to other purposes without infringing upon the due process clause contained in the Constitution of the United States.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

HONORABLE FRANK P. EVANS, Chairman,
Unemployment Compensation Commission,
Richmond, Virginia.

Dear Major Evans:

This is in reply to your letter of May 27, which is as follows:

"The Unemployment Compensation Act of Virginia, approved December 18, 1936, with respect to the compensation of the members of the Commission, is as follows:

"Each of the members of the commission appointed by the Governor shall receive as compensation for their services the sum of fifty-four hundred dollars per annum. The Commissioner of Labor shall receive, in addition to the compensation which he receives as Commissioner of Labor, such sum
as shall be necessary to make his total annual compensation, received as Commissioner of Labor and as a member of the commission, equal to fifty-four hundred dollars per annum.'

"The Appropriation Act, passed by the General Assembly of Virginia at its 1938 session, authorizes the payment of six thousand dollars per year to the two members of the Commission appointed by the Governor and one thousand dollars per year to the Commissioner of Labor, who is also a Commissioner, so that the total annual compensation received by him as Commissioner of Labor and member of the Commission will equal six thousand dollars per annum.

"The Commission requests an opinion from you as to whether or not the Appropriation Act has the effect of amending that portion of the original Act with respect to compensation of the members of the Commission and the Commissioner of Labor as a member of the Commission."

It is my opinion that the provisions contained in the Appropriation Act (Acts 1938, page 887) has the effect of amending the provisions contained in the original Act of 1936 above quoted, so that the salary fixed by law in Virginia, beginning July 1, 1938, for the two members of the Commission appointed by the Governor will be $6,000 each per annum and the salary of the Commissioner of Labor, as ex-officio member of the Unemployment Compensation Commission, will be $1,000 per annum.

This construction is in accordance with all previous rulings of this office. It has uniformly been held that a change in the salary of an officer or employee of the State, contained in the Appropriation Act, supersedes any provision as to the amount of his or her salary which may have been contained in any prior Act of the General Assembly.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Joint Resolution Authorizing Payment of Expenses of Special Committee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 21, 1938.

HONORABLE WILLIAM R. SHANDS,
Director of the Division of Statutory Research and Drafting
and Secretary of the Labor Relations Commission,
Richmond, Virginia.

My Dear Mr. Shands:

This is in reply to your letter of June 21, in which you request my opinion as to whether or not the actual expenses incurred by the Labor Relations Commission created by Senate Joint Resolution No. 1, Acts of 1938, page 1039, may be paid out of the general fund of the State Treasury, or out of the appropriation made to the Legislative Department as contained in the Appropriation Act of 1938.

It is my opinion that under our Constitution an appropriation cannot be made by a joint resolution, but must be by act referred to committees, with the recorded vote prescribed by the Constitution. Therefore, I would not construe the language referred to in the joint resolution as an appropriation, but as a provision that the expenses of the members of said Commission should be paid.

The appropriations to the Legislative Department for both years of the biennium provide that out of same shall be paid the salaries and mileage of members of legislative committees sitting during recess, and the incidental expenses of the general assembly. It is my opinion that the expenses of this Commission should
be paid out of these appropriations to the Legislative Department, and come within the general scope and purpose of said appropriations.

What I have said with respect to the foregoing also applies to the Commission created by Senate Joint Resolution No. 15, Acts of 1938, page 1033, to revise and simplify the laws relating to the public schools.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., MAY 16, 1938.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

Attention: Honorable S. C. Day, Jr.

DEAR COLONEL HODGES:

This is in reply to your letter of May 10, in which you request my opinion upon the question whether or not the Library Building Commission, which was created by chapter 242 of the Acts of the General Assembly of 1936, is authorized, out of the appropriation of $5,000 made to it for the purpose of carrying out the provisions of the Act, to pay the expenses of members of the new Commission created by chapter 405 of the Acts of 1938 between now and July 1, 1938.

It is my opinion that the old Library Commission possesses general power to expend the sum appropriated in any manner so as to further the purposes for which it is created, and that it is proper for the expenses of the new members of the new Commission to be paid out of this appropriation if, in the opinion of the old Commission, the service they render is in furtherance of the purposes for which the old Commission was created.

You also inquire as to whether or not an appropriation was made by the General Assembly of 1938 for carrying out the purposes of the 1938 Commission. I beg to advise that the general appropriation act, on page 936 of the Acts of Assembly of 1938, made an appropriation of $150,000 to the State Library Building Commission, and that, in my opinion, any necessary expenses of the Commission after July 1, 1938, is payable out of this appropriation and should be considered as a part of the cost of the construction of the State Library.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Transfers of—State Hospitals.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., JULY 1, 1938.

HONORABLE J. H. BRADFORD, Director,
Division of the Budget,
Richmond, Virginia.

MY DEAR MR. BRADFORD:

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

"Will you please give me for the Governor's information your opinion as to whether, under the provisions of section 46 of chapter 422 of Acts of
Assembly of 1936, transfers can be made with the Governor's approval, during the fiscal year ending June 30, 1938, from the appropriation for maintenance and operation for any one or more of the five State hospitals for mental defectives to the appropriation for one or more of the other such hospitals for the said year.

I am of the opinion that the provision contained in section 46 of the Appropriation Act of 1936 must be construed as confined to separate and single appropriations which must be deemed the unit within which transfers may be made. I see no authority for grouping the hospitals or considering them as one unit for this purpose during the 1936-1937 biennium.

There is a special provision, however, appearing on page 858 of the Appropriation Act of 1938 which does authorize such transfers during the next 1938-1940 biennium. The fact that it was considered necessary to incorporate this provision in the 1938 Appropriation Act would indicate that in its absence no such authority existed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Transfers—from State Hospitals to State Hospital Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 1, 1938.

HONORABLE J. H. BRADFORD, Director,
Division of the Budget,
Richmond, Virginia.

DEAR Mr. BRADFORD:

I have before me your letter of June 29, which is as follows:

"The State Hospital Board has asked the Governor to authorize a transfer of $10,000 from one or more of the appropriations provided by chapter 428 of Acts of Assembly of 1938 for maintenance and operation of the several State hospitals for treatment of mental defectives, under the control and supervision of the said Board, to a fund to be expended by the said Board for expenses in connection with the employment of clerks, traveling, purchase of office equipment, office supplies, and payment of rent, etc., for the conduct of the central offices of the said Board.

"It is proposed by the Board to expend these amounts in addition to the appropriation of $10,000 provided for the Board for the ensuing fiscal year by chapter 428 aforesaid.

"Will you please give me for the benefit of the Governor your opinion as to whether the said transfer can legally be made provided the Governor's approval therefor is obtained."

Following the appropriations made by the General Assembly to the State Hospital Board, the Central State Hospital at Petersburg, Petersburg State Colony, the Eastern State Hospital, the Southwestern State Hospital, the Western State Hospital at Staunton, the DeJarnette State Sanatorium, and the State Colony for Epileptics and the Feeble-minded, there appears the following provision:

"Whereas the Central State Hospital, at Petersburg, the Eastern State Hospital, at Williamsburg, the Southwestern State Hospital, at Marion, the Western State Hospital, at Staunton, and the State Colonies for Epileptics and Feeble-minded are all under the management and direction of the State Hospital Board, it is expressly provided that the said State Hospital Board
is hereby authorized and empowered, by and with the written approval of
the Governor, whenever in the opinion of said Board and of the Governor the
best interests of the State will thereby be conserved and promoted, to trans-
fer and deduct from the amounts herein appropriated to any one or more of
said hospitals or institutions for its operation and maintenance, such amounts
as may be deemed proper and add the same to the amounts herein appro-
priated for the operation and maintenance of any other one or more of said
hospitals or institutions.” (Acts of 1938, page 858).

It is my opinion that the general purpose and intent of the language was to
group the Hospital Board together with the Institutions named in said quoted
language, and that they should be considered as a unit with respect to the transfer
of funds from one appropriation to the other.

It is my opinion, therefore, that the question you ask should be answered in
the affirmative.

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

APPROPRIATIONS—Unexpended Balances—Use of to Satisfy Contracts.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 20, 1938.

Colonel LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

This office is in receipt of your letter of June 16, in which you call attention
to the Appropriation Act of 1938 (Acts 1936, chapter 422, section 48, page 977)
and quote a portion therefrom, covering the disposition of unexpended appropria-
tions for the biennium ending June 30, 1938. You then ask the following question:

"Would it be permissible under this provision of the law for the Comptroller to carry forward after July 10, 1938, unexpended balances, as shown
on the books of record in the Division of Accounts and Control, of items
separately set forth in the Appropriation Act for specifically designated
projects in order that those projects may be completed as contemplated when
the Appropriation Act was approved, and which for good and sufficient rea-
sons, satisfactory to the Governor in writing attested, have not been com-
pleted at the close of business on June 30, 1938, but for the accomplishment
of which properly executed contracts have been entered into and for which
adequate plans have been prepared and approved by competent authority, etc?"

It is my opinion that where money has been appropriated for a specific pur-
pose to one of the departments of the State or a State Institution, and such depart-
ment or State Institution has entered into a valid and binding legal contract for
the rendition of a service embraced within such specific purpose or for the furnishing
of material, merchandise, or other matter which may be the subject of the
contract, but there has not been a complete performance of the contract on the
part of the contractor on July 10, 1938, or at the expiration of any biennium,
the money appropriated by the General Assembly for such specific purpose should
be made available by the Comptroller for that purpose at the time of the perform-
ance by the contractor of his contract, even though it be after the said 10th day
of July.

It is obvious that any other construction of the general laws of the State
would impose a rigidity and lack of flexibility upon the carrying on of the business
of the State which could accomplish no good purpose and might be exceedingly
detrimental.
As to the method adopted by the Comptroller for making this fund available, I think that is within the discretion of the Comptroller and merely a matter of proper accounting in his office.

It is my opinion that such funds are to be deemed to have been expended within the period referred to by the language quoted in your letter, although the money has not actually been paid on warrants of the Comptroller.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Performing Services for Cities and Counties—Payment of Expenses.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 12, 1938.

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

DEAR MR. DOWNS:

I have before me your letter of January 8, in which you request my opinion upon certain questions arising under section 565 of the Code of Virginia in relation to establishing a system of bookkeeping and accounting, and auditing the books of the respective city and county treasurers, clerks of courts, and school boards.

This section provides that the auditor of public accounts may do this work either on his own initiative without request from the board of supervisors or council, or same may be done at the request of these legislative bodies, and he shall report to the said legislative bodies the findings of his investigation if same relates to the affairs of such county or city. The act then provides:

"The cost of such service as may be so required shall be borne by the county or city receiving the service of said Auditor of Public Accounts and shall not exceed an amount sufficient to reimburse the State for the actual cost to the State of such service, and in no event shall exceed the sum of five hundred dollars."

I have been advised by you that the appropriation which the General Assembly has made for defraying the cost of auditing work does not include any work of this type, and that you have no funds available out of your appropriation to pay for such audits or for the establishing of such systems of bookkeeping. The act clearly contemplates that the State shall be reimbursed for the actual cost of rendering the service.

There seems to be a conflict on the face of the statute by reason of a provision that the cost shall not exceed the sum of five hundred dollars. If a county or city should request the auditor of public accounts to perform the services, the cost of which would be more than five hundred dollars, the question arises whether the auditor would have the authority to do more than five hundred dollars worth of this work, or whether, at the request of the county or city legislative body, he could perform the entire work if such legislative body agrees to reimburse the State in excess of five hundred dollars.

The clear intent and purpose of this statute is to make available to the localities the services of the staff of the auditor's office. If possible, its provisions should be construed so as to carry out this manifest and obvious purpose and intent, and so as not to deprive the localities of the trained personnel of the auditor's office.

It is my opinion, after carefully considering this statute, that the limitation of five hundred dollars on the cost of the services in auditing these offices was
intended to apply only to cases in which the auditor on his own volition, and without being requested so to do, performs the service. In other words, the object of this restriction is to prevent the auditor from making voluntary audits which would cost the county or city more than five hundred dollars. To hold that the act forbids doing work costing more than five hundred dollars in cases where more work is desired, and the locality is willing to pay therefor, would be to force the locality to employ outside accountants and deprive it of the very service the statute was obviously intended to make available.

Therefore, if the county or city is willing to agree, and does agree with the auditor of public accounts, to reimburse the State for all costs of the service it requests to have rendered, without regard to the five hundred dollars limitation, and even though the said limitation be exceeded, it is my opinion that the auditor of public accounts has authority to make such an agreement with any county or city, and that the board of supervisors or city council possesses the power to appropriate the money to pay for same.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Employment of Delinquent Tax Collector for Collection of Real Estate Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 9, 1937.

HONORABLE ROBERT R. JONES,
Attorney for the Commonwealth,
Powhatan, Virginia.

MY DEAR MR. JONES:

This is in reply to your recent letter.

You state that the Board of Supervisors of Powhatan County appointed a delinquent tax collector under section 394 of the Tax Code of Virginia. I take it that you desire to know whether this delinquent tax collector so appointed may collect taxes on real estate sold for delinquent taxes, and whether such person may bring suits to sell the land for taxes assessed thereon.

If you will examine section 394, you will note that, insofar as it refers to a delinquent tax collector, it specifically provides that such person may collect delinquent local levies in "list numbered three". List number three represents taxes assessed on tangible personal property and certain taxes other than those on real estate.

I am, therefore, of opinion that a delinquent tax collector appointed under section 394 may not collect real estate taxes by suit or otherwise.

Upon such examination of the statutes as I have been able to make, I have found no statute giving authority to a county to appoint a delinquent tax collector for the collection of taxes on land which has been heretofore sold for delinquent taxes.

As you know, section 403 of the Code provides for suits to be brought for the collection of delinquent taxes. However, this section plainly contemplates that the suits shall be instituted and conducted by the attorney for the Commonwealth upon request of the treasurer of the county, or certain other designated officials. It seems to me that, if it is desirable that these suits be brought by some other person designated by the board of supervisors or other officials of the locality, then legislative action is necessary to accomplish this purpose.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

BOARDS OF SUPERVISORS—Funds—Annual Statement of Expenditures—How Itemized.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 12, 1938.

HONORABLE J. H. BRADFORD, Director,
Division of the Budget,
Capitol Building,
Richmond, Virginia.

MY DEAR MR. BRADFORD:

I am in receipt of your letter of January 7, in which you enclose a communication of January 5 from the Clerk of the Board of Supervisors of Wise County. The Clerk raises the following question on which you desire my opinion:

"I am requested by the Board of Supervisors of Wise County to ask that you rule on section 2577m (3) of the Code of Virginia as to the meaning of the words 'itemized disbursements'.

"Does it mean that each separate voucher issued by the Board of Supervisors showing the name of the payee and the amount for which issued must be published, or would publication of the amounts disbursed for each function of government as set up in the Budget Manual comply with the meaning of this section?"

Section 2577m (3) of the Code is a part of the Act of Assembly providing, among other things, for the preparation and publication by counties, cities and towns of annual budgets. The section reads as follows:

"The board of supervisors shall cause to be made out immediately after the adjournment of each regular annual meeting a statement showing the aggregate amount of the receipts and itemized disbursements of the twelve months next preceding. A copy of such statement shall be posted at the front door of the court house and at each of the voting places in the county, and published in one or more newspapers of the county or adjoining county or city."

When the fact that this section is only a part of a complete act setting up the budget system for counties, cities and towns is considered, in my opinion, the only reasonable construction that can be placed upon the words ‘itemized disbursements’ is that the requirement is that the amounts disbursed for each function of government as set up in the annual budget be published.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

CENTRALIZED PURCHASING—Acquisition of Leases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 28, 1938.

HONORABLE FRANK P. EVANS, Chairman,
Unemployment Compensation Commission,
Richmond, Virginia.

DEAR MAJOR EVANS:

This will acknowledge your letter of June 27, requesting the opinion of this office as to whether, in taking leases for the rental of branch offices used by
your Commission, it is necessary to go through the Division of Purchase and Printing and otherwise comply with the provisions of the centralized purchasing law.

The statutes establishing a system of centralized public purchasing, as set forth in Code sections 401-b and following, require every State department, officer, etc., to purchase through the Division of Purchase and Printing "all materials, equipment and supplies of every description, the whole or a part of the costs whereof is to be paid out of the State treasury."

In view of both the manifest policy and the language of the law, it is the opinion of this office that taking a lease for office space does not constitute a purchase of "materials, equipment" or "supplies", and that the subdivision of the statute to which you refer does not require a different conclusion.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CHATTEL MORTGAGES—Recordation—Lien Recorded in Another State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 12, 1937.

Hon. W. N. Hannah,
Commonwealth's Attorney
Palmyra, Virginia

My Dear Mr. Hannah:

I have your letter of August 2 requesting the opinion of this office in connection with subjecting a nonresident's motor vehicle to the payment of his burial expenses under the provisions of section 4814 of the Code, where such vehicle is covered by a lien securing payment of part of the purchase price thereof, the said lien being recorded in the State of New York and not recorded in Virginia.

Section 5197 of the Code (Michie's Code, 1936), provides as follows:

"No mortgage, deed of trust or other encumbrance created upon personal property while such property is located in another State shall be a valid encumbrance upon said property after it is removed into this State, as to purchasers for a valuable consideration without notice and creditors unless and until the said mortgage, deed of trust, or other encumbrance be recorded according to the laws of this State in the county or corporation in which the said property is located in this State."

The lien referred to in your letter I presume to be in the form of a conditional sale, and the general rule, in the absence of statutory regulations, seems to be that where a lien in the form of a chattel mortgage or conditional sale is executed in another State with reference to property located there, and duly recorded in that State, it need not be recorded in Virginia upon removal of the property to this State. This general rule is very clearly stated in R. C. L., Vol. 5, at page 991, from which I quote:

"With reference to conditional contracts of sale, the weight of authority is in accord with the rule with reference to chattel mortgages, and is to the effect that unless the local law of the State into which the property is removed, with reference to filing or recording of such contracts, expressly applies to contracts made out of the State with reference to property subsequently brought into the State, and compliance therewith is unnecessary in order to protect the vendor's after the removal of the property."

In the case of Osmond-Barringer Co. v. Hey, decided by Judge Crump in the Law and Equity Court of the City of Richmond (see Va. Law Register, Vol. 7, N. S., page 175) the Court held that a conditional sale was not embraced in the language used in section 5197 of the Code, and that, therefore, the general rule
applied in Virginia as to conditional sales. It is to be observed, however, that
some element of fraud was injected into the Hey case which might have been a
factor contributing to the Court’s decision.

In the light of the above quoted authorities, I would suggest that you advise
the coroner to proceed under the provisions of section 4814 of the Code, and
report the burial expenses for this man, with all the surrounding circumstances,
to the Circuit Court of your County, and govern himself by the Court’s order.

With my kind regards, I am

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CHECK-SIGNING MACHINES—Use of by Public Officers Generally.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 21, 1938.

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

DEAR MR. DOWNS:

I have your letter of March 19, in which you request my opinion upon the
question whether it is permissible for county officers, such as clerks of boards of
supervisors, county treasurers and others, who are required in the course of their
duties to sign checks, to use for the purpose of signing same a check signing
machine. It appears that these machines are provided with separate signature
plates for each officer who has to sign the check, and these plates are separated
from the machine and may be kept securely locked up when not in use.

There is no statute in Virginia relating to the use of signing machines by
any officer other than the State Treasurer. The use of such a machine by this
officer is covered under the provisions of section 2181 of the Code. He is authorized
to allow its use by his deputies, but is required to carefully safeguard the machine
against use by others.

I am unable to find any court decisions bearing upon the question of the use
of a signing machine by any other officer, but it is my opinion that such use is
proper and lawful provided each officer retains the custody of his own plate and
does not allow its use by any one other than himself, or in his personal presence.

In other words, I am of opinion that none of these officers has the authority to
delegate to another the right to sign his name on a signing machine.

Used in the manner above stated, it is my opinion that this machine is lawful
for the purpose of signing county warrants and checks in the due course of
business.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
the pollution of the rivers and streams of the State. You request my opinion upon
the question whether certain provisions contained in sections eleven and twelve
of the bill are in violation of section 127 of the Constitution of Virginia, which
limits generally the power of municipalities to issue bonds to an amount not in
excess of eighteen per cent of the assessed valuation of the real estate. This
limitation, however, does not apply to "bonds authorized by an ordinance * * *
and approved by the affirmative vote of a majority of the qualified voters of the
city or town * * * for a supply of water or other specific undertaking from which
the city or town may derive a revenue."

The proposed bill empowers the board thereby created to order a municipality
to install a sewer system, and provides that, if necessary in order to install same,
the municipality shall issue its bonds, and, "if the amount of such bonds necessary
to be issued would raise the total outstanding bonded indebtedness of such munic-
pality above such constitutional limitation on such indebtedness, or if the consent
of the electors cannot be secured, or if such municipality by its corporate authori-
ties shall determine against the issuance of direct obligation bonds, then such
municipality shall issue bonds and provide for the payment of the interest and
principal of such bonds from funds to be raised by imposing a sewer rental or
charge."

Section 12 of the proposed bill is as follows:

"For the purpose of financing the cost and expense, or its share of the
cost and expense, of constructing or acquiring or extending any sewer, sewer
system or sewage treatment works, either singly or jointly with other municip-
ALITIES, a municipality may issue bonds secured solely by a pledge, in whole
or in part, of the annual rentals or charges imposed for the use of such sewer,
sewer system or sewage treatment works. Said bonds shall not pledge the
credit, nor create any debt, or be a charge against the general revenues, nor
be a lien against any property of the municipality, but shall be a lien upon
and payable solely from the annual rentals or charges for the use of the
sewer, sewer system or sewage treatment works."

The effect of these quoted provisions of the proposed bill is to restrict the
liability of the city on the bonds to the annual sewer rentals or charges imposed
by the city on the abutting property owners. Whether such an involuntary sewer
rental or charge can be considered as "revenue" in the same sense as water rentals,
which are voluntary obligations assumed by the property owners when they
request water connections, is itself a doubtful question. But, assuming it to con-
stitute "revenue" as contemplated by said section 127 of the Constitution, the
question arises whether such restriction of liability to the annual rentals from
the sewer would operate to remove such "restricted bonds" from the classification
of "bonds" within the meaning of said section of the Constitution.

Again looking to said section, the further provision is found that if after a
five year period the revenue from such an undertaking is not sufficient to take
care of the interest, sinking fund and other charges, then thereafter "all such
bonds outstanding shall be included in determining the limitation of the power to
incur indebtedness, unless the principal and interest thereof be made payable ex-
cursively from the revenue of the undertaking."

This last quoted provision makes it clear that such "restricted bonds" are
nevertheless "bonds" within the meaning of section 127 of the Constitution and,
where the issuance of same would increase the bonded indebtedness of the municip-
ality above the eighteen per cent limitation, I am of the opinion that same can
be issued only after "approval by the affirmative vote of the majority of the
qualified voters of the city or town voting upon the question of their issuance."

It follows, therefore, that because the aforementioned provisions of the pro-
posed bill would operate to compel the issuance of such bonds without such
affirmative vote, I am of opinion that same are in conflict with said section 127
of the Constitution of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

CLERKS—Fees—Appeals in Ordinance Violation Cases.
Sheriffs—Id.
Towns—Liability for Costs in Acquittal of Ordinance Violations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 7, 1938.

HONORABLE PAUL H. SCOTT, Clerk,
Circuit Court of Orange County,
Orange, Virginia.

My Dear Mr. Scott:
I am in receipt of your letter of February 3, in which you advise me that, pursuant to the authority of section 4675 (25a) of the Code, the town of Orange has enacted an ordinance prohibiting persons from driving motor vehicles while drunk and prescribing punishment therefor. You state that from time to time appeals in these cases are taken from the trial justice court to the circuit court, and you inquire whether the clerk of the circuit court may charge the town for his services in appeal cases where the defendant does not pay the costs, and you also make some inquiry with reference to the fees of the sheriff.

The section of the Code to which you refer, authorizing towns to pass such ordinances, expressly provides that the Commonwealth shall not be chargeable with any costs in connection with any such prosecution, nor shall any such costs be paid out of the State treasury. I can find no statute which directs that your fees or those of the sheriff shall be paid out of the town treasury in such a case as you present and, in the absence of such a statute, I am of the opinion that the town whose ordinance is violated is not required to pay these fees. If you can point me to any statute which you think directs that these fees be paid by the town, I shall be very glad to give the matter further consideration.

In connection with the pay of jurors, I call your attention to section 4928 of the Code, apportioning the pay and mileage of jurors between the State and the county or corporation, as the case may be.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 26, 1937.

HONORABLE J. GORDON BENNETT,
Assistant Auditor of Public Accounts,
Richmond, Virginia.

My Dear Mr. Bennett:
I am in receipt of your letter of March 9, in which you refer to the fact that you have received a request from Mr. John M. Whalen, Clerk of Fairfax County, with reference to the disposition of a surplus of $142 left from the proceeds realized from the sale of an automobile forfeited because of its use in the illegal transportation of ardent spirits. You state that the clerk is particularly anxious to know what fees, if any, he is permitted to charge for handling the matter.

The proceeds of all fines and forfeitures are payable into the treasury of Virginia to the credit of the Literary Fund by virtue of the provisions of section 134 of the Constitution. The clerk is, of course, entitled to make such charges as the law allows for services in other cases. I presume, however, that Mr. Whalen
has in mind particularly the question as to whether or not the amount remitted should be included in the sum by which his commissions are determined under the provisions of section 406 of the Tax Code. It seems to me that the clerk is entitled to the commissions allowed by law.

The confiscated automobile is sold by the sheriff under an order of the court after a rather elaborate proceeding prescribed in the statute [Michie's Code of 1936, Sec. 4675 (38a)]. The matter of how the proceeds of the sale shall be transmitted is not covered in terms by the statute, but it seems to me that it would be a more orderly procedure for the sheriff, after complying with the order of the court, to report back to the court what has been done with the order and at the same time pay the funds into the court. Then the record of the whole case would be complete in the clerk's office, and the clerk would receive his commissions from the Comptroller, just as he does in the case of fines collected.

I may say that I have discussed this matter with Mr. Sidney C. Day, Assistant Comptroller, and he is in accord with the view I am expressing herein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Deputies' Powers in Probate Matters.

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

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

DEAR MR. THOMA:

Your letter of September 22 has been received.

You ask if the 1932 amendment of section 5247 of the Code of Virginia, providing that "duly qualified deputies of such clerks" shall have jurisdiction of the probate of wills along with the clerks of certain courts, is constitutional under section 101 of the Virginia Constitution, which in turn provides that the "general assembly may confer upon the clerks of the several courts having probate jurisdiction, jurisdiction of the probate of wills." (Italics supplied.)

I am of the opinion that deputy clerks may be validly entrusted with the performance of certain duties, relating to the probate of wills, formerly exercised only by the clerk himself. Such is not contrary to the meaning of section 101 of the Constitution.

A similar question was raised under section 106 of the Constitution of Virginia, which requires that writs shall be attested by the "clerks of the several courts." The Supreme Court of Appeals in the case of Farmers Bank v. McGavock, 119 Va. 510, 517, 89 S. E. 949 (1916), in holding that deputy clerks might attest writs under this section, pointed out that:

"* * * the legislature has seen fit to create independent public officers, known as deputy clerks, and to invest them with authority to discharge any of the official duties of the principal, unless it be some duty the performance of which is expressly forbidden by law. Notwithstanding the fact that this species of legislation has kept even pace with the various constitutional provisions in respect to the duty of clerks to attest writs, and has generally been observed, no constitutional convention has found it necessary or expedient to place limitation upon the power of the General Assembly to endow a deputy clerk with authority to do any act which his principal might do."

It seems to follow that the duties placed on deputy clerks by the 1932 amendment to section 5247 of the Code are valid under section 101 of the Constitution.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

CLERKS—Disposition of Old Tax Returns.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 20, 1937.

HONORABLE E. E. FRIEND, Clerk,
Circuit Court of Pittsylvania County,
Chatham, Virginia.

MY DEAR MR. FRIEND:

I am in receipt of your letter of September 18, asking if you have a right to destroy old tax returns or if the Judge of the Court has authority to dispose of them. I presume you are referring to tangible personal property returns, since the returns of income and intangible personal property have been forwarded to the State Department of Taxation for a number of years.

I call your attention to section 315 of the Tax Code, which provides that returns of tangible personal property that have been on file for four years may be destroyed by the Clerk upon the order of the Court of which he is the Clerk duly entered of record in the Order Book of such Court.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Fees—Docketing Judgments and Filing Papers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 19, 1938.

My DEAR MR. Ross:

I notice that in my letter of May 14, in reply to yours of the 10th, I did not answer the other question asked by you.

You inquire first as to the proper charge for docketing a judgment, and I presume you refer to docketing an abstract of judgment. It seems to me that this is covered by section 3484, subsection 31, of the Code, the fee of the clerk being 50 cents.

As to the proper charge for filing papers, I refer you to subsections 20 and 21 of the same section, 3484, which provide for a fee of 25 cents.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Filing and Recordation of Instruments—Deeds of Trust for Farm Credit Lien Books—Retaining Original.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 28, 1938.

My DEAR MR. POWELL:

I am in receipt of your letter of May 13, in which you ask if deeds of trust given under chapter 336 of the Acts of 1936 for docketing "in Federal Farm
Credit Lien Book” should be retained in the clerk’s office after they have been docketed.

Section 5 of the Act provides that “Any deed of trust given under and pursuant to this Act shall be filed in the office of the clerk of the circuit court ***.” The section then provides that the clerk shall docket such instruments and index the same. This section further provides that an assignment of an instrument executed under the Act “shall be filed in the office of the clerk”. Again, section 6 of the Act speaks of the instruments being “filed” under the Act.

The word “filed” means to preserve or to keep among the records, and I am of opinion, therefore, that by the use of this word it was the intention of the Legislature that these instruments should be preserved in the office of the clerk.

Also I call your attention to section 3386 of the Code, which provides that all papers “filed in the clerk’s office shall be preserved therein until legal delivery out.”

In my opinion, therefore, you should retain in your office these instruments filed with you.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 18, 1937.

Honorable J. E. Thoma, Clerk,
Circuit Court of Clarke County,
Berryville, Virginia.

My Dear Mr. Thoma:

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

“You have heretofore ruled that a contract docketed under section 5189 of the Code must be retained in the clerk’s office where docketed. I would, also, like to have the benefit of your opinion as to whether an agreement with regard to a lien on crops which is docketed under section 6452 should be retained on file. You will note that the latter section omits the word ‘filed’.”

From a careful consideration of the two statutes, I am of opinion that there is sufficient distinction between them to justify me in expressing the opinion that crop liens docketed under section 6452 of the Code need not be retained in the clerk’s office.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Recordation of Documents—“Federal Farm Credit Lien Book”—What to be Docketed In.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 14, 1938.

Hon. E. E. Friend, Clerk,
Circuit Court of Pittsylvania County,
Chatham, Virginia.

My Dear Mr. Friend:

I am in receipt of your letter of April 11, in which you refer to chapter 336 of the Acts of Assembly of 1936, specifying that certain instruments shall be docketed in a book known as the “Federal Farm Credit Lien Book.” You state in effect that you are in some doubt as to whether the clerk should docket in this book all deeds of trust on personal property.
I agree with you that the language of the Act is rather broad, but, if you will refer to section 5, you will see that it is provided that "any deed of trust given under and pursuant to this Act" shall be docketed in the Federal Farm Credit Lien Book. In view of the language which I have underscored, in my opinion, you should docket in this book only such deeds of trust as are plainly "given under and pursuant to this Act." Unquestionably there are certain deeds of trust other than those given to secure the Federal government which may be docketed in the book, but, where the deed of trust is not given to secure the United States or one of its instrumentalities or agencies, I think it should be very plain from the instrument that it is given under the Act in question.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Recordation of Instruments—Indexing—Deeds of Trust.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 9, 1938.

HONORABLE C. C. BRANNOON, Clerk,
Winchester, Virginia.

Dear Mr. Brannon:

I have your letter of March 3, in which you request the opinion of this office as to whether a deed of trust should be indexed in the name of the beneficiary, as well as in the name of the grantor and the grantee.

As you point out in your letter, section 3394 of the Virginia Code (Michie 1936) requires that all instruments admitted to record in the clerk's office shall be indexed "in the name or names of all parties appearing therein who are thereby shown to be affected by said instrument", and, in a broad literal sense, the beneficiary of a deed of trust is "affected thereby".

It is manifest, however, that this provision cannot be taken literally, since there are frequent instances in which it would be palpably absurd to index an instrument in the names of all the persons mentioned therein who are in any sense affected by it.

In view of the intent and purpose of the statute, and in view of the settled practice of the clerks throughout the State over a period of many years, which practice the legislature has never seen fit to alter by specific provision, it is my opinion that the beneficiary of a deed of trust is not a party "affected" by a deed of trust within the meaning of Code section 3394, and that, therefore, such instruments need not be indexed in the names of such beneficiaries.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Salaries in Lieu of Fees for Services to Cities.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 20, 1938.

HONORABLE LEROY HODGES, Chairman,
State Compensation Board,
Richmond, Virginia.

My Dear Colonel Hodges:

I am in receipt of your letter of June 14, in which you state:

"Mr. L. McCarthy Downs, a member of the Compensation Board, has presented the question to the Board as to whether a city may pay a clerk a salary in lieu of paying fees he would normally collect for services rendered
to the city. The office in question is the clerk of the Corporation and Circuit Courts of Newport News City, and the attached correspondence from Mr. Downs explains this question. The Board would like your written opinion, therefore, as to whether the city may pay this officer a salary in lieu of certain fees for services to the city.”

It further appears from Mr. Downs' letter, referred to by you, that the fees involved are those prescribed by statute for “recording delinquent taxes and land sold, preparing voting lists, and sundry other services which are rendered the localities by any clerk.”

By subsection 5 of section 3516 of the Code two-thirds of the excess of fees, allowances and commissions collected by the clerk over and above his maximum compensation and the expenses of his office are paid into the treasury of the locality, and one-third is retained by the State. Subsection 8 of this same section prescribes the maximum compensation of the clerk, but contains this proviso:

“* * * and provided, however, that in determining the compensation allowed to such city or county officers hereunder any compensation allowed to such city or county officers by their respective city councils or county board of supervisors, other than commissions allowed by State law for collecting, disbursing, or in any way handling taxes or levies or for the discharge of any other duties imposed upon such officers by the councils of such cities, boards of supervisors of the county, or laws of this State shall be disregarded only to the extent of twenty-five hundred dollars in cities or counties having a population of fifty thousand or more and in counties adjoining cities having a population of fifty thousand or more; and fifteen hundred dollars in cities and counties with a population between twenty-five thousand and fifty thousand; and one thousand in cities and counties with a population between fifteen thousand and twenty-five thousand.”

It is plain from both your and Mr. Downs' letters that the salary in question is in lieu of “commissions allowed by State law for collecting, disbursing, or in any way handling taxes or levies, or for the discharge of any other duties imposed upon such officers by * * * the * * * laws of this State * * *.”

The effect of the contract in question is that the clerk does not collect from the city the fees or commissions allowed by law for services performed. If these fees had been collected, they, of course, would have been included in the clerk's fee report and, if the total of the commissions and fees collected by him, including the fees and commissions in question, exceeded the clerk's allowed compensation and the expenses of his office, then one-third of such excess would go into the State treasury. Therefore, it follows that by such a contract it is perfectly possible (and indeed probable) that the State would be deprived of a part of the clerk's excess fees to which it is entitled by law. I know of no statute which authorizes the contract having the effect described, and, in my opinion, the city and the clerk do not have the power to make such a contract.

However, it seems that the present clerk and the city have been operating under such a contract for several years, and Mr. Downs desires to know whether or not this salary should be treated as fees and commissions in computing the maximum compensation to which the clerk is entitled under section 3516 of the Code. As I have above indicated, this salary is in lieu of fees and commissions which otherwise would have been collected under the law. I am, therefore, of opinion that in computing the maximum compensation of the clerk the salary should be treated as fees, commissions and allowances. However, if it should appear that, if the amount of the fees which would have been otherwise collected, if no such contract existed, was less than the amount of the salary in any year, then I am of opinion that only that portion of the salary which is equal to the fees which would have been thus collected should be considered in computing the maximum compensation of the clerk.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

P. S. The views herein expressed are subject to any provisions to the contrary in the charter of Newport News, which should be examined.
COMMISSION OF FISHERIES—Employment of Counsel

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 19, 1938.

HONORABLE G. WALTER MAPP,
Commissioner of Fisheries,
Accomac, Virginia.

Dear Senator Mapp:

Replying further to your letter of April 2, with reference to the employment of Honorable B. Drummond Ayers as attorney for the Commission of Fisheries. In my letter to you of April 6, I pointed out that chapter 47 of the Acts of 1936 does not permit the employment by the Commission of a regular attorney, and suggested that we have a talk about the matter on your next visit to Richmond. We have since had this proposed conference, and I believe we are in accord as to the circumstances under which the law permits special counsel to be employed by the Commission. However, as you requested me to write you in detail, so as to avoid any misunderstanding in the future, I will endeavor to cover the situation as fully as possible. You left with me a written memorandum of the occasions which you contemplate may arise requiring legal services to be rendered to the Commission, and I will discuss them seriatim.

Before doing so, however, I call attention to the provision of the statute requiring the Attorney General to render all legal services to the Commission except in cases "where it is impracticable or uneconomical for the Attorney General's office to render same." This is the test, therefore, which must be applied under the 1936 Act to determine whether the Attorney General is justified in recommending special counsel. With this test in mind, I will take up in the order contained in your memorandum the respective instances which you anticipate will arise in the course of the conduct of the business and affairs of the Commission.

1. "The Commission has found it necessary to have its own Counsel for the last ten or fifteen years and probably longer."

Prior to the 1934 Act relating to the office of the Attorney General, it was customary for nearly all the departments, institutions, commissions, etc., to employ regular counsel whenever desired. This practice was found to be not only expensive but also to result in conflicting opinions and interpretations of statutes by such regular counsel, differing both among themselves and from the opinions of the Attorney General's office. To promote uniformity and economy, chapter 77, page 74, Acts 1934, was enacted, prohibiting any employment of such regular counsel and permitting special counsel only on the written recommendation of the Attorney General. Pursuant to these provisions, I approved employment of special counsel for the Commission in accordance with a resolution of the Commission adopted November 30, 1934, and my letter interpreting and qualifying same dated December 21, 1934, copies of both of which are herewith enclosed.

In 1936, the cases in which special counsel might be employed were further restricted to those in which it was impracticable or uneconomical for the Attorney General to perform the service required.

2. "The seafood laws are always the subject of conflict between conflicting interests. They are always a subject of legislation in every Legislature,—a vital subject. The House has a special committee, Chesapeake and its Tributaries, which deals with nothing else except the seafood laws. The majority of the work of the Committee on Fish and Game in the Senate is likewise confined to the seafood laws."

I interpret the foregoing as relating to the work of drafting proposed legislation. When the occasion for this work arises, I think the matter to be dealt with should be presented to this office, and, if it appears the work cannot be done practically and economically by this office, I will be glad to recommend the em-
ployment of special counsel. Should it be desired to employ someone to appear before legislative committees and advocate the passage of proposed measures, I will say that I do not consider this within the scope of the work of "special counsel", and my recommendation would not be necessary for such employment.

3. "The Commission and Commissioner find it necessary to obtain the opinion of counsel almost daily, and frequently find it necessary to have these opinions rendered almost at a moment’s notice in order to prevent some irreparable damage to some branch of the seafood industry. It is therefore essential to have retained counsel, who is expert in this branch of the law."

I have always taken the view that special counsel are not authorized to render "opinions" construing laws and statutes, but, in order to preserve uniformity, this function should be restricted to the Attorney General.

I can well understand, however, that there may arise emergencies in which the advice of counsel is required immediately and under such circumstances that it would be impracticable to wait for advice from this office. In these cases I feel justified in now recommending the employment of special counsel.

4. "In addition to the advice otherwise sought by the Commission and the Commissioner, the Inspectors and Police Captains numbering 40 or more are continually seeking advice from the Commission’s counsel in the performance of their duties."

The foregoing presents a problem difficult of solution, as service of this nature would seem to be that customarily rendered by regular counsel, which would be in violation of the statute. On the other hand if it be considered special, the employment would be done by the inspectors and not by the Commission. I would like to talk with you further about this phase and see if a satisfactory solution cannot be worked out.

5. "It is the purpose of the present Commissioner to make a study of the seafood laws of other states for the purpose of making recommendations for the improvement of the seafood laws in this state, and it is particularly desirable to have special counsel with whom he is in close touch to consult on this question."

I do not feel that I can pass upon the question whether this office can practically render this service in the absence of specific information as to the particular study contemplated.

6. "While special counsel cannot be employed for criminal matters, difficulty is experienced in some sections in the enforcement of the seafood laws owing to the local authorities being out of sympathy with their enforcement. The assistance of the Commission’s counsel in these cases it is felt can be made use of."

Under our laws, the local attorney for the Commonwealth has exclusive jurisdiction of the prosecution of violators of the criminal laws relating to the Commission of Fisheries. Special counsel would have no authority to appear except at his invitation. In cases where he requests it, and the Commissioner deems it advisable, I think I could authorize the employment of special counsel to assist the Commonwealth’s attorney.

7. "The Commissioner is desirous of making a close study of the present laws of this state, many of which appear to be in conflict and not clearly drawn, some being of doubtful constitutionality, for the purpose of making recommendations for their clarification. It is especially desirable to have special counsel with whom he is in close touch and with whom he can confer for assistance in this connection."

8. "Legal questions frequently arise over conflicts between the citizens
of Maryland and Virginia as to their respective rights in the Chesapeake Bay. There is at the present time quite a violent controversy going on over the protection of the sponge craft. Federal legislation is threatened. Matters of this kind require the frequent advice of counsel specialized in this branch of the law.”

9. “The question of pollution is one of growing importance and one which threatens to destroy a large part of the industry. The Commissioner expects to make a special study of this and desires a special counsel for the purpose of investigating the legal aspects of the question in various sections with the possibility of undertaking in some sections the curb, if not the prevention, of the growing menace of pollution.”

What has been said with respect to paragraphs numbered 2 and 5 is likewise applicable here.

As to the procedure which should be followed, since the statute requires the approval of the compensation of special counsel by the Attorney General, I suggest that in cases where special counsel has been employed a detailed, itemized statement of the services rendered, and the compensation therefor, be submitted to this office for approval. If same is accompanied by a voucher, it will be delivered, along with the voucher, to the Comptroller after approval, so that he may draw his warrant upon the Treasurer.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONERS OF REVENUE—Authority to Fix and Alter Assessment on Real Estate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., November 10, 1937.

HONORABLE S. A. ELLIS,
Commissioner of the Revenue,
Gate City, Virginia.

MY DEAR MR. ELLIS:
I am in receipt of your letter of November 5, in which you ask the following question:

“When a tract of land has been divided and subdivided into lots and sold as such, do I have the right to reassess and raise the valuation of the land as lots?”

I am of the opinion that a commissioner of the revenue does not have the right to raise the valuation “of the land as lots”, with the result that the valuation as lots would exceed the total assessed valuation of the original tract which is sub-divided.

It would seem that the answer to your question is found in section 265 of the Tax Code, which provides in part that:

“When a tract or lot becomes the property of different owners in several parcels, the value at which the whole had been assessed shall be divided by the commissioner among the several parcels, having regard to the value of each parcel compared with that of the whole tract or lot, and the tax upon the whole shall be apportioned accordingly among the owners of the different parcels.”

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
COMMISSIONERS OF REVENUE—Authority to Fix and Alter Assessments on Tangible Personalty.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 28, 1937.

Honorable S. A. Ellis,
Commissioner of Revenue,
Gate City, Virginia.

Dear Mr. Ellis:

This is in reply to your letter of October 27, in which you ask my opinion upon your authority to raise or lower the assessed valuations of tangible personal property which the taxpayer reports on his return.

It is my opinion that, under the laws of Virginia, a commissioner of revenue has the power to inspect all personal property assessed for taxation and fix such valuation thereon as he deems to be proper.

It is generally held, however, that, under the Constitution of the United States, the commissioner of revenue should endeavor, where the actual value of personal property is not used as a basis of assessment, to have a uniform proportionate valuation throughout his jurisdiction. Thus, it would be improper in my opinion for the commissioner of revenue to assess one man's property at fifty per cent of its actual value, and another man’s property at full value.

Sincerely yours,

Abram P. Staples,
Attorney General.

COMMISSIONERS OF REVENUE—Collecting Tax Returns—Going Outside City Limits For.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 14, 1938.

Mr. J. W. Townes,
Commissioner of the Revenue,
Martinsville, Virginia.

My Dear Mr. Townes:

I am in receipt of your letter of May 12, in which you ask the following question:

“To obtain personal property and income tax returns from persons who reside within the city, but work in plants just outside of the incorporate limits, does the Commissioner have the right to go to the manufacturing plants to obtain these returns?”

Certainly there is no reason why the Commissioner of the Revenue may not go outside of the city to secure tax returns from a resident of his city. However, I must advise that, if you have in mind employees of a manufacturing plant, I think the authorities of the plant have a right to make reasonable rules, where the circumstances justify it, governing the times at which visitors may come to the plant to interview their employees.

Yours very truly,

Abram P. Staples,
Attorney General.
COMMONWEALTH'S ATTORNEYS—Compensation—Serving as Special Commissioner for Sale of Lands Subjected to Tax Liens by Chancery Suit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 29, 1937.

Honorable R. Page Morton,
Attorney for the Commonwealth,
Charlotte Court House, Virginia.

My dear Mr. Morton:
You request my opinion upon the question whether or not an attorney for the Commonwealth who is appointed as special commissioner by the court in the sale of lands in a suit instituted on behalf of the Commonwealth under section 403 of the Tax Code, and who receives compensation for acting in such capacity as provided for by law, should treat this compensation as derived from the performance of the duties of his office, or whether the same should be considered as compensation for services rendered in a different capacity.

A special commissioner appointed by the court to sell lands is not acting in this capacity as an attorney at law. He is an agent and officer of the court, appointed by the court, and his authority is limited to that vested in him by the decrees of the court. The special commissioner need not be an attorney at law, nor even a resident of the State of Virginia. (See cases cited on pages 405 to 408, Michie's Digest, Virginia and West Virginia Reports).

This office has heretofore held that compensation for services performed by an attorney for the Commonwealth outside of the usual scope of the duties of his office belongs to him individually, and is not within the same category as fees received for the performance of his official duties.

It is my opinion, therefore, that compensation received by the attorney for the Commonwealth for the performance of his duties as special commissioner under appointment by the court need not be paid over to the county or State, but may be retained by him as his own individual money.

Sincerely yours,

Abram P. Staples,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Duties Prosecuting Appeals in Ordinance Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 27, 1937.

Honorable D. W. Earmen,
Attorney for the Commonwealth,
Honorable W. W. Wharton,
City Attorney,
Harrisonburg, Virginia.

Gentlemen:
This is in reply to your joint request for my opinion upon the question whether or not it is the duty of the attorney for the Commonwealth for the city of Harrisonburg and Rockingham county or the city attorney of Harrisonburg to prosecute appeals from the police justice court for the city of Harrisonburg in cases involving violations of city ordinances. You state there is nothing in the charter of the city of Harrisonburg imposing the duty of prosecuting these appeals upon the city attorney.
Section 4864 of the Code provides as follows:

"Every commissioner of the revenue, sheriff, constable, or other officer shall give information of the violation of any penal law to the attorney for the Commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, whether in the name of the Commonwealth or of a county or corporation, and may in such case issue or cause to be issued a summons for any witness he may deem material to give evidence before the court or grand jury. It shall, however, be unlawful for any attorney for the Commonwealth to go before any grand jury during their deliberations except when duly sworn to testify as a witness, but he may advise the foreman of the grand jury or any member or members thereof in relation to the discharge of their duties."

While by its terms the section refers only to cases in which information of a violation of law is given to the Commonwealth's attorney by a sheriff or other officer, it would seem to be the general intendment of the statute that the Commonwealth's attorney should prosecute all criminal cases in a court of record whether the offense charged be a violation of a State law or a municipal ordinance. There would seem to be no sound distinction in construing the act as applicable only to those particular cases where the complaint is made by a public officer.

It is my opinion, therefore, that, in the absence of a charter provision on the subject, it is the duty of the Commonwealth's attorney to prosecute in a court of record all appeals from trial justices involving violations of city ordinances as well as violations of the State law.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMPENSATION BOARD—Chairman—Duties—Whether Full Time Required.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 4, 1938.

HONORABLE JAMES H. PRICE,
Governor of Virginia,
Richmond, Virginia.

DEAR GOVERNOR PRICE:

This is in reply to your request for my opinion upon the question whether or not the chairman of the Compensation Board is required to devote all of his time to the duties of the office, or whether he may be permitted to devote only such part of his time thereto as is necessary to discharge said duties. The duties of the office are stated in chapter 364 of the 1934 Acts of the General Assembly of Virginia. Section 9 of said Act provides for the creation of the Compensation Board, and contains the following language:

"The member designated by the Governor as chairman shall receive such compensation as such chairman as the Governor may allow but it shall not be in excess of forty-five hundred dollars per annum, or if such chairman be an officer of the State or is otherwise employed by the State, his compensation as such chairman shall not exceed three thousand dollars per annum."

Pursuant to the foregoing provisions, the Governor of Virginia appointed Honorable E. R. Combs, then State Comptroller, as chairman of the Compensation Board. He performed the duties of this office as well as those of the office of Comptroller.

It seems clear to me that the Act itself contemplates that the duties of the chairman of this Board would not require all of the time of the person appointed
to that position, and the fact that the Governor of Virginia adopted that view by requiring only part of the time of the chairman to be employed in discharging the duties of such chairman is confirmation of this construction of the statute.

It is my opinion, therefore, that the chairman of the Compensation Board is not required by the statute creating said Board to devote all of his time to the discharge of the duties of the office.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONFEDERATE MEMORIAL FUNDS—Expenditure for Flags Not to Be Used in State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 7, 1938.

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

Attention: Honorable John H. Johnson, Chief Pension Clerk.

Dear Mr. Combs:

This is in reply to your letter of February 5, in which you request my opinion upon the question whether or not the Confederate memorial funds appropriated for the care and upkeep of Confederate graves, cemeteries and monuments may be expended for the purchase of flags to be sent to cemeteries located outside the State of Virginia.

It is my opinion that such expense is not permissible under the appropriation referred to, and that all such expenditure must be confined to Confederate graves, cemeteries and monuments located within the State of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONFISCATION—Under Lottery Laws—Disposition of Confiscated Property.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 15, 1937.

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

My Dear Mr. Walton:

I have your letter of December 9, and note your inquiry as to the proper disposition to be made of money found in seized slot machines, which money is now in the possession of the sheriff.

It is my opinion that, as soon as the court has adjudicated the fact of forfeiture, this money should be paid by the sheriff to the clerk of the court, who in turn should pay same into the State Treasury.

As to the disposition which should be made of the fruit cakes, knives, and other prizes which were seized along with the punch boards, I am unable to find any specific provisions in the statutes covering this question. Section 4685, which contains the legal prohibitions against the exhibitions and use of punch boards,
provides that same shall be deemed a gaming apparatus within the provisions of sections 4820 to 4822, inclusive, which later sections provide for the seizure of gaming apparatus and the destruction of same under the direction of the justice or the court in which the case is pending.

I am of opinion that whether or not the prizes to which you refer are to be deemed a part of the punch board within the meaning of the statute is a question of fact for the court to determine under all of the circumstances and evidence before it in the case, and that the court should, in the light of such evidence, direct the sheriff as to the disposition of these prizes. It seems to me to be very doubtful whether they can be held to be a part of the punch board, although it is possible, if they were all purchased together as a complete unit, the court might so hold.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

CONSTITUTIONAL LAW—Price-Fixing—Tobacco Warehouse Sales.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 31, 1938.

HONORABLE COLEMAN B. YEATTS,  
Member House of Delegates,  
Chatham, Virginia.

DEAR MR. YEATTS:

I have your letter of March 16, in which you request the opinion of this office as to whether the Legislature might enact a valid statute fixing a minimum price below which tobacco could not be sold on warehouse floors in the State.

It seems clear that the Legislature is without power to fix a minimum or maximum price for sales of tobacco generally—i.e., for all sales, whether made on or off the warehouse floor—since it is not suggested that the tobacco business is itself one “affected with a public interest” within the meaning of the familiar principle of constitutional law, and hence a statute impairing the owner’s freedom to sell at any price he chooses would be held repugnant to the due process clauses of both Federal and State Constitutions. Cf. Reynolds v. Milk Commission, 163 Va. 957.

It is well settled, however, that the business of a public warehouseman is “affected with a public interest”, and so subject to regulations and restrictions which could not be imposed upon strictly private business. Munn v. Illinois, 94 U. S. 113; Danville Warehouse Co. v. Tobacco Growers’ Co-op. Ass’n., 143 Va. 741; Reaves Warehouse Corp. v. Commonwealth, 141 Va. 194; 27 R. C. L., pp. 958-961.

As to the forms of regulation to which warehouses as such are subject, the authorities afford little help. It is held that the Legislature may fix the commissions to be charged by warehousemen, on the grounds that the business is essentially monopolistic. Munn v. Illinois, supra. On like grounds, the courts uphold statutes licensing warehousemen and requiring them to give security for prompt payment of their obligations. Brass v. North Dakota, 153 U. S. 391. Our own court has upheld a statute requiring disclosure of the true owner’s name in all warehouse sales, on the grounds that warehouse methods are peculiarly susceptible to fraud on persons who have contracted to buy whole crops (as in the case of cooperative marketing associations), and that such regulation is a valid exercise of the police power to prevent fraud. Danville Warehouse Co. v. Tobacco Growers’ Co-op. Ass’n., supra; Reaves Warehouse Corp. v. Commonwealth, supra.

I find no case in which a particular form of warehouse regulation has been held invalid, or any indication given as to just what types of restrictions may not be imposed. However, it is clear that not every legislative restriction would be
upheld simply because it is imposed on warehousemen, and in each case upholding a given regulation, the court has taken pains to emphasize some potential evil peculiarly incident to the business which the particular regulation is appropriate to curb.

In the light of these cases, and in the absence of any case directly involving a statute regulating the price to be paid the producer, the validity of such a statute would seem to depend on whether or not it can be shown that such a regulation is a reasonably appropriate measure for curbing some injurious practice to which the business of a warehouseman is peculiarly susceptible.

However, the question ultimately depends on an application of the concepts of due process of law and the police power. These concepts are at present undergoing rapid change, and it would seem useless for this office to hazard an opinion as to the validity of the particular statute which you suggest, it being quite apparent that no one can say today what form these constitutional principles may have assumed by the time such a statute might next be brought before our Legislature.

It is the opinion of this office, therefore, that no one would be justified in asserting today that such a statute, if enacted at the next session of the Legislature, would or would not be held constitutional.

I regret that it is impossible to give you a more satisfactory answer.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., FEBRUARY 11, 1938.

HONORABLE WILLIAM L. CARLETON,
Member House of Delegates,
Richmond, Virginia.

DEAR MR. CARLTON:

This is in reply to your letter of February 10, in which you request my opinion upon the constitutionality of House Bill No. 1, as amended, a copy of which amended bill you enclosed with your letter.

The effect of the amended bill is to restrict the extent of the area which any city or town may annex in proceedings instituted by it, so that no greater area may be annexed than will leave an area of at least sixty square miles remaining in the county from which the territory is taken. The purpose obviously is to insure for the future the stated minimum area in every county, unless the annexation proceedings are instituted by those living in the county. The proposed legislation applies to every county in the state, though it is probable that there is little likelihood that the area of many of them would be reduced below the prescribed minimum at any time in the near future. Continued annexations, however, may subsequently bring other counties within its protection. The bill is clearly an expression of legislative policy.

A similar policy with respect to new counties is contained in section 61 of the Constitution of Virginia, which provides that "no new county shall be formed with an area less than six hundred square miles; nor shall the county or counties from which it is formed be reduced below that area."

The bill seems to me to be a general one, both in form and in application, and in my opinion is not in violation of any constitutional provisions.

As Honorable G. A. Massenburg, patron of the bill, spoke to me sometime ago relative to the constitutionality of same, I am sending him a copy of this letter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CONVICTS—Computation of Term—Credit for Time Spent Under Observation in State Hospital Before Trial.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 21, 1938.

HONORABLE A. H. HOPKINS,
Judge of the Circuit Court,
Rocky Mount, Virginia.

DEAR JUDGE HOPKINS:

This is in reply to your request for my opinion regarding the following question: If a person charged with a crime is before trial committed to a hospital for the insane and is later adjudged sane and then tried, convicted and sentenced for his crime, is the time spent in the hospital to be deducted from the term of his sentence?

A person sentenced for a crime is not entitled to any deduction from the term of his sentence which is not expressly provided for by statute.

Section 4909 of the Virginia Code, which provides for observation in a hospital for the insane before trial, does not provide that the time spent for such observation shall be deducted from the sentence, but merely that "when such person, if insane, has been restored to sanity, the superintendent *** shall send such person back to the jail or custody from which he was removed, where he shall be held in accordance with the terms of the process by which he was originally committed or confined." Section 4912 provides that the court shall then proceed to try him as if no delay had occurred on account of his insanity.

Attention is called to the fact that section 4910 of the Virginia Code, which provides that a person who has been convicted, if insane, may be committed to a hospital for insane until he is restored to sanity, expressly provides that the time such person is confined in the hospital shall be deducted from the term for which he was sentenced. It would seem that the legislature intended such time to be deducted from the term of sentence in the latter case, but not in the former.

Section 5019 of the Virginia Code, which provides that the time actually spent in jail while awaiting trial, or pending an appeal, shall be deducted from the term of sentence, does not affect the situation in question, as in this case the accused is not confined in jail but was merely sent to a hospital for care and treatment.

Such time spent in the hospital is not in the nature of punishment for the offense, but is merely treatment for the mental illness of the accused. An accused would in no case be entitled to have such time deducted from his term of punishment unless it was expressly so provided, as is done by section 4910 in the case of those who have been convicted, or who were actually serving a sentence already imposed.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONVICTS—Term to Be Served Under Certain Order.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 24, 1937.

HONORABLE R. M. YOUELL, Superintendent,
The Penitentiary,
Richmond, Virginia.

DEAR MAJOR YOUELL:

I have your letter of November 22, in which you enclose a copy of a judgment of conviction entered by the Circuit Court of Northumberland county sen-
tencing one Bernard Jones to confinement in the penitentiary for a period of twelve months, but suspending the sentence as to the last six months thereof and directing that the prisoner be released at the expiration of said six months. The judgment of the court also provides that, regardless of any credit which may be allowed for good behavior, the entire six months shall be served.

You request my opinion as to whether the effect of this judgment is to conclusively require the discharge of the prisoner at the expiration of six months, regardless of his good behavior during that time.

The judgment suspending the last six months of the sentence provides that it shall be during the good behavior of the prisoner. The court derives its power to suspend sentences from section 1922b of the Code. This section provides as follows:

"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, or within the maximum period for which the defendant might originally have been sentenced to be imprisoned, whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed; and in case the execution of the sentence has been suspended, the original sentence shall be in full force and effect, and the time of probation shall not be taken into account to diminish the original sentence."

It is my opinion, therefore, that in the event the prisoner referred to in this judgment of the court should be guilty of misconduct, if the penitentiary authorities should bring the matter to the attention of Honorable E. Hugh Smith, Judge of the Circuit Court of Northumberland County in which the judgment of conviction was rendered, he would no doubt revoke the suspension and require the prisoner to serve the entire term of the sentence originally imposed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

CONVICTS—Use of by Counties for Public Works.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 23, 1938.

Hon. John A. Blakemore,
Commonwealth's Attorney,
Washington County,
Abington, Virginia.

Dear Mr. Blakemore:

In your letter of June 20 you ask if the County Board of Supervisors may legally require prisoners convicted of misdemeanors to work on various work projects in the county.

Under section 2075 of the Code, the Board of Supervisors of any county may make a written request to the judge of the circuit or corporation court for an order requiring male prisoners convicted of misdemeanors to be delivered to them for work upon the county roads, or such other types of public work as said Board of Supervisors may require to be performed. No one under the age of eighteen shall be so delivered, and the delivery of any such one between the ages of eighteen and twenty-one shall be discretionary with the court or judge. Unless such prisoner over the age of twenty-one shows the judge good cause to the contrary, the duty is imposed upon the judge to order him to be delivered to the Board of Supervisors for work. Reference is made to section 2075 for the conditions and procedure under which such order may be entered.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

CORONERS—Fee—Investigating Death Where Body Not Recovered.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 17, 1938.

Honorable A. Dunston Johnson,
Attorney for the Commonwealth,
Windsor, Virginia.

My dear Mr. Johnson:

I am in receipt of your letter of February 7, in which you ask whether the coroner of a county is entitled to a fee in the following cases:

"A colored man was riding on the running board of an automobile on the James River Bridge, presumably doing something to the motor, and while the car was in motion the right front tire blew out and threw the man against the bridge. Though he received quite a blow when he was thrown against the bridge, it is believed that he died from drowning when he fell into the James River. The body has never been recovered.

"On another occasion two young men fell from a boat while fishing in the James River. The body of one of them was recovered fourteen hours later, but the body of the other one has never been recovered. The deaths of both of them were ascribed to drowning.

"The coroner was notified in each of the above instances, visited the scene of the accidents and made inquiry into the circumstances of the deaths. He, of course, did not view the unrecovered body of one of the young men who fell overboard while fishing, or the body of the colored man who fell from the James River Bridge."

Section 4806 of the Code provides that in certain classes of deaths the coroner of the county "shall view the body and make inquiry into the circumstances of the said death * * *.*

Section 4818 of the Code provides that the coroner "shall have for viewing a dead body, whether an inquest be had or not, three dollars * * *." While there would seem to be some hardship in two of the cases that you mention where it was impossible for the coroner to view the body, yet it seems to me that, under the wording of the statutes, his fee is limited, where no inquest is held, to cases where he views the body. Therefore, I must advise that my opinion is that in the cases you mention the coroner is not entitled to the fee prescribed for viewing the body.

Yours very truly,

Abram P. Staples,
Attorney General.

CORONERS—Who May Act For—Trial Justices.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 20, 1938.

Hon. Wm. M. Smith,
Commonwealth's Attorney,
Cumberland, Virginia.

My dear Judge Smith:

I am in receipt of your letter of June 17, in which you ask if a trial justice may act as coroner in case of failure of the coroner to act, or where there is no coroner authorized to act, or none in the neighborhood in which the dead body is found.

Section 4816 of the Code provides that, under these circumstances, "any jus-
tice of the county may act as coroner." While it is true that when this section was enacted there were probably no trial justices, I am of opinion that the language of this section is broad enough to include a trial justice and that, therefore, such trial justice and justices of the peace of the county have concurrent jurisdiction.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COSTS—Clerk’s Fees in Felony Cases—What Payable Out of Treasury.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 14, 1938.

HON. CHARLES J. ROSS,
Clerk of the Circuit Court,
Madison, Virginia.

DEAR MR. ROSS:

I have your letter of the 10th instant, with which you enclose a statement of your costs in the case of Commonwealth v. Meadows, inquiring as to why certain items thereon were stricken off, these items consisting of a charge of 25c for docketing, 25c for taxing cost, 2.50 for issuing ten summons, 75c for swearing jury and witnesses and 3.00 for witness oath and certificate of attendance. You also include in your statement the sum of 2.50 provided for by section 3506 of the Code as clerk’s fee to be paid out of the treasury in felony cases.

I have had a talk with the Comptroller’s office and am advised that the only item payable out of the state treasury which is embraced in your expense account is the sum of 2.50 provided for by section 3506. All of the other items of costs which you have taxed are correct and allowable providing same are paid by the accused or out of his estate.

You will notice that Section 3404 of the Code deals with payment to officers out of the treasury in Commonwealth cases. The statute draws this distinction in cases in which the Commonwealth has to pay the costs and in cases in which they are paid by the accused.

Section 3505 provided for fees to be paid to the attorneys for the Commonwealth, although this section has been superseded by placing the attorneys for the Commonwealth upon a salary basis. Section 3506, following, authorizes the payment to the clerk out of the State treasury the sum of 2.50 for his services in each felony case. This section was originally section 3029 of the Code of 1887, and, I am advised by the Comptroller’s office, has always been construed as fixing and limiting the amount of fees which can be paid to the clerk in any felony case to the sum of 2.50.

The only additional payment which I know of which can be paid to the clerk out of the State treasury is for the services of preparing and keeping a full and descriptive list of persons convicted in his own court of felony or other infamous offense. Section 4787 of the Code provides that for each such list prepared of each prisoner on the form therein contained, there shall be allowed a fee of 50c to be paid out of the treasury of the Commonwealth. Of course, this service is not rendered as a part of the actual trial and conduct of the case, but is a supplemental service thereafter rendered.

Trusting that I have made the situation clear to you, I am with best wishes

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

COSTS—Hospitalization of Prisoners.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 21, 1938.

HONORABLE EDWARD MEEKS,
Amherst, Virginia.

MY DEAR JUDGE MEEKS:

I am in receipt of your letter of February 10, the first paragraph of which is as follows:

"On or about August 2, 1937, a colored man by the name of Cephas Woodson of Fluvanna County, Virginia, entered the University of Virginia Hospital from a serious wound received by him in attempt to commit a robbery; almost simultaneously with the entry into the hospital, this man was taken under surveillance and ultimate custody, tried for attempted robbery after he had sufficiently recovered, and has since died as a result of his wounds."

You state that Cephas Woodson was totally insolvent and that the University of Virginia Hospital is now seeking to be paid $52.70 covering his hospital expenses.

The matter of the payment of hospital charges for prisoners under varying factual situations likewise has given me trouble from time to time. In the case you put this man does not appear to have entered the hospital as a prisoner, and it is not entirely clear when he was actually taken into custody. However, in view of the broad language of section 4960 of the Code, I would say that probably in your discretion you could allow this bill if it were not for the last paragraph of the section, reading as follows:

"It is further provided that no compensation shall be allowed hospitals for the treatment of prisoners unless application shall have been made to the superintendent of the penitentiary, or to the superintendent of the State farm, for the admission of prisoners to the hospital wards of said institutions and such application refused, unless the disease, or wound, or accident, from which the prisoner is suffering is of such an emergency kind that immediate treatment in the hospital is necessary, and then only such amounts shall be allowed to the hospitals as shall have been incurred before it is practicable to remove the prisoner from the hospital to one of the institutions above mentioned."

Since this man was not at first in the custody of any officer, I do not presume that application was made for hospitalization, as provided in the quoted paragraph, and so I am of the opinion that the bill of the University of Virginia Hospital cannot be allowed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Budgets—Spreading on Minute Books of Board of Supervisors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 21, 1937.

HONORABLE L. B. MASON, Clerk,
King George County Circuit Court,
King George, Virginia.

DEAR MR. MASON:

This is in response to your letter of December 20, in which you request my opinion upon the question whether the budget, which under the provisions of sec-
tion 2577(L) the board of supervisors is required to prepare, should be spread at length upon the minute books or other record books of the board of supervisors.

You state that the procedure which has heretofore been followed by the board is to publish the notice of hearing required by section 2577m of the Code, and, after the expiration of thirty days, the board enters an order adopting the budget and filing it among the papers of that meeting.

In my opinion, this procedure is a correct one and it is not necessary to spread upon the minute books a copy of the budget. It is my opinion, however, that the board of supervisors has the authority to spread same upon their minute books if the members by resolution so provide.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES AND CITIES—Courthouses—Duty to Provide.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 20, 1937.

Senator Morgan R. Mills,
210 East Franklin Street,
Richmond, Virginia.

My Dear Senator:
This is in reply to your request for my opinion as to whether or not the statutes of Virginia impose upon the counties and cities of the State the duty and obligation of providing a court house for the accommodation of the courts and court officers.

It is my opinion that section 2854 of the Code imposes this obligation upon all of the counties and cities in the State.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

COUNTIES—District Bonds—Refunding.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 20, 1937.

Dr. Sidney B. Hall,
Superintendent Public Instruction,
Richmond, Virginia.

Dear Doctor Hall:
This is in reply to your letter of December 17, in which you request my opinion upon the question whether or not the Lebanon Magisterial District of Russell County is prohibited from issuing bonds to refund an unpaid portion of a previous issue of $22,000 which matures on December 1, 1938.

Under the provisions of section 115-a of the Constitution, no district of a county may incur any bonded indebtedness without a referendum to the qualified voters unless the indebtedness is within certain exceptions mentioned in that section. One of the exceptions is a debt "to redeem a previous liability." In my opinion, this indebtedness is a previous liability and the bonds may be issued to redeem same without a referendum to the qualified voters.

It appears from the letter which you transmitted to me from Honorable G. H. Givens, Division Superintendent of Public Schools of Russell County, that the present bond issue is a district school bond issue of the Lebanon District.
Statutory provisions relating to refunding bond issues are contained in sections 718a to 718(L), inclusive, of the Code. The particular sections which might be appropriate would depend upon the facts relating to the bond issue desired to be refunded.

I am returning herewith Mr. Givens' letter.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Expenditures—Dues for Membership in League of Virginia Counties.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 26, 1938.

Hon. Juniус W. Pulley,
Commonwealth's Attorney,
Courtland, Virginia.

Dear Mr. Pulley:

I have your letter of January 25, in which you inquire as to the opinion of this office with reference to the power and authority of the Board of Supervisors to appropriate funds for the payment of dues for membership in the League of Virginia Counties.

You refer to my letter contained on page 27 of the report of this office for the year 1934-1935, in which I expressed the opinion that the Board of Supervisors was without authority to make an appropriation of funds to an association of county supervisors.

I am still of that opinion as I consider an association of county supervisors to be an association of individuals and not an official organization of county governments. For many years there has been a League of Virginia Municipalities and no one has ever questioned the authority of the councils of the respective cities to join this league and pay dues thereto for its support and operation.

Section 2743 of the Code empowers the Board of Supervisors of any county "to adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State."

It is my opinion that the question of the action to be taken with respect to the League of Virginia Counties, such as joining said League and paying membership dues of the county, or sending a representative to the meetings of said League, is one to be determined by the Board of Supervisors themselves. In the exercise of this discretion it is also my opinion that the Board of Supervisors should give primary consideration to whether the best interests of the county will be conserved and promoted by joining the said League, paying dues thereto and sending a representative to its meetings. It may be that the Board of Supervisors finds itself confronted with perplexing problems which would be simplified or solved by conferences with representatives of other counties which have dealt with similar questions, and which might render the expenditures advisable and worth while.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
COUNTIES—Expenditures—Housing WPA and NYA Offices.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 16, 1938.

Honorable Charles M. Lankford, Jr.,
Attorney for the Commonwealth,
Exmore, Virginia.

My Dear Mr. Lankford:

I am in receipt of your letter of May 10, in which you ask if the Board of Supervisors has authority to appropriate money for the payment of rent, heat and lights for the local office of the Works Progress Administration. You also ask the same question as to the local office of the National Youth Administration.

I am informed by Mr. W. A. Smith, of the Works Progress Administration, that the projects of that Administration in the various counties are undertaken under the joint sponsorship of the counties and the Works Progress Administration, and that before any local project is undertaken the county is required to certify that it has the authority to enter into the project. It is also a fact, of course, that any local project in any county is undertaken for the primary benefit of that county.

In view of the above, I am of opinion that, if the county had authority to undertake the project in the first instance, it necessarily has the authority to provide money for the payment of the items to which you refer.

I am further informed that the National Youth Administration is a division of the Works Progress Administration and, therefore, the same reasoning would apply to the payment of the expenses for the benefit of the National Youth Administration.

Yours very sincerely,

Abram P. Staples,
Attorney General.

COUNTIES—Fire-Fighting Equipment—Power to Purchase.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 21, 1937.

Honorable Julian K. Hickman,
Attorney for the Commonwealth,
Warm Springs, Virginia.

My Dear Mr. Hickman:

I am in receipt of your letter of September 17, asking whether or not the Board of Supervisors of Bath County has authority to contribute money to a duly organized fire-fighting company of the county for the purpose of purchasing fire-fighting equipment.

While sections 2743-C and 3144-K of the Code (Michie's, 1936) authorize certain counties to do certain things in connection with fire protection in their respective counties, as you will see from an examination of these sections, Bath county is not included therein. I know of no statute which can be said to give Bath county the authority you mention, and I am, therefore, of opinion that no such authority exists.

While I am of opinion that the board of supervisors has no authority to make a donation to a fire company, nevertheless, it is my opinion that the board may purchase on behalf of the county fire fighting equipment and allow it to be used by the volunteer fire company.
Section 2743 of the Code confers upon the board of supervisors the power "To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State."

The fighting of fires bears a direct relation to the safety, health and general welfare of the people of the county, and, in my opinion, comes within the power conferred upon the board of supervisors by the language above quoted.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Providing Traffic Signals on Primary Highways.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 12, 1938.

Honorable M. B. Booker,
Attorney for the Commonwealth,
Halifax, Virginia.

Dear Mr. Booker:

I have before me your letter of January 11, in which you request my opinion upon the question whether or not the board of supervisors of Halifax county possess the authority to appropriate money for the erection and maintenance of a stop light at the intersection of routes 58 and 360, both of which are in the State highway primary system, which intersect at a point about one mile from South Boston, Virginia.

Your question raises two points which I will treat separately.

The first question which arises is whether or not the board of supervisors has the authority to erect any lights or other traffic signals on the roads comprising the State highway system, unless the same are authorized and approved by the State Highway Commission.

In my opinion, it is very clear that the control of the roads in said highway system of Virginia is vested by statute in the State Highway Department, and the board of supervisors has no authority to install any traffic lights or signs on these highways except with the concurrence, permission and authorization of the State Highway Commission.

The second question is whether, in the event the State Highway Commission should authorize the installation and maintenance of the light in question by the board of supervisors, said board would have the power to appropriate money for the erection and maintenance of such signal or stop light.

Section 2743 of the Code expressly confers upon the boards of supervisors of counties the power "To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State."

It seems to me obvious that, if the Highway Commission is of opinion that the stop light to which you refer is proper and will promote the safety of the travelers on the two highways at the point of intersection, it is within the power of the board of supervisors to appropriate money for that purpose.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 18, 1937.

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

DEAR GOVERNOR PEERY:

This is in reply to your letter of November 17, in which you request my opinion upon certain questions arising from a letter under date of November 9, addressed to you by Honorable William T. Graybeal, Commonwealth's Attorney of the City of Buena Vista, Virginia, relating to the appointment of a judge of the corporation court of the City of Buena Vista to fill the vacancy created by the death of Judge R. L. Gardner.

Judge Gardner has for some years held the positions of judge of the corporation courts of the City of Buena Vista and the City of Radford, both of which are cities of the second class.

Section 98 of the Constitution of Virginia provides that the corporation courts of such cities existing at the time shall continue, but may be abolished by a vote of the majority of the qualified voters of such city in an election held for the purpose. This section of the Constitution further provides that, whenever the office of judge of any such court whose annual salary is less than eight hundred dollars, shall become and remain vacant for ninety days consecutively, such court shall thereby cease to exist. In the event of such abolition, it is further provided that such city shall thereupon come in every respect within the jurisdiction of the circuit court of the county wherein it is situated until otherwise provided by law, and the records of such former corporation court shall thereupon become a part of the records of such circuit court and be transferred thereto and remain therein until otherwise provided by law.

It appears from Mr. Graybeal's letter that on December 4, 1937, ninety days will have expired since the death of Judge Gardner, the former judge of the corporation court of Buena Vista. The following are questions which arise from the requests, which he makes in his letter to you:

1. Is the judge of the circuit court of the circuit of which Rockbridge County (in which Buena Vista is located) is a part, or the judge of one of the adjoining circuits, eligible to be appointed judge of the corporation court of the city of Buena Vista?

This question seems to me to be extremely doubtful. Section 99 of the Constitution provides that the judge of a corporation court of any city having a city charter, and less than ten thousand inhabitants, may reside outside of the city limits, and may also be a judge of a corporation court of some other city having less than ten thousand inhabitants. This would seem by clear implication to negative the eligibility of a judge of any such city holding the position of judge of any other court except that permitted in section 99 of the Constitution, namely, the judge of another similar court.

Section 105 of the Constitution also provides that no judge of a court of record shall hold any office of public trust during his continuance in office. Of course, the position of judge of the corporation court of Radford would be an entirely separate and distinct position from that of judge of the circuit court of the various courts within his circuit.

Section 105 also contains an exception that the judge of a city court in a city of the second class may hold the office of commissioner in chancery of the circuit court for the county in which the city is located. The effect of this exception is twofold: first, it does not confer the right upon such a judge to hold the position of judge of the circuit court, and, second, if the judge of the circuit court of Rockbridge County is also judge of the corporation court of the city of Buena Vista, the effect would be to make him eligible to hold the position of commissioner in chancery in his own circuit court.

It would seem that, if the judge of a circuit court is eligible to hold the position of judge of a corporation court of a city of the second class, he would also
be eligible to hold the position of judge of any other court of the Commonwealth provided he meets any residential requirements required by the Constitution or statute. Thus, the judge of the twentieth circuit, if he is a resident of the city of Roanoke, would under this principle be eligible to hold the positions of judge of the corporation court of the city of Roanoke and, also, that of judge of the court of law and chancery of the city of Roanoke.

In my opinion, it is a very much safer plan to create in the city of Buena Vista a separate circuit court within the eighteenth judicial circuit, as permitted under section 95 of the Constitution. The circuit court of this city would have, so far as I can tell, exactly the same jurisdiction as the corporation court would have. The effect of this would, perhaps, be also to abolish within the city of Buena Vista the concurrent jurisdiction of the circuit court of Rockbridge County, which it seems to me would be desirable from the standpoint of those living in the city of Buena Vista.

2. As above noted, unless a judge is appointed to fill the vacancy in the corporation court of the city of Buena Vista before December 4, 1937, such court would cease to exist as a separate court and the records of same, and the jurisdiction formerly exercised by said court, will pass to the circuit court of Rockbridge County. The letter of Mr. Graybeal requests you to designate the judge of some other court to hold the December Term of the Buena Vista Corporation Court, which begins on the first Monday of December—which is the 6th day of December, 1937.

Since the court will cease to exist on that date unless the vacancy is filled, it is my opinion that no other judge can be designated to hold the December Term.

If it is the desire to have established at Buena Vista a circuit court within the eighteenth judicial circuit and at the same time avoid any hiatus or inconvenience which might result from an actual or theoretical transfer of the records of the expired corporation court to the circuit court of Rockbridge County, I am of opinion that this may be avoided by the appointment of some person to occupy the position of judge of the Buena Vista corporation court temporarily. This appointee could resign and at the expiration of ninety days thereafter the court would cease to exist. In the meantime, an act of the General Assembly could be enacted which would provide for the creation of a circuit court at Buena Vista within the eighteenth judicial circuit, same to become effective immediately at the time that the corporation court ceases to exist.

Under the provisions of section 98 of the Constitution relating to these two corporation courts, same can be abolished only by a majority vote of the people, or else by the expiration of ninety days after the occurrence of a vacancy in same. The General Assembly does not have the power to abolish these courts.

This suggestion is made because I am informed that the salary paid to the judge of this corporation court is so small that it offers no attraction to any person competent to hold the position of judge of said court.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DAIRY AND FOOD COMMISSIONER—Cold Storage Warehouses—Fruit Warehouses.

Id.—Id.—Id.—Requiring Recording Thermometers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 30, 1938.

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

DEAR MR. LAPSLEY:

In your letter of June 28, you ask if the Dairy and Food Commissioner, who is required to enforce the general cold storage law (sections 1228a-1228o of Michie's
Code of Virginia, 1936), is also required to enforce sections 1228p and 1228q, which relate to certain records of temperatures to be kept by cold storage warehouses in which apples and other perishable fruits are stored. You also ask if such warehouses may be required, either by virtue of sections 1228p and 1228q or by virtue of the general cold storage law, to maintain recording or indicating thermometers which automatically inscribe a continuing record of temperatures.

Sections 1228a-1228o of the Code comprise an Act adopted in 1919 and amended in 1923, defining cold storage and cold storage warehouses and regulating the storage of articles of food. This general cold storage law defines "cold storage warehouse" as "any place * * * in which articles of food are placed or held for thirty days or more." "Articles of food" are defined as "fresh meat and fresh-meat products, except in process of manufacture, and all fresh fish, game, poultry, eggs, milk, butter, cheese and edible fats and oils and lard." This Act then provides for the regulation of the storage of articles of food, and imposes upon the Dairy and Food Commissioner the duty of enforcing the Act and gives him power to pass rules and regulations for this purpose. This Act does not attempt to regulate, and gives the Dairy and Food Commissioner no authority over, cold storage warehouses in which apples or other perishable fruits are stored, as such warehouses are not within the definition of cold storage warehouses dealt with by this Act.

Sections 1228p and 1228q comprise a separate Act, adopted in 1926, dealing specifically with warehouses in which apples and other fruits are stored. This 1926 Act is not an amendment of the general cold storage law and, in fact, makes no reference thereto. The two Acts are entirely separate, though one follows the other in Michie's Code. The provisions in the general cold storage law (sections 1228a-1228o), requiring the Dairy and Food Commissioner to enforce that Act and giving him authority to pass rules and regulations for this purpose, have no application to sections 1228p and 1228q.

Sections 1228p and 1228q require anyone operating cold storage warehouses in which apples or other perishable fruits are stored for hire to keep careful and accurate daily records of the temperatures existing in each room of such warehouses. They also provide that such warehouses shall be subject to inspection at any time by any authorized agent of the Department of Agriculture and Immigration.

In answer to your question as to whether such warehouses may be required to maintain recording or indicating thermometers, it is my opinion that the Act only requires them to keep careful and accurate daily records. If this can be done by the use of ordinary thermometers, they cannot be required to use others. If they use ordinary thermometers and their records are not careful and accurate, then they become subject to prosecution for the violation of section 1228p of the Code.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DEBTS DUE THE STATE—Compromise and Settlement—Forfeited Recognizances.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 21, 1937.

HONORABLE P. W. ACKISS,
Attorney for the Commonwealth,
Virginia Beach, Virginia.

DEAR MR. ACKISS:
I have before me your letter of December 17, in which you request my opinion as to whether or not there is any provision of law by which a judgment
against a surety for a forfeited recognizance may be compromised, settled, or disposed of in any manner except in accordance with section 2569 of the Code, and the other sections therein referred to.

While section 8, of chapter 47 of the Acts of 1936, at page 75, authorizes the Attorney General to compromise and settle claims involving the interests of the Commonwealth in certain cases when approved by the Governor, I have recently had occasion to consider this question and have heretofore reached the conclusion that the authority conferred by the above mentioned act on the Attorney General has no application to fines, penalties, and forfeited recognizances, which are dealt with in section 2569 of the Code.

I know of no other provision of law by which the judgment to which you refer can be remitted in whole, or in part, except in compliance with the provisions of section 2569 and other related sections.

You also inquire whether or not there is any statutory provision for an annual penalty of ten per centum on a judgment rendered on a forfeited recognizance.

I have been unable to find any statute providing for any penalty after the rendition of the judgment.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

DEBTS DUE THE STATE—Compromise and Settlement—Criminal Court Costs.

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

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

DEAR GOVERNOR:

Referring to my letter of November 5, 1937, addressed to Honorable E. R. Combs, in which I approved the compromise and settlement of the judgment in favor of the Commonwealth of Virginia against John L. Hagood, the amount of the judgment being $140.34 and the amount of the settlement being $50.00, I beg to advise that it appears from a letter from N. G. Hutcheson, Clerk of the Circuit Court of Mecklenburg County, in which the judgment is recorded and docketed, that the judgment is entirely for costs in a criminal prosecution against the defendant.

It is my opinion that this is not a fine or penalty within the meaning of the statute requiring certain procedure to be complied with before same can be compromised or remitted. A judgment for costs is intended to recover from a defendant an amount sufficient to reimburse the Commonwealth for the expenses to which it has been put for the trial. In my opinion, therefore, this judgment comes within the provisions of chapter 47, section 8 of the Acts of 1936 (page 75), under the provisions of which the Attorney General is authorized to compromise and settle disputes, claims and controversies involving the interest of the Commonwealth, with the approval of the Governor and the head of the Department interested.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
DEBTS DUE THE STATE—Statutes of Limitations—College Fees Due V. P. I.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,

Mr. J. B. Fogleman, Treasurer,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

My Dear Mr. Fogleman:

I have your letter of April 14, in which you state that, as treasurer of the Virginia Polytechnic Institute, you employed the American Credit Bureau to collect several old accounts for unpaid college fees against former students of the Institution, and that one of these students, in an action brought by the collecting agency, has pleaded the statute of limitations and declines to make payment of the indebtedness.

It is my opinion that the debt to the Virginia Polytechnic Institute is, as a matter of law, deemed to be a debt in favor of the Commonwealth of Virginia. (See Eastern State Hospital v. Graves, 105 Va. 151).

Under the provisions of section 5829 of the Code, no statute of limitation which does not in express terms apply to the Commonwealth shall be deemed applicable to any proceeding by or on behalf of the Commonwealth. This section, however, contains a provision as follows:

"This section shall not, however, apply to agencies of the State incorporated for charitable or educational purposes."

Section 860 of the Code provides that the board of visitors of the Institution, which is now the Virginia Polytechnic Institute, shall be and remain a corporation.

It is my opinion, therefore, that under the provisions of the statute above referred to, the statute of limitations may be successfully pleaded against a claim such as you refer to.

Permit me to call your attention to the provisions contained in chapter 47, page 73, etc., of the Acts of 1936, which is designated as section 374a of the Code of Virginia. Under the provisions of this Act, the Attorney General is required to render all legal services for the State, and all of its institutions, agencies, and so forth, except in special cases where it is impracticable or uneconomical for the Attorney General to render such service. In such case he may recommend to the institution the employment of an attorney to render such particular service.

I do not know the present status of your arrangements with the collection agency, but I call your attention to these statutory provisions so that you may bear same in mind in the future. No doubt the service you employ the collection agency for could not have been practicably rendered by this office, and the employment you made would have been recommended, and I am merely calling this to your attention for future guidance.

Yours very truly,

Abram P. Staples,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,

Honorable P. E. Ketron, Director,
Division of Purchase and Printing,
Richmond, Virginia.

Dear Mr. Ketron:

I have your letter of June 21, requesting the opinion of this office as to whether the person who is serving as clerk of both the Law and Equity Court,
Part One, of the city of Richmond, and the Law and Equity Court, Part Two, of that city, is entitled to two copies of the bound Acts of the Assembly.

Under Virginia Code (Michie 1936) section 388, the Director of the Division of Purchase and Printing is required to deliver “one copy” of the Acts “to each clerk of any court.”

By Code sections 5912, 5922 and 5933a, the Legislature has established the Law and Equity Court, Part One, and Law and Equity Court, Part Two, of the city of Richmond, as distinct courts, providing that the same person shall serve as clerk of both.

While the language of Code section 388 is not clear, it seems more in conformity with the policy of the statute to hold that a copy of the Acts should be furnished for use in connection with each court.

Accordingly, it is the opinion of this office that the statute authorizes you to furnish the clerk with two copies.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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DOG LAWS—Compensation for Stock Killed—Computation of Value.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 12, 1937.

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

DEAR MR. WILLIAMS:

This is in reply to your letter of November 9, in which you request my opinion as to the proper method to be used by the board of supervisors in computing the value to be paid to an owner for sheep killed by dogs in Clarke County, where the sheep have been so recently purchased that there has been no opportunity for them to be listed or appraised for taxation.

While section 3305(75) of the Code does not seem to provide expressly for the payment to the owner of livestock killed by a dog, where such stock has not been assessed, except in the case of lambs or poultry, nevertheless, it would seem to be the intention of the statute, in cases where the owner of livestock has followed an invariable custom of listing his livestock for taxation and reporting same to the commissioner of the revenue, to allow compensation in such a case.

Where the commissioner of the revenue has customarily assessed such livestock at less than actual value, I am of the opinion that the board of supervisors should, in fixing the amount of compensation, fix such proportion of the actual value of the sheep killed as is customarily placed upon such sheep when same are assessed for taxation. If, under the practice in the county, an owner fixes his own value, then I am of opinion that the same proportion of true value customarily fixed by the owner in returning his livestock for taxation should be followed in this case.

I am also of opinion that, in order to technically comply with the statute, the sheep should be assessed for taxation at the value fixed, and the owner should pay the tax thereon.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

DRY CLEANERS BOARD—Appropriation of Revenues of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 23, 1938.

Mr. R. W. Billingsley, Secretary,
State Dry Cleaners Board,
Capitol Building,
Richmond, Virginia.

Dear Mr. Billingsley:

I am in receipt of your letter of June 22, which I quote as follows:

"Under Chapter 335 Acts of 1936, certain moneys were appropriated to the State Dry Cleaners' Board for administration and enforcement of the Act. After the expiration of the Act there will likely be some expense in connection with prosecuting persons who had violated the Act prior to the expiration June 30, 1938.

"Will you please advise whether or not expenses incurred in such prosecutions will come from the funds which accrued to the Board under the Act of 1936 which expires June 30, 1938."

The appropriation made to your Board by the 1936 Act is in the following language:

"All funds collected by the board as provided in this act shall be paid into the general fund of the State treasury and the same shall be, and are hereby, appropriated to the board for the purpose of the administration and enforcement of this act."

The 1936 Act by the terms thereof expires on July 1, 1938. However, the General Assembly of 1938 amended the 1936 Act (Acts 1938, p. 975) and again provided in section 5 that all funds collected by the Board under the Act are appropriated to the Board for the purpose of enforcing the Act.

In my opinion the 1938 Act is, in effect, a continuation of the 1936 Act, and that the funds collected by the Board under the 1936 Act, and unexpended, are reappropriated by the 1938 Act.

Therefore, in answer to your inquiry, I am of opinion that after July 1, 1938, you may still use the funds collected under the 1936 Act for the purposes named in the Act.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DRY CLEANING—Disposal of Garments Not Called for.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 20, 1937.

Mr. R. W. Billingsley, Secretary,
State Dry Cleaners Board,
Capitol Building,
Richmond, Virginia.

My Dear Mr. Billingsley:

I have your letter of December 17, in which you ask the following question:

"Will you please advise when and under what conditions a cleaner can legally dispose of garments not called for within a reasonable time."
I am of opinion that, where a person delivers garments to a cleaner or presser for service to be performed thereon, there is the relationship of bailor and bailee. See Michie's Digest of Va.-W. Va. Reports, Vol. 1, page 937. It also seems to be settled that at common law goods deposited with a tradesman or artisan for manufacture or repair are subject for the work done on them to a specific lien. 3 Ruling Case Law, page 121. Section 6449 of the Code prescribes in detail where a bailee, having a lien at common law on personal property in his possession, may sell the same at public auction for cash and apply the proceeds to the satisfaction of the debt and expenses of sale, the surplus to go to the owner of the property. Before such a sale can be made, however, the statute provides what must be done in the way of advertising, personal notice to the owner, etc. The statute is somewhat lengthy and so I will not copy it in this letter, but refer you to it for the precise procedure to be followed.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 28, 1938.

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

DEAR MR. BILLINGSLEY:

On my return to the office after an illness of several days, I found your letter of June 17, requesting my opinion as to the right of a person who has been engaged in the dry cleaning business during 1937, and is still so engaged on July 1, 1938, to have issued to him a 1938 license in spite of the fact that he has never obtained the license required by law for 1937. You also ask my opinion as to whether such a person may yet be prosecuted for having engaged in the dry cleaning business without a license during 1937.

In response to your first question, it is the opinion of this office that such a person is entitled to receive a license for the year 1938. As you pointed out, section 7 of chapter 432 of Acts 1938 provides:

"All persons, firms, corporations and associations in the State of Virginia engaged in the business of cleaning, dyeing and pressing, or in the power operated laundry business, at the time this act becomes law, shall be entitled to have issued to them a license upon the payment of the license fee herein required."

It will be observed that this section does not refer to persons, firms, etc., legally engaged in the business, and since the statute is penal in nature, I do not think this qualifying word can be read into the Act.

As to your second question, it is my opinion that persons who engaged in the dry cleaning business as defined in the former statute—Acts 1936, chapter 335—without a license may yet be prosecuted for this offense, since I know of no limitation on prosecutions of this nature.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
DRY CLEANERS—Licenses—Corporation Changing Its Name.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 8, 1938.

Mr. E. T. Moorefield, Jr., Chairman,
c/o Mr. R. W. Billingsley, Secretary,
State Dry Cleaners Board,
Richmond, Virginia.

DEAR Mr. BILLINGSLEY:
I have your letter of April 4, requesting the opinion of this office as to whether or not a corporation holding a dry cleaners license is entitled to have a new license issued when such corporation makes a change in its corporate name.

The necessity for a new license for such a cleaner arises out of the provisions of section 1, Rule I of the Rules and Regulations promulgated by the Board in an official bulletin promulgated under date of July 1, 1930, which section requires that a cleaner shall operate only under the trade name in which his license has been issued.

Virginia Code (Michie 1936) section 1702-g(2) provides that the State Dry Cleaners 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.”

In view of this statute, it would seem that the Board would not be justified in refusing to grant a new license in the case which you suggest, unless it should be determined at a hearing, after due notice, that this cleaner is guilty of some violation of the provisions of the statute or of the Board's regulations.

Of course, since there is no change in the identity of the corporation which is already licensed, no new license tax or fee is chargeable for the new license. In reality it is not a new license, but an amended or altered one.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates—Petition—Qualifications of Signers—Duties of Clerk With Respect to.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 22, 1938.

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

MY DEAR MR. ANDERSON:
This is in reply to your request for my opinion as to the duty resting upon you with respect to the following case:

You state that various candidates filed their notice of candidacy for city offices in the election to be held in the City of Hopewell on June 14; that accompanying each of these notices filed by said candidates there were petitions in each case signed by fifty persons who, in said petitions, stated themselves to be qualified voters; that immediately after the time expired within which notices of candidacy could be filed, you certified a list of persons whose names had been filed, together with copies of the petitions of qualified voters filed with the respective notices.

Since these names, and copies of notices and petitions were certified by you to the electoral board, a question has been raised as to whether or not the petition accompanying the notice of one of the candidates is signed by fifty qualified voters, some question having been raised as to the eligibility of several of the signers of said petition to vote in the coming election.
You request my opinion as to whether or not you have the authority to recall your certification of this candidate's name after same has been certified in the manner above stated, where no question was raised as to the eligibility of the signers of the said petition prior to your certification.

Under these circumstances, it is my opinion that you have no further jurisdiction or authority with respect to the names which you have certified, and that, if any person desires to raise any question about the right of this particular candidate to have his name printed on the ballot, said question should be raised before the electoral board to whom his name has been certified.

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

ELECTIONS—Candidates—Petitions—Candidate for City Council as Candidate for “City Office” Under Statute.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 6, 1938.

HONORABLE WILLIAM T. GRAYBEAL:
Attorney for the Commonwealth,
Buena Vista, Virginia.

My Dear Mr. Graybeal:
I am in receipt of your letter of April 4, in which you state:

"There seems to be a difference of opinion here among attorneys as to whether a City Councilman is a city officer and required to file with his notice of candidacy a petition with the names of fifty voters as required in chapter 383 Acts of 1936, page 613, near the bottom of that page."

It does not seem to me that there can be any doubt that a member of a City Council is a city officer and that a candidate for this office must file along with his notice of candidacy a petition therefor signed by fifty qualified voters of his city, pursuant to the following provision of section 154 of the Code:

"* * * nor shall the name of any candidate for the General Assembly, or for any city or county office, other than a party nominee as above mentioned, be printed on the ballots provided for such election, unless he file along with his notice of candidacy a petition therefor, signed by fifty qualified voters of his city, county or district, as the case may be, witnessed as aforesaid and with like affidavits attached thereto."

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

ELECTIONS—Candidates—Towns—Petition of Qualified Voters.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 9, 1938.

HONORABLE G. M. WEEMS,
Treasurer of Hanover County,
Ashland, Virginia.

Dear Mr. Weems:
This will acknowledge your letter of March 4, in which you request my opinion on the question whether a candidate for a town office is required to file a
petition signed by fifty qualified voters of the town. You call my attention to
the relevant statutes which are sections 154 and 168 of the Virginia Code (Michie
1936).

Code section 154 requires candidates for various specified offices to file notice
of their candidacy with either the Secretary of the Commonwealth, or the clerk
or clerks of the appropriate circuit or corporation court or courts, according to
the nature of the office being sought. An additional provision of this section re-
quires candidates for certain prescribed offices, not including town offices, to file
with such notice petitions signed by certain specified numbers of voters.

Section 168, dealing generally with elections in towns, expressly requires can-
didates for town office to give notice of their candidacy to the county clerk as
provided by section 154, but does not mention a petition by qualified voters.

While it is true that section 168 in general terms requires that town elections
shall be held subject to the rules prescribed for other elections, except as otherwise
provided, in my opinion the specification in section 154 of the elections to which
this requirement shall apply excludes elections to town officers from the operation
of such requirement.

It is the opinion of this office, therefore, that a candidate for a town office is
not required to file with his notice of candidacy a petition of qualified voters of
the town.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates—Withdrawal—Refunding Filing Fee.

HONORABLE A. B. GATHRIGHT,
Treasurer of Virginia,
Richmond, Virginia.

DEAR MR. GATHRIGHT:

In the absence of the Attorney General, I am answering your inquiry as to
your authority to repay to Honorable W. Worth Smith the sum of one hundred
and forty dollars ($140) paid into the treasury of the State of Virginia by Mr.
Smith as a primary fee upon his entrance as a contestant in the August Primary
for the office of Attorney General of Virginia.

Honorable John R. Saunders, Attorney General of Virginia, on April 30,
1931, in a letter to Mr. Thomas W. Blackstone, of Accomack Court House, ex-
pressed the opinion that there was no statute covering the right of an announced
candidate to withdraw his candidacy for a primary nomination, but, at the same
time, advised that a candidate be allowed to withdraw his candidacy.

Paragraph (a) of section 24-2, of chapter 40 of an act approved February 12,
1918, provides that, where a prospective candidate withdraws, he is entitled to
have paid back to him the amount paid as a candidate’s entrance fee.

As there is no time limit set in which a candidate may withdraw and have
his entrance fee returned, I am of the opinion that Mr. Smith, having publicly an-
nounced his withdrawal as a candidate for the democratic nomination for Attor-
ney General of Virginia, is entitled to have his entrance fee repaid

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.
ELECTIONS—Electoral Boards—Compensation—Certain Limitations on.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 25, 1937.

HONORABLE J. S. DISHMAN,
Secretary of Electoral Board,
Nindes Store, Virginia.

My Dear Mr. Dishman:

This is in reply to your letter of October 23, in which you advise that the electoral board of your county has held seven meetings in 1937, two of which are on account of the primary election which was held in August, and you inquire as to the proper compensation to be allowed the board which had already held five meetings prior thereto.

Section 89 of the Virginia Election Laws provides that no member of an electoral board shall receive more than twenty-five dollars in any one year exclusive of mileage, unless one or more special elections be held in such year, in which event the members of the electoral board shall be paid additional amounts at the same per diem, and mileage.

Inasmuch as primary elections are not regarded as special elections within the meaning of the election laws, as I wrote you some days ago, I do not believe it would be permissible under this statute to allow any extra compensation on account of such elections.

Primary elections are regularly held at the days prescribed by statute and I do not believe they can be classified as special elections under the meaning of section 89 of the elections laws.

Section 141 of the election laws defines special elections as follows:

“Special elections shall be deemed to be such as are held in pursuance of a special law, and also such as are held to supply vacancies in any State or of any county, city, town, magisterial district, or ward, and the same may be held at such time as may be designated by such special law or the proper officer duly authorized to order such elections.”

Our laws providing for the holding of primary elections are not special, but general laws.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Electoral Boards—Compensation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 3, 1937.

HON. E. L. BILLUPS,
Secretary of Electoral Board,
Mathews, Virginia.

My Dear Mr. Billups:

I am in receipt of your letter of September 27, in which you ask if you, as a member of the Electoral Board who delivers the ballots to the various precincts, are entitled to the $5 per diem allowed by section 89 of the Code.

While I think it is reasonable to say that this per diem is primarily intended for members of the Electoral Board while sitting as a Board, yet, in view of the fact that the law further makes it the duty of one of the members of the Board...
to distribute the ballots, I am of opinion that the member so distributing the bal-
lots is entitled to the per diem while engaged in this duty.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Electoral Boards—Meetings.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 21, 1937.

MR. J. S. DISHMAN,
Secretary of the Electoral Board,
King George County,
Nindec Store, Virginia.

DEAR MR. DISHMAN:
I have your letter of the 20th instant, inquiring whether or not the electoral
board is authorized to hold a meeting in connection with a primary election.

Section 87 of the Election Laws provides that the electoral board of each city
and county shall hold a meeting at any time upon the call of any member of the
board, and at any such meeting the board shall have the same powers as at a regu-
lar meeting.

It is my opinion that the board is authorized to have a meeting at any time
a member sees fit to call one regardless of the particular purpose for which the
meeting is called. There is no limit upon the number of meetings the board may
hold.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Miscellaneous.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 7, 1938.

MESSRS. W. D. DUNNINGTON,
E. A. BOONE and N. J. CHRISTENSEN,
Registrars,
Hopewell, Virginia.

GENTLEMEN:
Your five letters of June 4 and your one letter of June 6, asking a number
of separate questions as to the construction of several provisions of the election
laws, have been received. I am replying thereto, first stating your several ques-
tions seriatim and answering each in the same manner.

First: You ask when is the last day a person may apply to you, as regis-
trars, for an absentee ballot.
June 9 is the last day, as that is five days before your June 14 municipal
election.

Second: You ask whether an absentee ballot should be rejected because the
original envelope containing the return ballot has been opened.

Section 211 of the Virginia Election Laws provides that the original envelope
containing the return ballot shall be opened, and that the registrar "shall file the
coupon enclosed with the sealed ballot, with the letter of application, and de-
posit the envelope containing the ballot, unopened, in a sealed box to be provided for the purpose, and there it shall remain until the day of election." As provided in section 213, the registrar shall return the unopened box containing the sealed ballots, together with the letters of application and their accompanying coupons, to the judges of election.

Third: You next ask whether an absentee ballot can be rejected because the coupon required to be sent back was placed in the voucher envelope containing the ballot.

While section 208 of the Virginia Election Laws provides that only the ballot shall be enclosed in the envelope provided for the same, I do not think that a ballot should be rejected because the voucher printed on the back of the envelope has been enclosed within the envelope provided for the ballot alone. Strictly speaking, the envelope should contain only the ballot, and this "envelope, together with the coupon, which must be filled out and signed by a notary public, * * * shall be enclosed within the envelope directed to the registrar."

As to this question, as well as to the other questions you asked, I am of the opinion that no technical failure to follow strictly the letter of the law will justify the rejection of a person's ballot. The law itself provides that it shall be liberally construed, and the courts have uniformly held that the right of suffrage should not be abridged and a person denied his or her right to cast a ballot because of some inadvertent failure to comply strictly with all the technical provisions. It is only when violations amount to a fraud upon suffrage that a person's ballot should be rejected.

Fourth: You say that an inquiry has been made as to whether, where there was a purging of the registration books last year, a person now offering to vote can be challenged as a non-resident, where his status has not changed, without giving the person whose right to vote is to be challenged some form of notice or a second purging of the registration books.

I am of the opinion that a person's right to vote can be challenged without previous notice and irrespective of a previous purging of the registration books, and that it does not require what you are pleased to call a repurging. Judges of election have, subject to an election contest, the final determination of every person's right to vote, subject, however, to the provisions of section 3003 of the Code.

Fifth: You then ask whether, where a voter has moved from one precinct to another in your city and has lived there for a period of more than thirty days prior to an election, he may return to his old precinct and, upon challenge, be allowed to cast his ballot.

In my opinion, where a person has moved from one precinct to another and has lived there for a period of more than thirty days prior to an election, and has acquired the right to vote in his new precinct, he is not entitled to return to his old precinct because he has failed to secure a transfer and register in his new precinct prior to or on the last registration day.

Sixth: You further ask whether, where a person has applied for, obtained and duly filled out his absent voter's ballot, such ballot should be rejected because of the registrar's failure to post the notice required by section 98 of the Virginia Election Laws.

I do not think that such person should be denied his or her right to vote on account of the failure of election officers to perform their duties.

Since the receipt of your inquiries already referred to, I have received your letter of June 6, in which you ask the opinion of this office "as to what constitutes actual residence."

This question is a very difficult one to answer. I do not think that actual residence means that a person must have slept within a city or town the night before a municipal election. A person is an actual resident of a place who, having previously acquired a domicile, either of origin by way of birth or of choice by virtue of having left the domicile of origin with intention of acquiring a domicile (of choice) elsewhere, has established a domicile and residence at the place of his choice.

A case illustrating the law, which is frequently cited, is that of Williams v. Commonwealth, 116 Va. 272. Briefly stated, that case held that Williams, a councilman of the city of Alexandria, was a resident of that city even though he had temporarily removed therefrom, and that "Where a man has two places of
living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention. When he acquires a new legal residence he loses the old, but to effect this there must be both act and intention. Where a person leaves his original residence, with intention of returning, he retains his legal status as a resident of that place and is entitled to vote and hold office in the place of that original residence. It is only when a person leaves his original residence, with no intention of returning and adopts another "(for a space of time, however brief, if it be done) with intention of remaining there permanently, his first residence is lost."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Poll Tax Lists—Effect of Failure to Post at Time Required.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 13, 1938.

Honorable A. R. Beane,
Treasurer of Lancaster County,
Lancaster, Virginia.

My Dear Mr. Beane:

This is in reply to your request for my opinion and advice as to what action you should take under the following circumstances:

It appears that an election will be held in the incorporated town of Kilmarnock on the second Tuesday in June, in the year 1938, for the election of a mayor and members of the town council. You further advise me that up to the present time there has been a failure to certify to the clerk of the court a list of the residents of the incorporated town of Kilmarnock who have paid the State poll tax provided by law six months prior to said second Tuesday in June. As a consequence, of course, the list has not been certified by the clerk to the sheriff, and, therefore, has not been posted as is contemplated by section 38 of the Constitution.

Under these circumstances, it is my opinion that it is your duty as treasurer of the county to immediately furnish the clerk of the circuit court of your county with a list of said residents of said town who have paid said poll tax on or before the time above stated. The clerk should immediately certify said list to the sheriff, who should immediately post same at each of the voting places in the town and make his return thereon to the clerk that same has been so posted. The clerk is required to keep in his office ten copies of said voting list.

If this is done promptly, it will afford all persons who claim to have paid their poll taxes within the required time, but whose names do not appear on said list, the required thirty days within which to appear before the court and have their names placed thereon.

In view of the fact that you say the voting list of the town will contain only about 113 names, I do not see that any person can claim to have been substantially prejudiced by the fact that the list was not certified by you five months prior to the date of election, and was not posted and published thereafter as the law contemplates. Persons whose names may have been improperly omitted are still allowed the required time within which to have the proper correction made, and the only persons who could claim to be prejudiced are those who desire to canvass the qualified voters.

Since the electorate is very small and there still remains over sixty days within which this canvassing can take place, it does not seem to me that any person can claim to be seriously injured by the omission to strictly comply with the terms of the statute. Certainly, it is the public policy in Virginia that the election shall be held, and a much greater harm would result from not holding the election than can possibly be done by the delay in posting the list.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Registration—Time for—Voters Becoming of Age Immediately Before Election.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 21, 1937.

Dr. J. E. Williams,
Dean of the College,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

Dear Dr. Williams:

This is in reply to your letter of October 19, in which you request the views of this office upon the question of the right of a person who became twenty-one years of age on February 11, 1937, to register at any time up to and including November 2, the date of the next election.

This office has repeatedly had occasion to give opinions on questions almost identical to the one you have in mind, and it has uniformly held that the registration books shall close thirty days prior to the holding of a general election. It has also been held that this applies to persons becoming of age during the year in which he first offers to vote. Section 26 of the Constitution provides as follows:

"Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution."

We have always held that, even though a person becomes of age after the closing of the registration books thirty days prior to the election, nevertheless, he is entitled, under the above quoted section of the Constitution, to register prior to the closing of the registration books and, therefore, there is no provision within the law placing him upon a different status from any other person desiring to register. He is afforded the same opportunity to register prior to the closing of the books as any other voter.

Yours very truly,

Abram P. Staples,
Attorney General.

ELECTIONS—Registrars—Duty to Furnish Clerk With Registration Lists.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 13, 1938.

Honorable V. C. Randall,
County Clerk of Norfolk County,
Portsmouth, Virginia.

My Dear Mr. Randall:

This is in reply to your letter of April 9, in which you request my opinion upon the interpretation of certain provisions contained in section 98 of the Virginia Election Laws, requiring a registrar to certify to the clerk of the court a list of all persons who have registered with him since his last sitting.

This section also requires the clerk, upon receipt of such list, to record same in a suitable book kept in the clerk’s office for that purpose. The section likewise requires the registrar to certify to the clerk the name of any registered voter which has been changed by marriage or otherwise, and the clerk is required to make this same change in his records.

You state that your clerk’s office has never kept a book for this purpose, and
that a large number of the registrars have failed to furnish the list as required by law, and you inquire whether or not, in order to complete this list, you have the right to request the information from the registrars, and whether or not you have the right to request a registrar to turn over his registration books to you for that purpose.

The provisions of law above referred to with reference to the certification and copying of lists of persons who have registered was first enacted by chapter 323 of the Acts of 1906, page 571 of said acts and became effective about the 20th of June, 1906.

This section of the old Act of 1906 was amended by chapter 455 of the Acts of 1916, page 770, and the requirements with reference to the certification and copying of the list was omitted. However, section 98 of the Code of 1919, which became effective in January, 1920, inserted these requirements in the Code and same has remained in effect ever since.

Your clerk's office, therefore, should have a record of all persons who have registered between June 20, 1906, and June 23, 1916. It is not required to have on record a list of those who registered between June, 1916, and January, 1920. It is required to have such records of persons who registered between January, 1920, up to the present time.

I see no objection to having in your office, if it can be obtained without expense to the county, a list of persons who registered between June, 1916, and January, 1920, nor any objection in having those who registered prior to June, 1906. In fact, it might be much simpler to obtain a list of the entire registration books than to undertake to segregate those who registered prior to 1906, or between 1916 and 1920. This is largely a matter which I think could be determined after a conference between you and the various registrars in your county.

It is my opinion that you are entitled to the information from the books of the registrars in cases where these lists have not been furnished to your clerk's office as required by law. I doubt, however, if it is the duty of the present registrar to certify a list for any period of time prior to the time that he entered into the duties of his office.

I am of opinion that you do not have any right to call upon the registrars to send to you the original registration books. The law makes no provision for this. However, this office has held that the registration books are public records, and that any person has the right to make a copy of same provided he does not interfere with the performance of the registrars' duties in so doing.

Under these circumstances, I feel sure that you will be able to work out a satisfactory arrangement with the various registrars and arrange, if it is practicable and the registrars prefer to have their books copied in their office, for the W. P. A. workers to make the copies there. Where the registrars are willing to turn their books over to you for this purpose, I see no objection thereto and the copies may be made in your office.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Special—Miscellaneous Rules Controlling.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 23, 1938.

MR. H. McGranaghan, Chairman,
Chesterfield County Electoral Board.
R. F. D. No. 9,
Richmond, Virginia.

DEAR MR. McGranaghan:
I am in receipt of your letter of March 22, in which you ask a number of questions in connection with the special election which has been called in Ches-

The Act to which you refer provides:

"The regular election officers of said county at the time designated in the order authorizing the vote, shall open the polls at the various voting places in the county and conduct the election in such manner as is provided by law for other elections, in so far as the same is applicable. * * *"

From the above quoted provision, I think it perfectly plain that the general law governing eligibility to vote and the manner of conducting the same controls. Now, taking up your question, I shall endeavor to answer them seriatim.

1. "Is the special election to be held in Chesterfield county regarded the same as the general election in November?"

I am not sure I understand the purport of this question, unless you mean to inquire whether the general law controls the special election just as it does the general election. If that is your question, the answer is yes.

2. "Within what time before the special election must persons, otherwise qualified, register to vote in the special election? What time must the registrar close his books before the election?"

This office has heretofore ruled that in a special election such as this persons otherwise qualified to vote may register up to and including the day of election, if the registration books are open. It has also been held that in cities and towns the registrars must close their books on the third Tuesday in May, and all registrars must close their books thirty days previous to the November election. In as much as the special election about which you inquire is to be held on May 12, the registration books will be open and, therefore, persons otherwise qualified may register up to and including the day of election.

3. "Can a person that has paid his 1937 capitation tax six months prior to June 14, 1938, be qualified to vote in a special election if he has paid 1935 and 1936 capitation taxes and is properly registered?"

Section 83 of the Code provides that, in a special election to be held before the second Tuesday in June:

"* * * any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held * * *"

From the quoted language, it is plain that the answer to the above question is yes.

4. "Can a person that becomes of age prior to June 14, 1938, qualify and vote at this special election?"

A person must be twenty-one years of age on the day of election to be eligible to vote in that election. Therefore, I am of the opinion that, in order that a person may qualify and vote in this special election, he or she must be twenty-one years of age on May 12.

5. "Can a person that becomes of age after June 14, 1938, and before the general election in 1938, qualify and vote in this special election?"
For the reasons stated in the answer to question 4, the answer to this question is no.

6. "Are persons who are qualified to vote in the last general election, but who have moved into Chesterfield six months prior to the special election, qualified to vote in such election?"

This question must be answered in the affirmative, provided the requirements of section 100 of the Code are complied with.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Special—Poll Tax List for.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 8, 1938.

HONORABLE J. WILLIAM DANCE,
Treasurer,
Chesterfield Court House,
Virginia.

DEAR, MR. DANCE:

This is in reply to your letter of April 8, which is as follows:

"In view of the Special Election to be held on May 12, 1938, in the county of Chesterfield, on the question of changing the county's form of Government, will the Treasurer of said county be required to make up an amended list of those persons who have paid their 1935, 1936 and 1937 State Capitation Taxes, in said county between May 2, 1937, and December 14, 1937."

It is my opinion that the treasurer is not required, as a matter of law, to make up the amended list to which you refer. However, it is also my opinion that the treasurer would be authorized to make up such a list, and that the judges of election should receive it as prima facie evidence that the persons whose names are placed thereon are entitled to vote in the special election.

By reason of the fact, however, that the list has not been published as required by law, and persons whose names may have been accidentally omitted therefrom, but who were entitled to be placed thereon, have not been afforded the opportunity which the law provides to appeal to the court within the permitted time and make application for the inclusion of their names on said list, I do not think the list which you would furnish would be conclusive.

It is my opinion that any person who produces before the judges of election tax receipts or certificates of the treasurer with respect to the payment of his taxes, which receipts or certificates taken in conjunction with and in addition to the list which was used in the preceding November election show the payment of taxes for the year 1935, 1936 and 1937 prior to the 14th day of December, 1937, will be entitled to vote in said special election.

Of course, persons who have moved into the State recently, or who have recently become of age and are not assessable with taxes for the three preceding years, would be required to produce evidence only that they have paid such taxes as have been assessed or assessable against them within said period.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Town Sergeants—When Held.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 13, 1938.

Senator R. O. Norris,
Lively,
Virginia.

Dear Senator Norris:

This is in reply to your request for my opinion as to when the sergeant of a town should be elected under the provision of the State statutes; that is, whether at the June election provided for by section 2994 of the Code for the election of the mayor and councilmen, or at the November election at which time all other city officers other than mayor and councilmen are elected, and also at which time State officers and county officers are elected.

Section 3026 of the Code provides that "In every city and town, unless otherwise provided by its charter, there shall be elected by the qualified voters thereof one sergeant. The term of office of a city sergeant shall be four years and of a town sergeant two years.* * *"

There is no express provision in the statutes as to when the town sergeant shall be elected, but, inasmuch as under the provisions of section 3012 the city sergeants are required to be elected in November, and inasmuch as the statutory provisions for a town sergeant is contained in the same section of the Code as that providing for the election of a city sergeant, it is my opinion that the time provided for the election of the city sergeant, namely the November election, should also control the time for the election of a town sergeant.

Sincerely yours,

Abram P. Staples,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 27, 1938.

Hon. V. S. Pittman,
County Treasurer,
Courtland, Virginia.

My Dear Mr. Pittman:

I have your letter of June 24, in which you request my opinion as to the capitation taxes necessary to be paid by a person moving into Virginia from another state after January 1, 1937, in order to be qualified to vote in certain elections.

This office has repeatedly ruled that, since the capitation taxes are assessable as of January 1, such person is not assessable with a tax for 1937. However, he will be assessable for taxes for the year 1938. In the meantime, however, since no taxes are assessed or assessable against him which have been unpaid, and since one year's residence authorizes him to vote, such a person, if he moved into Virginia prior to November, 1937, will be entitled to vote in the November election and therefore in the August Democratic Primary, if he is a Democrat, without payment of any capitation taxes whatever.

In order to vote in the year 1939, however, he must have paid his 1938 taxes within the required time just as any other voter.

With best wishes, I am

Sincerely yours,

Abram P. Staples,
Attorney General.
ELECTIONS—Voters—Prepayment of Capitation Taxes Assessable But Never Assessed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 12, 1938.

HONORABLE G. CURTIS HAND,
Member of the House of Delegates,
Portsmouth, Virginia.

My Dear Mr. Hand:
I am in receipt of your letter of May 10, in which you state that there are a number of persons in Norfolk county who are otherwise qualified to vote and who also have paid their 1935, 1936 and 1937 capitation taxes to the Treasurer of Norfolk county. I presume, of course, that their names appear upon the treasurer's list of persons whose poll taxes have been paid within the required time. I further understand that it is contended that, on account of the fact that the Commissioner of the Revenue failed to assess these individuals with these capitation taxes, they are not qualified to vote in the general election.

In my opinion, the persons you describe, assuming that all of the other requirements of the statute are met, are unquestionably entitled to vote. Section 21 of the Constitution provides that, in order to vote a person must pay at least six months' prior to an election "all State poll taxes assessed or assessable against him * * * during the three years next preceding that in which he offers to vote." These taxes were unquestionably "assessable" against the individuals and, therefore, when they have been paid, as evidenced by their names being on the said treasurer's list, I am of opinion that this provision of the Constitution has been met and that the persons are eligible to vote.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 23, 1937.

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

Dear Mr. Whitehead:
This is in reply to your letter of October 15, requesting the opinion of this office on two questions, viz.: (1) where a person otherwise qualified to vote in Virginia is convicted of having and concealing untaxed liquor in violation of the United States revenue laws, and has served his sentence therefor, is he entitled to vote? (2) If such person is disqualified by virtue of such conviction, may his disqualification be removed by the Governor?

Under section 23 of the Constitution of Virginia and sections 82 and 93 of the Code, among the persons to be “excluded from registering and voting” are “persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony.”

Under USCA, Title 26, section 1287, the offense of possessing and concealing untaxable liquor is punishable by imprisonment for not less than three months, nor more than three years. USCA, Title 18, section 541, provides that “All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies.”
Thus it appears that the person to whom you refer is clearly disqualified to vote in Virginia, having been convicted of an offense which constitutes a felony according to the law of the jurisdiction in which he was convicted.

Your second question seems to be expressly answered by section 73 of the Constitution of Virginia, which provides that the Governor "shall have power ** to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution."

Very truly yours,

ABRAM P. STAPLES,
Attorney General

ELECTIONS—Voters—Residence—Students.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 22, 1939

MR. H. W. BROWNING, Chairman,
Washington County Electoral Board,
Meadowview, Virginia.

My Dear Mr. Browning:
I have your letter of April 22, in which you inquire as to the right to vote at Emory, Virginia, of a certain individual.

You will understand that this office cannot attempt to pass on the right of any particular individual to vote, because this right depends upon the facts in each particular case, and I am sure you will appreciate that this office cannot attempt to pass on the facts.

In the case you put, if the individual has actually moved her legal residence to Emory and was a legal resident there for the time required by statute, she unquestionably has a right to procure her transfer and vote at Emory. However, she may not vote at Emory simply as a matter of convenience and retain her original domicile or legal residence at Exeter. If she is retaining her legal residence at Exeter, she should vote there.

You will see, therefore, that the answer to your question depends entirely upon whether or not the individual has actually established her legal residence at Emory. If so, she may unquestionably vote there; if not, she may not vote there.

I presume that you may have in mind section 24 of the Constitution, which provides in part as follows:

"* * * nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution."

As applied to a student, this section means that the mere fact that a person may be a student at an institution does not of itself confer upon such a person the right to vote at the place where the institution is located. However, the section does not mean that a student at an institution, more than twenty-one years of age, may not of his or her own volition establish his or her legal residence at such place.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Voters—Residence.

MR. E. O. WILLIS, JR.,
Judge of Election,
Culpeper, Virginia.

DEAR MR. WILLIS:

Upon my return to the office my attention has been called to your letter of the 2nd instant, in which you ask my opinion as to whether persons who have paid their capitation taxes as provided by law and who are registered as voters in the Town of Culpeper are entitled to vote in the October 15 special election, who are not at that time actually eating, sleeping and residing in the Town of Culpeper. You then quote an ordinance of the Town of Culpeper providing punishment for persons who are not residents of the Town who vote in town elections.

Section 2997 of the Code of Virginia provides:

"The electors of a town shall be actual residents thereof and qualified to vote for members of the General Assembly."

This provision of law as to the qualification of voters of towns is contained in identically the same language in section 1024 of the Code of 1887, and on page 420 of the Acts of 1902-3-4.

It will thus be seen that the provision as to those qualified to vote in town elections has been upon the statute books of the State for at least the last fifty years. During all of this time the attorneys general of the State have uniformly held that persons otherwise qualified to vote in a town were not disqualified because of the fact that they were not actually eating and sleeping in a town upon the days of the elections. And it has likewise been uniformly held that the word resident is synonymous with the word domicile, and that a person domiciled in a town, although not actually present in the town at all times, was entitled to vote in that town, being otherwise qualified.

It is my opinion, therefore, that all qualified registered voters for the Town of Culpeper, who have not since they were so qualified removed from the Town of Culpeper with the intention of abandoning the Town as the place of their domicile, are entitled to vote in town elections.

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

EMBALMING—Laws Governing Practise of—Applicability to Officers, Students, Etc., of Medical School.

Dr. W. T. SANGER, President,
Medical College of Virginia,
Richmond, Virginia.

DEAR DR. SANGER:

This is in reply to your letter of November 12, in which you request the opinion of this office as to the right of officers or employees of the Medical College of Virginia to embalm bodies upon which an autopsy has been performed by the officers, students or employees of your college, where no charge is made for same.
It is my opinion that section 1720 of the Code, as amended by chapter 127 of the Acts of 1936, page 219, regarding persons practicing embalming, does not apply to the authorities, students and employees of your college who embalm, free of charge, bodies upon which autopsies have been performed in your institution, and by officers, students and employees thereof, it being my opinion that the section referred to applies to the commercial business of embalming.

It is also my opinion that, even if the provisions of section 1720 of the Code were not restricted to commercial embalming, it would not apply to the Medical College for the reason that section 1724 of the said chapter expressly excepts from the operation of section 1720 embalming by the authorities of institutions such as the Medical College of Virginia.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

EXECUTORS AND ADMINISTRATORS—Bond—Amount, Where Estate Encumbered.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 8, 1937.

HONORABLE CLARK M. SMITH,
Clerk of Corporation Court,
Winchester, Virginia.

MY DEAR MR. SMITH:
I am in receipt of your letter of December 2, in which you ask the following question:

"Please advise in taking of a bond by the Clerk of an Administrator or an Executor if this bond should be taken for the actual value of an estate or on actual value less incumbrances."

Section 5370 of the Code, dealing with the penalty of the bond of an executor or administrator, provides that "where there is a will which authorizes the executor or administrator to sell real estate * * * the bond shall be in a penalty equal at least to the full value both of the said personal estate and of such real estate * * *."

In most cases the personal representative has no jurisdiction with respect to real estate of which his decedent died seized. In such a case the value of the real estate should be disregarded. In cases where the decedent's will empowers his personal representative to sell and convey the real estate the situation is different. If the personal representative sells the real estate, the entire proceeds may come into his hands for distribution with the idea that he will discharge the encumbrances out of the proceeds of sale. It seems, therefore, in such a case that the amount of the bond should at least equal the value of the entire estate, both real and personal, without regard to encumbrances on either.

However, since the amount of the bond is in the discretion of the court, my suggestion is that you confer with Judge Williams and be guided by his ruling.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
EXECUTORS AND ADMINISTRATORS—Qualifying Without Security.
Id.—Probate Tax.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 23, 1938.

Honorable C. W. Eastman, Clerk,
Saluda, Virginia.

Dear Mr. Eastman:

I am in receipt of your letter of March 17, in which you ask this question:

"Mr. A. dies intestate, seized of $800.00 value of real estate and $80.00 personal property. His widow qualifies under said section. Should there be a qualification tax and clerk's fees charged on the qualification? Does said section, exempting personal representative from payment of qualification tax and fees, only apply to the personal property of the decedent or to his real and personal property both?"

Section 5371a of the Code provides that personal representatives may, in the discretion of the court or clerk, qualify by giving bond without surety "where the amount coming into the hands or possession of the personal representative or guardian does not exceed one hundred dollars."

In the case you put, the real estate does not come into the possession of the personal representative, and I am of the opinion, therefore, that under the aforesaid section the personal representative may qualify by giving bond without surety.

As to the probate tax imposed, it is plain from section 125 of the Tax Code that the probate tax is to be computed not only on the personal property, but on the real estate of the decedent. The estate of Mr. A. is $880.00, and I am of the opinion, therefore, that the probate tax must be paid upon this basis.

Yours very truly,

Abram P. Staples,
Attorney General.

FEES—Clerks—For Filing Criminal Warrants—Taxation by Trial Justice.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 2, 1938.

Hon. D. W. McNeil,
Trial Justice of Rockbridge County,
Lexington, Virginia.

My Dear Mr. McNeil,

I am in receipt of your letter of February 21, in which you ask me if there is any statute in Virginia "providing for the trial justice to tax a filing fee in favor of the clerk of the circuit court for the clerk's fee in the filing and indexing of criminal warrants." You state that you have been unable to find any authority for the taxing of this filing fee in the case of criminal warrants.

I must advise that I have made a rather careful examination of the pertinent statutes and, like you, have been unable to find any statute which authorizes the trial justice to tax a filing fee for the benefit of the clerk of the circuit court. Until I received your letter and made an examination of the Code, it had been my impression that such a filing fee could be taxed, but I am now unable to find the authority therefor.

Of course, you are familiar with the fees provided by sections 2552 and 2566 of the Code.

It may be that a statute relating to this filing fee exists, although I have been unable to find it. If it does exist, it is very probable that the clerk of your cir-
cuit court could point you to it, and I suggest that you confer with him about the matter. If he has in mind such a statute, I shall be glad if you will write me again.

With best wishes, I am

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES—Executing Search Warrants.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 18, 1938.

Mr. R. N. Clark, Constable,
Stuart, Virginia.

My Dear Mr. Clark:
I am in receipt of your letter of March 14, in which you ask the following question:

"A justice of the peace issues a search warrant for the premises of A. I as constable execute that warrant and I do not find the thing searched for and so make my return. Who pays me for executing the search warrant?"

Section 3508 of the Code provides that the fee for executing a search warrant shall be $1.00, and I am of opinion that where you have executed a warrant you are entitled to be paid your fee by the Commonwealth if a violation of a State criminal law was involved. Your fee may be certified to the State Comptroller as other fees in criminal cases are certified.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FEES AND COSTS—Arrest Fee, Where Arrest Made by Division of Motor Vehicles Officer—Taxation of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., September 30, 1937.

HONORABLE H. ELMER KISER,
Clerk,
Circuit Court of Tazewell County,
Tazewell, Virginia.

My Dear Mr. Kiser:
This is in reply to your letter of September 24.
You ask the following question:

"The Trial Justice and I have had some discussion in the matter of taxation of cost against the defendant in criminal cases where the arrest is made by an officer of the Motor Vehicle Division. Should the arrest fee be taxed against the defendant and remitted to the State when and if collected 'as costs previously paid by the State'?"

As you know, section 2154 (53) of the Code (Michie's, 1936) provides that no trial justice shall assess "as a part of the costs of such case any fee for arrests * * * for the benefit of any police officer of the division or divisions * * *." The idea back of the payment of costs by a defendant who has been convicted is that such defendant shall reimburse the State for costs which have been paid by the State in his prosecution.

In the case you put the State does not have to pay to the police officer any
fee for the arrest made by him. I am of opinion, therefore, that, in view of the statute and what I have written, where an arrest is made by an officer of the Motor Vehicle Division, the arrest fee shall not be taxed as a part of the costs.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

FINES AND COSTS—Trial Justices—Taxing Certain Items as Costs—Disposition of Certain Items Collected.

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

HONORABLE JOHN D. HOOKER,
Trial Justice of Patrick County,
Stuart, Virginia.

MY DEAR MR. HOOKER:
Honorable L. McCarthy Downs has referred to this office for reply your letter of November 8.

You ask, first, how the $5 fee taxed for the attorney for the Commonwealth in cases of appearance before the trial justice shall be distributed.

Section 4987m of the Code (Michie, 1936) provides that one-half of all fees collected as fees belonging to the attorney for the Commonwealth shall be turned into the treasury of the county in which the offense was committed, and the remaining half shall be promptly paid to the clerk of the circuit court, who shall pay the same into the treasury of the State.

You next ask whether in cases where fines are imposed for violation of county ordinances the fee of $1 for the clerk of the circuit court prescribed by section 2566 of the Code should be taxed as a part of the costs.

In my opinion, the statutes do not contemplate that the clerk of the circuit court shall report to the State Comptroller a list of fines imposed for violations of local ordinances and, inasmuch as the statutes do not contemplate this service, I am of opinion that this fee prescribed therefor, mentioned by you, should not be taxed.

I agree with you that fines collected by the trial justice for violations of county ordinances should be paid direct into the treasury of the county. Section 4987 of the Code, which I have mentioned above, seems to clearly contemplate this.

I am further of opinion that the allowance to the sheriff for the board of county prisoners should be paid direct to the sheriff and not to the clerk of the circuit court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FINES—Disposition of—Traffic Cases Where Arrest Made by State Officer.

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

HON. J. GORDON BENNETT,
Assistant Auditor of Public Accounts,
Richmond, Virginia.

MY DEAR MR. BENNETT:
This is to acknowledge receipt of your letter of the 22nd ultimo, requesting the opinion of this office as to whether people arrested by members of the State
Police force for violation of different traffic laws should be tried under the State law or under local ordinances paralleling the same, when the warrant does not designate whether the arrest was made by the officer under the State law or the local ordinance.

In the first place, it is to be observed that members of the State Police force are special officers and derive their powers solely from the statute, their power being confined to the enforcement of the criminal laws of this State and are without power to make arrests for the violation of local ordinances. In this connection, I wish to refer you to section 6 of the Motor Vehicle Code of Virginia (Michie's Code, 1936) 2154(53), which reads in part as follows:

"The director, his several assistants, and police officers appointed by him are hereby vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this State, and it shall be the duty of such director, his several assistants and police officers appointed by him to use their best efforts to enforce the same; * * *"

By reason of the law above quoted, I am further of the opinion that where an arrest is made by a State officer, and as recited in your letter, the warrant issued does not indicate whether the alleged offense was in violation of the State law or of some local ordinance, such warrant should be tried under the State law, and if there is any fine imposed and collected, the same should be paid into the State Treasury.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FISH AND FISHERIES—"Tidal Stream"—What Constitutes; Id.—Id.—Right of Public to Fish in—How Regulated.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 28, 1938.

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

DEAR MR. MAHON:

This will acknowledge your letter of March 22, in which you request my opinion on certain questions relating to fishing in Mill Creek.

You point out that the Commission of Game and Inland Fisheries has determined that its jurisdiction to regulate fishing in Caroline County includes Mill Creek to its mouth. You state that, for a distance of one mile above the mouth, the tide ebbs and flows in this creek. The opinion of this office is requested on the question whether the public has any right to fish in this portion of the creek, or whether the fishing rights are controlled by the abutting property owners.

In this connection, you add that certain parties interested in this question have made a point of the fact that the tidal force at this point, while sufficient to raise and lower the level of the water, is not sufficient to change the direction of the current—that is, that even on flood tide the general movement of the water is down stream.

I have been unable to discover any case or legal treatise dealing with the precise question of whether the tidal force in a given stream must be sufficient to reverse the direction of the current before such stream shall be considered tidal. The common definition of "tidal", as set forth in Webster's New International Dictionary (Second Edition, 1935), is as follows: "The alternate rising and falling of the surface of the ocean, and of gulfs, bays, rivers, etc., connected with the ocean." In the absence of any authority for an exception to this definition, it would seem that the matter of the direction of the current is not material, and
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it is the opinion of this office that the section of Mill Creek to which you refer must be classified as a tidal stream.

On the question whether the public has a common right to fish in tidal streams, it cannot be said that the law of this State is perfectly clear. However, from the opinion of the court in the case of *James River and Kanawha Power Company v. Old Dominion Corporation*, 138 Va. 461, at 470, it would seem that such a common right of fishery does exist, even though the abutting landowner might conceivably show, under the principles laid down in the later case of *Miller v. Commonwealth*, 159 Va. 924, that he owned the bed of the stream by virtue of some ancient grant specifically conveying the same. Therefore, conceding that the question is open to debate, it is the opinion of this office that the public has a common right of fishery in the tidal waters of the Commonwealth, including the section of Mill Creek to which you refer. This right, of course, extends only to ordinary low water mark. *Miller v. Commonwealth*, supra.

It should be observed that the location of the jurisdictional line established by the Commission of Game and Inland Fisheries does not affect the question of whether the public has a right to use the waters in question as a common for fishing, but only relates to the question whether the fishing within such waters shall be regulated by the Commission of Game and Inland Fisheries rather than by the Commission of Fisheries. It seems clear that all fishing, whether in public fisheries or in private waters, is subject to regulation, either by the Commission of Game and Inland Fisheries or by the Commission of Fisheries within the respective jurisdictions of these two agencies.

Trusting this opinion will serve your purpose, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

FOREST FIRES—Actions to Recover Expense of Fighting.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 21, 1937.

HONORABLE J. LIVINGSTONE DILLOW,
Commonwealth’s Attorney, Giles County,
Pearisburg, Virginia.

DEAR MR. DILLOW:

This is in reply to your letter of October 12, in which you request my opinion upon the question whether an action under section 542a of the Code, to recover expenses incurred by the Commonwealth and by a county for fighting or extinguishing forest fires negligently started by a person, should be instituted against such person by the State Forestry Department in the name of the Commonwealth, or by the Board of Supervisors on behalf of the county, or by both.

It seems to me that the answer to this question is dependent upon whether or not the expense of fighting the fire in question is incurred by the State or by the county or by both jointly. In the event that the expense was incurred only by the State, then, in my opinion, the action should be brought in the name of the Commonwealth. However, in the event that it was incurred only by the county, then, in my opinion, the action should be instituted by the Board of Supervisors. In the event that it was incurred jointly, I think the action should be brought jointly.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
GAMBLING—Slot Machines—Miscellaneous.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Honorable Bentley Hite,
Attorney for the Commonwealth,
Christiansburg, Virginia.

Dear Mr. Hite:

This is in reply to your letter of January 15, in which you request my opinion upon several questions therein set out which I will answer in the order of inquiry.

The first question is whether the operation of a pin table machine is rendered unlawful, under section 4694a of the Code, by the fact that persons playing the machine, but not in any way interested in operating it, bet on the scores among themselves.

It is my opinion that this betting between persons playing the machine does not make the operation of such machine in violation of this particular section of the Code. This answer has no application, however, to any other section, or to the question whether or not the persons making said bets violate other provisions of our statutes.

Your second question is whether a slot machine which is so operated as to pay off in cigarettes or chewing gum, if the player makes a lucky play, is in violation of said section of the Code.

Subsection 2(b) expressly provides that a machine operated in the manner stated is a slot machine within the prohibitions of said section.

With reference to your inquiry as to the legality of so-called bank nights operated in connection with motion picture shows, I am enclosing herewith a copy of an opinion which I recently gave upon this question.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

GAMBLING—“Tip Books”—Possession of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Hon. Luther E. Fuller,
Commonwealth’s Attorney,
Russell County,
Honaker, Virginia.

Dear Mr. Fuller:

In your letter of June 21 you ask if section 4682 of the Code makes it unlawful to manufacture “tip books.”

It is my opinion that section 4682 of the Code refers to the actual recording, registering or receiving bets or wagers and not the manufacturing of the equipment used in taking such bets or wagers. The statute, of course, makes it unlawful to occupy any place with apparatus or paraphernalia for the purpose of recording or registering bets or wagers. It would not be unlawful to have the possession of such equipment unless it was used for such purpose.

If I am correct in assuming that by “tip books” you mean merely books or pamphlets containing information about horses, their records, etc., then I do not believe that this section makes unlawful the mere preparation of such books or information. If I am under a misapprehension of the facts involved, I would appreciate a letter setting them out in greater detail.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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GAME, INLAND FISH—Bag Limits—Conflicting Special County Limits—Effect of in Certain Cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 26, 1937.

HONORABLE CARL H. NOLTING, Chairman,
Commission of Game and Inland Fisheries,
Richmond, Virginia.

MY DEAR MR. NOLTING:
This is in reply to your letter of October 23, in which you ask the following question:

“Our general regulation concerning the killing of deer has a bag limit of one deer a season. The counties of Amelia, Chesterfield, Dinwiddie, Greensville, Prince George, Southampton, Surry and Sussex have a limit of two deer a season. A resident of Nansemond County, where the bag limit is one deer per season, has killed his deer and he asks if he may be permitted to go into one of the counties of Amelia, Chesterfield, Dinwiddie, Greensville, Prince George, Southampton, Surry and Sussex, and kill an additional deer without violating your game regulations.”

It is my opinion that the regulations of the department concerning the number of deer which may be killed in the respective counties of the State are local in their application and are not affected by the residence of the person who kills the deer. For this reason, it is my opinion that the person to whom you refer above may go into one of the counties of Amelia, Chesterfield, Dinwiddie, Greensville, Prince George, Southampton, Surry and Sussex, and kill an additional deer without violating your game regulations.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH—Bag Limits—Conflicting Special County Limits—Effect of in Certain Cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 29, 1937.

HONORABLE M. D. HART, Executive Secretary,
Commission of Game and Inland Fisheries,
Richmond, Virginia.

DEAR MR. HART:
This is in reply to your request for an opinion from this office as to whether a person who has killed two grouse in a county in which the limit has been fixed at two per day may go into another county and kill two more on the same day.

You call our attention to subsection (c) of section 36 of the Game, Inland Fish and Dog Code, Virginia Code (Michie 1936) section 3305(36), which makes it unlawful “To hunt or attempt to kill or trap any species of game after having obtained the daily bag or season limit during such a day or season”.

It is my opinion that this section refers to the daily bag limit obtaining in the county where the allegedly unlawful hunting or killing is done; that hence a person who has killed his daily bag limit, in a county where the limit is especially restricted, could not be convicted for hunting or killing further game in another county unless he kills in this latter county more than the number allotted by the limit for such county, or unless he kills a total of more than the state-wide law permits to be killed anywhere in the State.

The general state-wide law as to the bag limit on grouse, as contained in subsection (f) of section 37 of the Game, etc., Code, Virginia Code (Michie 1936),
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section 3305(37), sets the daily limit at four per day. Under this provision, I am of opinion that a hunter may kill his fourth grouse in any one day in any county in the State wherein the daily limit has not been further restricted by the Commission, and, in case it has been so restricted, he may kill in such county any number of grouse up to the limit fixed for that particular county regardless of how many he may have killed in some other restricted county on the same day so long as he does not kill more than four grouse altogether.

I return herewith your correspondence with reference to this matter.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG LAWS—County Hunting Licenses—Enlisted Men Stationed in County.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 8, 1937.

HONORABLE V. C. RANDALL, Clerk,
Circuit Court of Norfolk County,
Portsmouth, Virginia.

MY DEAR MR. RANDALL:
I am in receipt of your letter of September 3, in which you state:

"We have had many applicants for county hunting licenses who are enlisted men and stationed at the Norfolk Navy Yard, many of whom have been stationed at that place for more than one year. There is some question as to whether or not a resident of the Norfolk Navy Yard, which is a United States Government Reservation, is entitled to a county hunting license, or whether or not, under Virginia law, it will be necessary for them to purchase a State hunting license."

Section 3305 (22) of the Code provides that certain persons are considered residents within the meaning of the Game and Inland Fish laws and entitled to county licenses to hunt, trap and fish in the county in which they are residents. One of the classes enumerated in the section is as follows:

"(d) Any person commissioned or enlisted in the United States Army, Navy, or Marines while stationed or located within the county wherein license is applied for."

I trust this will give you the information you desire.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Gigging in Certain Streams—Permit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 7, 1938.

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

MY DEAR MR. WILLIAMS:
I have before me your letter of January 6, in which you request my opinion as to the proper interpretation of the regulations of the Commission of Game and
Inland Fisheries relating to gigging in the Shenandoah River in Clarke County.

As you point out in your letter, on page 20 of the booklet issued by said Commission relating to the hunting, trapping and inland fish laws there appears a regulation prescribing what are the lawful methods of fishing, among which gigging is not included. This regulation, however, carries the qualification that it is effective "unless and until otherwise provided by a regulation of the commission".

On page 24 of said booklet there appears the following regulation:

"Exceptions to Fishing by Angling"

"It shall be lawful for persons who have license to fish by angling to take the species of fish hereinafter named in the manner or by the means described in the designated waters of the counties named during the season provided therefor, dates inclusive. Any person so taking fish shall carry license to fish by angling and exhibit the same promptly upon request of any game warden or other officer."

Then follows a compilation of certain counties in which is fixed open seasons for certain fishing in said counties. The provision with reference to Clarke county is as quoted in your letter:

"Clarke county.—Open season to gig carp only, in the Shenandoah river only, December 15-February 15. (Regulation effective November 13, 1931.)"

From the foregoing it appears clear to me that it is expressly provided in the regulations that it is lawful to gig carp in the Shenandoah River in Clarke county between December 15 and February 15, and, inasmuch as said regulation contains no requirement that the person fishing shall have a permit, I do not think a permit is necessary during the open season.

The provision contained on page 47 of said booklet, in which the chairman of the Commission is authorized, subject to such restrictions as he deems wise, to issue permits for gigging undesirable fish from inland waters for table use only, is in my opinion applicable only to closed seasons, during which it is unlawful to gig said fish without a permit.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
I also call your attention to subsection (d), which allows one commissioned or enlisted in the United States Army, Navy or Marines, while stationed or located in the county wherein license is applied for, to secure a resident hunting license. This provision differs from section 24 of the Constitution dealing with residence for the purpose of exercising the right to vote, which specifically provides that no member of the United States Army or Navy shall be deemed to have gained a residence by being stationed in any county, city or town. This difference between residence for the purpose of voting and that for the purpose of securing a resident hunting license indicates that it was the intention of the lawmakers that the statute prescribing who may secure a resident hunting license shall be liberally construed.

I am of opinion, therefore, that the person you describe, who has been actually residing in the county two years, may secure a resident hunting license.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG LAWS—Licenses—Prepayment of Poll Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 29, 1938.

HONORABLE CARL H. NOLTING,
Chairman,
Commission of Game and Inland Fisheries,
Richmond, Virginia.

DEAR MR. NOLTING:

This will acknowledge your letter of June 24, requesting an opinion from this office interpreting, in connection with the issuance of hunting and fishing licenses, the statutory requirement as to prepayment of capitation taxes.

Section 128 of the Tax Code provides that no officer authorized to issue any license, permit, etc., shall do so unless it be shown that the applicant has paid the State capitation tax assessable against him “for the tax year immediately preceding the last preceding tax year to the tax year to which the license, permit or authorization relates.”

You point out that hunting and fishing licenses, unlike licenses issued under the Tax Code itself, are not issued for any one calendar year but for the fiscal year, from July 1 of one year to June 30 of the following. You request my opinion as to the years for which capitation taxes must have been paid (if assessable) in order to make an applicant eligible for a 1938-1939 hunting or fishing license.

While the statute is not entirely clear, in view of its clear policy, it is my opinion that the applicant for a hunting or fishing license should be required to show that he has paid any capitation tax assessable against him for the tax year preceding the tax year preceding the calendar year in which the license is purchased. Thus, a person applying in 1938 for a current hunting license should be required to show (in the manner prescribed by the statute) that he has paid the poll tax assessable against him for the year 1936, and a person who makes application after January 1, 1939, should show prepayment of his capitation tax for the year 1937.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
GAME AND INLAND FISH—Sale of Pheasants—Permits—Interstate Commerce.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 18, 1937.

HONORABLE CARL H. NOLTING, CHAIRMAN,
COMMISSION OF GAME AND INLAND FISHERIES,
RICHMOND, VIRGINIA.

DEAR SIR:

I have your letter of November 16, with enclosures, in which you ask whether a North Carolina resident who raises pheasants for sale, under a North Carolina permit, can be required to pay the $5.00 fee for a permit to sell these pheasants to restaurant and hotel keepers in Virginia.

Your regulation as of December 5, 1936, amending the regulation governing permits for the sale of Mongolian and Ring-Necked pheasants (pamphlet of Virginia Hunting, Trapping and Inland Fish Laws, page 45), provided:

"* * * all persons desiring to sell Mongolian and ring-necked pheasants for food purposes shall first obtain a permit from the Chairman of the Commission of Game and Inland Fisheries authorizing such sale. Such permit shall require such person or persons offering said pheasants for sale for food to report monthly to the Chairman all sales made of such pheasants, stating from whom they were obtained.

"This shall also apply to the person or firm shipping Mongolian or ring-necked pheasants into Virginia for sale for food purposes."

Where the sale is made directly to the restaurant or hotel keepers from North Carolina in the course of interstate commerce, I am of the opinion that the North Carolina resident cannot be required to pay this license fee. While it is true that the Legislature may pass laws for the protection and conservation of game within the borders of the State and forbid their shipment to other States (Connecticut v. Geer, 61 Conn. 144, 22 Atl. 1012, and note, aff. 161 U. S. 519, 40 L. ed. 793), a State cannot enact a law affecting the right to import and deal in fish or game imported from other States or foreign countries. See People v. Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34. The basis for the latter holding is that such a law does not protect the game in the State where such is being imported, and constitutes an interference with, or regulation of, interstate commerce.

On the other hand, if the pheasants are brought into Virginia and are thereafter sold here, the person making such sale would be subject to the Virginia license fee. This license fee may also be required of the party making a resale in Virginia after the interstate sale has been consummated.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

GAMBLING—Games of Skill—Shooting Gallery Offering Prizes—Legality of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 12, 1938.

HONORABLE W. N. HANNAH,
ATTORNEY FOR THE COMMONWEALTH,
PALMYRA, VIRGINIA.

MY DEAR MR. HANNAH:

I am in receipt of your letter of May 9, asking if I know of any statute mak-
ing it a misdemeanor for a person to operate a shooting gallery offering and paying money prizes for high scores.

From the facts you present, I do not think that the operation of such an enterprise is prohibited by any of the gaming statutes. Certainly, theoretically at least, there is no element of chance present, the winning of the prize depending entirely upon the skill of the marksman.

Nor do I know of any statute requiring a State revenue license for operating a shooting gallery. I assume, of course, that no admission is charged for entering the gallery, the only charge being for the use of the rifle and ammunition.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH AND DOG CODE—Sunday-Hunting Without Firearms.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 13, 1938.

HONORABLE CARL H. NOLTING,
Chairman,
Commission of Game and Inland Fisheries,
Richmond, Virginia.

DEAR MR. NOLTING:

This is in response to your request for my opinion upon the question whether or not it constitutes a violation of the hunting laws of the State of Virginia for a person to go into the fields or woods on Sunday with dogs for the purpose of training said dogs, or locating or flushing birds or turkeys.

The only pertinent provision I can find in the statute is contained in section 35 of chapter 247 of the Acts of 1930, as amended by chapter 389 of the Acts of 1936, page 369. This provision makes it unlawful "(a) To hunt or kill any wild bird or wild animal, including any predatory or undesirable species, with a gun or other firearm on Sunday, which is hereby declared a rest day for all species of wild bird and wild animal life."

It will be noted that this section expressly requires the hunting to be done with a gun or other firearm in order that same shall be unlawful.

A regulation has also been adopted by the Commission of Game and Inland Fisheries, in which it is provided that it is unlawful to hunt, shoot, track, pursue or chase, or to attempt to hunt, shoot, track, pursue or chase any protected wild bird or wild animal, except as specifically permitted by law and then only by the manner or means and within the number stated.

It is my opinion that this regulation has no application whatever to the provisions contained in the statute above quoted and should be construed as meaning that the prohibition is directed against acts prohibited by law, since the law permits all hunting and fishing to be done unless same be prohibited by some provision of the statutes.

It is my opinion, therefore, that the acts you refer to are not in violation of either the statute or the regulation referred to.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
GAME, INLAND FISH AND DOG LAWS—Trespass While Hunting—Punishment.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 24, 1938.

HONORABLE JUNIUS W. PULLEY,
Commonwealth's Attorney,
Courtland, Virginia.

DEAR MR. PULLEY:

This will acknowledge your letter of January 20, in which you request the opinion of this office as to the punishment provided for violations of Virginia Code (Michie 1936) section 3305(50), which is section 49 of the Game, Inland Fish and Dog Code of Virginia, as amended by Acts 1936, page 476.

As you point out, the statute provides that, "on written request of the owner or agent, a game warden or other officer shall arrest and prosecute the offender" for the first offense defined in this section, but prescribes punishment only for the case of a trespasser who, after having been warned not to do so, again goes upon the property of another without the latter's consent.

Your attention is called to section 3305(48) of the Code, which provides that violations of the Game and Inland Fish laws, not otherwise provided for, shall be punished by a fine of not less than $5 nor more than $50, and/or by imprisonment in jail for not more than thirty days. This provision would seem to answer your question.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GENERAL ASSEMBLY—Compensation of Members—Absence Through Sick-ness.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 4, 1938.

HONORABLE O. V. HANGAR,
Clerk of the Senate,
Senate Chamber,
Richmond, Virginia.

MY DEAR MR. HANGER:

This is in reply to your request for my opinion upon the question whether or not Senators Vaughan and Lesner, who have been prevented by illness from attending the sessions of the General Assembly, are entitled to receive the salary provided by law for members of said body.

Section 3454 of the Code prescribing the salaries for the members of the General Assembly contains this provision:

"Any sick member, or one who shall have obtained leave of absence, shall receive such salary as is due him in the same manner as if he had been in his seat."

It is my opinion that under the terms of the foregoing provision the two senators who have been sick, and who have been granted leaves of absence in accordance with the copies of resolutions which you enclose with your letter, are entitled to receive the same salaries as other members of the General Assembly.

With reference to the mileage provided for by section 3455, inasmuch as there was no travel by the absent members to and from the place of meeting, I do not
think that such members are entitled to mileage. The purpose of mileage is to reimburse the members for expense of travel and, where this expense was not incurred, I do not think it would be permissible for the State to pay same.

With my best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Counties—Expenditures to Build Secondary Roads.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 5, 1938.

Honorable W. Earle Crank,
Attorney for the Commonwealth,
Louisa, Virginia.

Dear Mr. Crank:

I have before me your letter of January 5, in which you ask my opinion as to the authority of the board of supervisors to pay for rights of way for new roads proposed to be established as a part of the secondary system of State highways.

Section 8 of the so-called Byrd Road Law, Acts 1932, page 876, continues in the local road authorities the powers vested in them at the time of the passage of the act for the establishment of new roads in their respective counties to become parts of the secondary system of State highways within such counties, provided that the State highway commissioner shall be made a party to any proceeding before the local road authorities for the establishment of any such road; and provided further that no expenditures by the State shall be required upon any new road established by the local authorities except such as may be approved by the State highway commissioner.

In view of these provisions, it seems to me clear that, where a new road is established in the manner provided by law as a part of the secondary highway system, the board of supervisors have the authority to expend such monies in connection therewith as may be necessary to supplement the funds which may be allocated thereto by the State highway commission.

I am informed that the practice usually followed in cases of this kind is to obtain the approval of the State highway commissioner of the establishment of the new road before action is taken thereunder, although I do not find that this is required by law. It is necessary, however, that the State highway commissioner be made a party to any proceedings for the establishment of such a new road.

With my sincere good wishes, I am

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Funds—Erection of Signs and Landscaping Highways.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 4, 1938.

Hon. H. G. Shirley, Commissioner,
State Highway Commission,
Richmond, Virginia.

Dear Mr. Shirley:

This is in response to your request for my opinion upon the question whether or not the following language contained in Senate Joint Resolution No. 13 "be
used solely and exclusively for the construction, reconstruction, maintenance and 
repair of public highways and bridges within the State and for the necessary State 
policing thereof will include within its meaning and proper construction the in-
stallation and erection of signs along the highways for the guidance and safety of 
travelers, and landscaping along the highways and upon the rights of way owned 
by the State.

In my opinion such language does include the erection of such signs and such 
landscaping development.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 28, 1938.

HON. M. A. COGBILL,
Attorney for the Commonwealth,
Chesterfield C. H., Virginia.

MY DEAR MR. COGBILL:

I have your letter of March 24, in which you ask my opinion as to the law 
concerning public roads which were not incorporated in the secondary system by 
the Highway Commission.

Chapter 415 of the Acts of 1932, section 5, empowers the Highway Commiss-
ioner to make maps of the several counties of the State showing thereon the 
roads of the secondary system upon which funds will be expended thereunder. 
These maps were made in conjunction with the boards of supervisors of the va-
rious counties. Not all of the public roads in existence as of March 1, 1932, 
were placed on these maps, and the Department was obligated only to maintain 
the roads on the maps. Section 2 of that act sets forth the procedure to be fol-
lowed to have the said system enlarged. That procedure is briefly this: After 
consulting the local engineer of the Department, the board of supervisors makes a 
written recommendation to the Department of Highways as to the expenditure 
of funds on new roads. This recommendation is forwarded to the Department 
and considered by it. Each year the secondary system is increased to a very 
small extent in every county. It would be a financial impossibility for the De-
partment of Highways to improve and maintain all of the public roads in all of 
the counties. The Department takes the position that it is only obligated to main-
tain and improve those roads which are shown on the maps prepared and amended 
in accordance with the aforesaid statute.

From a strictly legal standpoint, all of the public roads not in the primary 
system are in the secondary system, but from an administrative standpoint just 
those roads shown on the maps aforesaid are the ones which the State is obli-
gated to maintain. I may state in passing that the situation in which your county 
finds itself is not at all unusual. The same condition exists in most of the larger 
counties and in the counties adjoining metropolitan areas. If the Highway De-
partment included all such public roads in the secondary system, the funds used 
for the development of new road projects in those counties would be greatly de-
pleted. In other words, the Highway Commission could allocate the funds for 
this purpose, but in so doing it would be necessary to withdraw the allocations 
from other projects developing the highway system either in that county or in 
that district where the allocations are made. Therefore, from a practical stand-
point, a county in such condition would not be benefited unless the Department 
had considerably more money than it has at present to develop the highway system.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.
MR. JAMES W. PHILLIPS,
Assistant Commissioner,
Department of Public Welfare,
Richmond, Virginia.

DEAR MR. PHILLIPS:

I am in receipt of your letter of April 20, in which you set out the history of Mrs. Tennant’s case. It seems that certainly prior to 1934 this woman was a resident of Virginia, but that upon the commitment of her husband to the Eastern State Hospital she went to Baltimore to live with her mother. You state that she and her husband have never been legally separated. It further appears that Mrs. Tennant herself in 1934 became “mentally disturbed” in Baltimore and, at the request of the Maryland authorities, was transferred to the Western State Hospital at Staunton. From time to time since her original commitment to Staunton she has been allowed to return to Baltimore on furlough, apparently at the request of her relatives there. Finally on November 24, 1937, Mrs. Tennant having again been sent back to the Western State Hospital, habeas corpus proceedings were instituted, apparently at the instance of Mrs. Tennant’s relatives, and the Corporation Court of Staunton directed that she be discharged from the custody of the Western State Hospital on the grounds that she was not a resident of Virginia, but of the State of Maryland. Since that time Mrs. Tennant again seems to have become in need of hospitalization in an institution, and the Maryland authorities are requesting that this hospitalization be afforded by Virginia.

You now ask:

“* * * Is this woman entitled to hospital care in the State of Virginia as contended by Maryland and as originally conceded by Richmond authorities; second—in view of the court’s decision, is it possible or proper for this woman to be accepted as a responsibility of the State of Virginia?”

I am of opinion that both of your questions must be answered in the negative, in view of the decision of the Corporation Court of Staunton in a proceeding instituted by Mrs. Tennant’s relatives. The question has become res adjudicata and it is, therefore, no longer a matter of policy, it having been decided by a court of competent jurisdiction in this State that Virginia has no legal right to detain Mrs. Tennant. The institutions maintained by Virginia for the care of the insane are for residents of Virginia, and the Corporation Court has decided that Mrs. Tennant is not a resident of Virginia.

You suggest in your letter that the Maryland authorities contend that, because Mr. Tennant was originally domiciled in Virginia, and he and Mrs. Tennant not being legally separated, Mrs. Tennant becomes the responsibility of Virginia. I presume this is on the theory that Mr. Tennant’s original domicile controls that of Mrs. Tennant and, he no longer being able to select his own domicile, his original Virginia domicile still remains with him. However, I call your attention to a case in the Supreme Court of Appeals of Virginia (Commonwealth v. Rutherford, 160 Va. 524) holding that the domicile of a husband does not necessarily control that of his wife if she elects to establish a separate domicile.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
INSANE, EPILEPTIC, ETC.—Lunacy Commissions—Officers’ Arrest and Summons Fees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 6, 1937.

Honorable Edward P. Simpkins, Jr.,
Commonwealth’s Attorney for Hanover County,
Mutual Building,
Richmond, Virginia.

My Dear Mr. Simpkins:
I am in receipt of your letter of December 2, in which you ask the amount of fee that officers should receive for making arrest and summoning the commission and witnesses in cases before a lunacy commission.

Section 1021 of the Code provides that “the officer making the arrest and summoning the commission and witnesses shall receive the same fees as are allowed for like services in a felony case.” Section 3508 of the Code provides that the officer shall receive “for an arrest in case of a felony, one dollar and fifty cents” and for “summoning a witness in a felony case, forty cents.” It seems to me that the above quotations from the sections of the Code mentioned in terms answer your question, and that the amount of the fees about which you inquire is controlled by section 3508 of the Code.

I note you refer to section 3487 of the Code, also dealing with fees of sheriffs, sergeants, constables and certain other officers. However, a consideration of this statute historically and in the light of the language of the statute itself plainly indicates that this section relates primarily to fees in civil cases, as distinguished from criminal cases. This office has frequently so ruled in the past.

Yours very truly,
Abram P. Staples,
Attorney General.

INSANE, EPILEPTIC, ETC.—Transportation to Hospital—Compensation of Officer.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., December 28, 1937.

Honorable J. E. Quillen,
Sheriff of Scott County,
Gate City, Virginia.

My Dear Mr. Quillen:
This is in reply to your letter of December 23, in which you request my opinion as to the fees which the law provides for the sheriff of a county for the transportation and return of patients who are committed to one of the State Institutions as insane persons or inebriates.

Section 1027 of the Code contains the provisions which are applicable to the transportation of such persons to the hospital or colony to which they are committed. The procedure prescribed is for the superintendent of the hospital to send an attendant to conduct such person to the hospital or colony, but in the event it is impracticable to send an attendant, then the superintendent may appoint some other suitable person, or may order the sheriff of the county or sergeant of the city in which such person is held to convey him. If such person is conveyed to the hospital by a sheriff or sergeant, then the clerk of the court is
required to furnish a certificate of transportation and prescribe the route to be
traveled. This section of the Code also contains the following provision:

"* * * An attendant, sheriff or sergeant, or other person appointed for
the purpose shall receive for conveying an insane, epileptic, feeble-minded
or inebriate person to the hospital or colony only his actual expenses.

"The cost of conveying persons committed to any hospital or colony,
except those committed to the department for the criminal insane, from the
railroad station or steamboat landing designated by the superintendent of
such hospital or colony shall be paid from the funds appropriated for the
support of said hospital or colony. Unless authorized to do so by the com-
missoner of State hospitals or superintendent of a hospital or colony, no
officer shall be allowed anything for carrying an insane, epileptic, feeble-
minded or inebriate person to or from any hospital or colony, either for him-
self or the insane, epileptic, feeble-minded or inebriate person."

I am advised by the Comptroller's Office that, in determining what are "ac-
tual expenses", it is usual to allow a mileage of five cents per mile where the
person to be reimbursed uses his own automobile; although the question of the
amount of the allowance is usually left to the discretion of the superintendent,
whose judgment would probably be final unless clearly unreasonable.

There are so many different situations which may arise with reference to
cases of this kind that it is impossible to lay down any specific rule which would
govern. The foregoing, however, would seem to apply to most of the cases of
transporting persons under disability to the State Institutions.

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

INSANE PERSONS—Expenses of Commitment—By Whom Paid.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 22, 1938.

HONORABLE BENTLEY HITE,
Commonwealth's Attorney,
Christiansburg, Virginia.

DEAR MR. HITE:

Please pardon my delay in replying to your letter of March 18, which was
received during my absence from the office on account of illness.

You state that your board of supervisors has received bills for the commit-
ment of several patients to the State Hospital at Marion; that these persons,
while formerly of Montgomery County, had moved away from the county before
the time of their commitment, and that none of them were committed from Mont-
gomery County. You request the opinion of this office as to whether Montgomery
County is liable for the expenses of committing these patients.

Section 1021 of the Virginia Code (Michie 1936) provides that the expenses
of committing any patient to one of the State Hospitals shall be borne by the
county of which he is a resident at the time of his commitment. Thus it appears
that the expenses of committing the persons to whom you refer should not be
paid by Montgomery County if, in fact, they had abandoned their Montgomery
County residences by actually acquiring new domiciles elsewhere.

On this question of fact, of course, this office expresses no opinion. I call
your attention to the fact that in a previous ruling I expressed the view that the
findings of a lunacy commission as to the residence of the patients is entitled to
great weight.

Very truly yours,
ABRAM P. STAPLES,
Attorney General.
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COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 1, 1937.

HONORABLE C. G. QUESENBERY,
Attorney at Law,
Waynesboro, Virginia.

DEAR MR. QUESENBERY:
I have your letter of June 17, enclosing copy of a certain "Warranty Certificate" issued in connection with the sale of automobile tires. You request my opinion as to whether the use of such a certificate by a company not authorized to engage in the insurance business involves a violation of Virginia Code (Michie 1936) section 4235a.

The certificate "warrants" each tire for a stated period against not only such casualties as might result from defects in material and workmanship, but also against such as result from cuts, bruises, faulty brakes, etc. Section 4235a of the Code prohibits the writing of insurance by or for any "insurance company or other insurer" not licensed to do an insurance business in the State. This section defines "insurance company or other insurer" so as to include any individual, company, etc., "conducting a business including any of the features or principles of insurance."

The problem, then, is to determine whether a business which includes the use of these "Warranty Certificates" is a business which includes "any of the features or principles of insurance" within the meaning of the Virginia statute.

From a careful examination of the authorities it appears that this question cannot be dogmatically answered, our Supreme Court of Appeals never having dealt with the subject and pertinent decisions in other States being in conflict. This being true, and since the question could be definitely settled only by a court decision, the most helpful answer that I can give you is a brief review of the authorities.

"Insurance" is commonly defined as follows:
"Insurance is a conditional contract, whereby one party undertakes to indemnify another against loss, damage, or liability arising from some specified but contingent event." (1 Vance, Insurance, section 1.)

Other widely accepted definitions are:
"* * * it is an agreement by which one person for a consideration promises to pay money or its equivalent, or to do some act of value to another, on the destruction or injury of something by specified perils. * * *" (14 R. C. L., page 839.)
"* * * The business of insurance consists in accepting a number of risks, some of which will involve losses, and of spreading such losses over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it. * * *" [Home Title Ins. Co. v. United States, 50 F. (2d) 107, 110 (C. C. A. 2nd).]

Simply applying these abstract definitions of "insurance", a business which includes the use of such "Warranty Certificates" as the one in question would certainly seem to be "a business including any of the features or principles of insurance."

The actual decisions most nearly in point, however, are in conflict. While I find no cases where the seller of goods thus "guarantees" them against casualties beyond his control, there are numerous cases in which persons undertaking to keep property in good condition or to "service" it, "guarantee" the property against such casualties.

In the case of Moresh v. O'Regan, 120 N. J. Eq. 534, 187 Atl. 619, the New
Jersey Court of Chancery squarely held that such agreements do not constitute contracts of insurance. In that case a company engaged in the business of inspecting and repairing fixtures used to support or retain plate glass windows made contracts whereby the company agreed, for certain periodic payments, to inspect and adjust the fixtures and to replace any panes which might be through any cause broken. This was held not to be a contract of insurance within the meaning of the New Jersey insurance laws, on the sole grounds that no contract is a contract of insurance unless it provides for the payment of a sum of money by the alleged insurer in the case of loss. See opinion of Egan, V. C., 187 Atl. at page 625. To the same effect, see Commonwealth v. Provident Bicycle Ass'n, 178 Pa. 636, 36 Atl. 197, 198.

On the other hand, an agreement identical to that involved in the Moresk case, supra, was held to constitute a contract of insurance for purposes of applying the New York insurance laws. People v. Standard Plate Glass etc. Co., 174 App. Div. 501, 156 N. Y. Supp. 1012.

As between the two views represented by these cases, the view taken by the New York court is distinctly more consistent with the weight of authority, especially in view of the grounds on which the New Jersey decision was placed.

Except for the New Jersey and Pennsylvania cases noted, I find no case holding that a contract is not a contract of insurance unless it obligates the insurer to pay money in case of loss. On the contrary, innumerable cases have held that contracts to perform certain services or confer other non-pecuniary benefits on named contingencies are contracts of insurance. See the extensive collection of cases in 63 A. L. R. 711 and 100 A. L. R. 1449.

In view of these decisions it seems that the "Warranty Certificate" to which you refer should, according to the weight of authority, be held to constitute a contract of insurance, and hence bring the seller's business within the provisions of Code section 4235a. However, I should not wish to mislead you by expressing a definite opinion as to the law in Virginia in the absence of some expression by our own Court of Appeals.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

INTERSTATE COMMERCE—Carriers—Drayman Delivering Coal from Depot.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 21, 1938.

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

My Dear Mr. Johnson:

I have your letter of June 20, in which you request my opinion upon whether or not a contract proposed to be entered into by the school board of Isle of Wight County for the transferring of coal from the cars of the railroad company to the school bins of the various school buildings is interstate commerce, so as to require the owner or operator of the trucks or motor vehicles transferring said coal to comply with the Federal statutes relating to motor carriers in interstate commerce. It appears from your letter that the coal is purchased in Kentucky, and is shipped over the Norfolk and Western Railroad to Windsor, Virginia.

You state that one of the officials of the Bureau of Motor Vehicles of the Interstate Commerce Commission has raised a question as to whether or not this carrier should comply with the Federal requirements, and obtain a license from the Interstate Commerce Commission.

It is my opinion that when this coal is delivered to the consignee, the school board of Isle of Wight County, at Windsor it has come to rest within the State. It is not again to be deemed in interstate transportation, nor is the original carrier's charge for transportation in any way connected with the contract of the transfer company or truck owner. This last transaction is, therefore, clearly an
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intrastate one and has no relation to interstate commerce. (See Schechter v. United States, 295 U. S. 542-544).

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

INTERSTATE COMMERCE—Peddler's License Law—Constitutionality.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 10, 1938.

Senator Robert C. Vaden,
Senate Chamber,
State Capitol,
Richmond, Virginia.

Dear Senator:

Referring to our conversation of yesterday afternoon as to whether or not a statute requiring a person soliciting orders for magazines or merchandise to be delivered in the future to give bond for the final delivery of the magazines or goods purchased would be in violation of the Interstate Commerce Clause of the Federal Constitution, I beg to advise that I have looked into this question as you requested.

I am of opinion that the statute would not be sustained in so far as it would apply to the sale of goods or subscriptions for magazines, where the goods or magazines are to be delivered from outside of the State. In the case of Real Silk Hosiery Mills v. Portland, 268 U. S. 325, the Supreme Court of the United States held invalid an ordinance of the city of Portland requiring a license, and also a bond similar to the one to which you refer. The syllabus of that case reads as follows:

"A state statute requiring persons going from place to place soliciting orders for goods for future delivery, and receiving payment or any deposit of money in advance, to secure a license and give bond conditioned for final delivery of goods ordered, violates the commerce clause of the Federal Constitution in so far as it is made to apply to agents soliciting orders in a state, to be forwarded to a manufacturer in another state, to be filled by C. O. D. shipments, and it is immaterial that the solicitors traveled at their own expense, and received their compensation through retention of advance partial payments on goods ordered.

"An expressed purpose to prevent possible frauds does not justify state legislation which really interferes with the free flow of interstate commerce."

With best wishes, I am
Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

INTOXICATION—In Public Place—What Constitutes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 20, 1937.

Honorable W. Clyde Dennis,
Trial Justice,
Grundy, Virginia.

Dear Judge Dennis:

This is in reply to your letter of December 18, requesting my opinion as to
the proper construction of section 4568 of the Code as applied to certain facts which you state to be as follows:

"At a private meeting of a group of citizens on property leased by them which property was in view of the public highway and passersby who could have seen the persons drunk although no disturbance was caused by said persons intoxicated to attract attention of said passersby."

The section of the Code to which you refer provides that if any person arrived at the age of discretion get or be drunk in public, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than ten dollars. Whether getting drunk or being drunk on the leased premises under the circumstances set forth in the above quotation from your letter is "in public" would seem to be the question upon which your decision in the case would be determined.

I do not feel that it would be possible for me to undertake to pass upon this question, inasmuch as the answer would depend upon whether the place of the occurrence is a public place within the general meaning of the statutes relating to this subject. There is a collection of cases contained in Volume 6 of Words and Phrases, under the heading Public Place, which may throw some light upon the question. The following Virginia cases also discuss the question of what constitutes a public place with reference to committing an offense:

- Farmer v. Commonwealth, 8 Leigh 741;
- Bishop v. Commonwealth, 13 Gratt. 787;
- Commonwealth v. VanDine, 6 Gratt. 690;
- Wortham v. Commonwealth, 5 Randolph 675;
- Neil v. Commonwealth, 22 Gratt. 918;
- Purcell v. Commonwealth, 14 Gratt. 680;
- Windsor v. Commonwealth, 4 Leigh 681;
- Commonwealth v. Feazle, 8 Gratt. 587.

It seems to me that your decision in this case would depend upon whether or not under all of the facts and circumstances as developed by the evidence, considering the number of people present, the proximity to the right of way, or any other relevant matters, the place where the alleged offense occurred can be said to be a public place under the principle laid down in the decisions referred to.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 9, 1938.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

MY DEAR MR. HODGES:

This is in reply to your letter of May 5, in which you request my opinion upon the question raised in a letter addressed to you by Mr. F. B. Barham as to the earliest day on which a judge of a circuit court can retire and be entitled to receive annual compensation based upon the increase in the salary of such judge provided for in chapter 210 of the Acts of 1938.

Chapter 222 of said Acts provides that after retirement in compliance with its provisions, a judge shall be entitled to receive annual compensation in an amount equal to three-fourths of the basic annual salary "being received by him as judge immediately prior to his retirement".

There might be some question as to the meaning of the word "immediately"
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and, in order that there be no doubt about the matter, I would suggest that July 5 be suggested as the earliest date for such retirement.

Sincerely yours,

ABRAM P. STAPLES, Attorney General.

JUDGMENTS—Liens—Effect of Verdict Pending Entry of Judgment and Issuance of Execution.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 16, 1938.

HONORABLE E. O. RUSSELL, Clerk,
Leesburg, Virginia.

DEAR Mr. Russell:

I am in receipt of your letter of May 11, in which you say:

"'A' was convicted of one felony on April 22nd and of another on May 3rd. Both trials were by jury. The verdicts carried with them sentences in the penitentiary in both cases, but no fines. In both cases counsel for the defendant moved the court to set aside the verdict and award a new trial. A hearing was set for May 11th, when the motions were overruled by the court. On May 4th and May 7th, 1938, trusts were recorded covering all the personal property of "A.'"

After making the above statement, you ask two questions:

"1st. Are the judgments of the jury, although they were not final as they could have been set aside by the court, liens as of April 22nd and May 3rd against his real estate for the costs expended by the Commonwealth in the trials?"

"2nd. Are the judgments (no executions having been issued and placed in the hands of the sheriff before the recording of the chattel mortgages) prior liens on the tangible personal property of 'A', under the ruling of Commonwealth of Virginia v. McCue, 109 Va. 302, or do the liens of judgments for costs attach as do other judgments only after an execution is issued and placed in the hands of the sheriff as noted on the fieri facias?"

Judgments as such are never liens on personal property. Executions issued on judgments are liens on all personal property, both tangible and intangible. Provided judgments are entered for costs on verdicts of juries, clerks can, and should, issue executions on such judgments in favor of the Commonwealth just as they would issue executions in other cases.

Clerks may also proceed under the provisions of section 4964 of the Code, by which section it is provided that upon the conviction of an accused the clerk
shall, as soon as may be, make up a statement of all the expenses incident to the prosecution and issue execution therefor. If no judgment for costs was entered by the court, section 4964 provides that chapter 102 shall apply thereto in like manner as if, on the day of completing said statement, there was a judgment in favor of the Commonwealth against the accused for the amount of the fine.

I do not think that, upon the statements contained in your letter, the Commonwealth is entitled to priority over the trusts of May 4 and May 7 on account of the verdicts of April 22 and May 3, provided, of course, the trusts were bona fide and were not made with the object of defrauding the Commonwealth in preventing the recovery of its costs.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Life of—Trial Justices.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 20, 1938.

HON. W. HOWARD McCINTIC, Trial Justice,
Juvenile and Domestic Relations Court,
Warm Springs, Virginia.

DEAR Mr. McCINTIC:

In your letter of April 19 you inquire about the life of a judgment rendered in a trial justice court.

Such a judgment which is not appealed is good as long as any other judgment. Its life depends upon whether or not an execution has been issued. If no execution has been issued, it is good for one year. However, it may be revived by writ of scire facias at any time within ten years from the date of the judgment. If an execution has been issued on which there is no return, the judgment remains alive for ten years from the return day of such execution. If there is a return on such execution, the judgment remains alive for twenty years from the return day. The judgment may be kept alive indefinitely by the issuance of repeated executions within the above mentioned periods of time. See Code sections 6470 and 6477.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Compensation—Fee for Issuing Warrant Against Two Defendants.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 14, 1937.

MR. T. M. TISDALE,
Justice of the Peace,
Clarksville, Virginia.

DEAR Mr. TISDALE:

I am in receipt of your letter of December 8, in which you inquire as to the amount of your fee for issuing a warrant in a civil case where there are two defendants.

Section 3481 of the Code dealing with fees of the justice of the peace provides that for issuing any warrant in which the Commonwealth is not plaintiff, except in certain cities, the fee shall be fifty cents. There seems to be no provision for any additional fee where there is more than one defendant. It is true that sec-
tion 4987-m of the Code provides that the fee of a trial justice for issuing a warrant in a civil case shall be fifty cents for the first defendant and twenty-five cents for each additional defendant. However, this section is limited to trial justices and does not include justices of the peace.

In view of the statutes which I have mentioned, I must advise that under existing law your fee in the case you mention amounts, in my opinion, to fifty cents.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Fees—Issuing Criminal Warrants.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 14, 1938.

MR. M. F. PERRY,
Luray, Virginia.

My Dear Mr. Perry:
I am in receipt of your letter of May 10, in which you state the following:

"As a Justice of the Peace for the County of Orange, my bill for warrants issued was presented to the Clerk of the Circuit Court of Orange, who turned same over to the Trial Justice for certification against his records and same was certified as properly charged against the Commonwealth with the exception of twelve warrants which had not been returned to his office. Inquiry was made to the local officers and I was informed that after these warrants were issued it was found that the parties could not be found or were turned over to authorities elsewhere on other charges and the charge was not pressed."

You then ask if your fees, which the Trial Justice refused to certify in cases where no returns were made on the warrant, are properly chargeable to the Commonwealth.

The first paragraph of section 3504 prescribes what fees of certain officers, including a justice of the peace, may be paid out of the State treasury in criminal cases. After carefully reading this paragraph, I am of opinion that your fees for issuing the warrants mentioned are not included within the scope of this section to be paid out of the State treasury. As you know, no fee can be paid out of the State treasury in criminal cases without specific statutory authority, and the statute does not seem to provide for the fees about which you write.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Jurisdiction—Issuance of Summonses in Garnishment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 4, 1938.

MR. J. R. HAWTHORNE,
Justice of the Peace,
Victoria, Virginia.

My Dear Mr. Hawthorne:
I am in receipt of your letter of March 24, in which you ask if a justice of the peace may issue a summons in garnishment.

It is the practice, for obvious reasons, for a summons in garnishment to issue from the court in which the judgment was obtained. See section 6509 of the Code.
Section 4897f (7) of the State-wide Trial Justice Act provides that justices of the peace within their respective counties "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 * * *." I think it doubtful whether a summons in garnishment is included in the language "attachments, warrants and subpoenas"; and, in view of this doubt and of the practice to which I have referred, I am of opinion that a justice of the peace may not issue a summons in garnishment.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Warrants—Authority to Dismiss on Proof of Settlement.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 12, 1938.

HON. W. R. MARSHALL,
Justice of the Peace,
Saltville, Virginia.

MY DEAR MR. MARSHALL:

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

"In a misdemeanor warrant sworn out by some individual against another, returnable of course to the trial justice, suppose that they wish to compromise and settle out of court by paying the accrued costs, have I, as a justice, the legal right to do this, or must it be done before the trial justice with a court cost."

"I know that all warrants are made returnable to the trial justice for action, but what I want to know is, is it necessary that they must reach his office for settlement, or can the charges and warrant be withdrawn before it reaches the court."

As you state, the Trial Justice Act provides that warrants issued by a justice of the peace "shall be returnable before the trial justice for action thereon." Section 4987-f of the Code of Virginia (Michie, 1936). In view of this provision, I am of the opinion that, when a justice of the peace issues a warrant, he has no further jurisdiction in the matter, and that the warrant may only be dismissed by the trial justice.

I am not sure that I understand just what information you desire when you state:

"Has an officer the right, legally to accept a cash bond, without a certificate of acknowledgment?"

The statute relating to cash deposits in lieu of recognizances with surety may be found in Acts of 1924, page 637, and it also appears in section 4973-a in Michie's Code of 1936. This section prescribes in detail how cash deposits may be taken, and I refer you to it.

However, if this is not the information you desire, I will be glad if you will write me again.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

LABOR—Hours of for Women—"Any One Week". Id.—Id.—Rest Days—Sunday Laws. Id.—Id.—Certain Exemptions in Statute.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 25, 1938.

HONORABLE THOMAS B. MORTON,
Commissioner of Labor,
RICHMOND, VIRGINIA.

DEAR MR. MORTON:

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

"The law limits the hours to not more than forty-eight hours in any one week. Does the phrase 'in any one week' mean a calendar week or any seven-day period, and in the case of restaurants and other concerns which do not come within the Sunday law, would these be allowed to work women employees continuously without any days off as long as they limit the hours of their women employees to not more than forty-eight in any one week or seven-day period?

"Relative to the exemptions in the latter part of paragraph one of section 1808, do these mean that bookkeepers, stenographers, cashiers, and other types of work as listed under (a) are entirely exempt from the law, so far as it applies to hours of workers, or are they exempt only if so employed in the types of work enumerated in (b) and (c), and then for a period not exceeding ninety days in any one year?"

You then request a construction of three provisions included in chapter 409 of the Acts of Assembly of 1938, page 770, commonly called the Hours Law for Women. These questions I am answering seriatim.

1. In my opinion, the phrase "in any one week" means a period of seven days, whether beginning on Sunday or any other day of the week. If beginning on Sunday, a week includes the period of time from 12:00 o'clock Saturday night to 12:00 o'clock the following Saturday night, and, if beginning on Wednesday, then from 12:00 o'clock Tuesday night to 12:00 o'clock the following Tuesday night. This construction is to the effect that "one week" is not confined to a calendar week beginning on Sunday, but includes a seven-day period beginning on any other day.

2. The Sunday law prohibits a person, male or female, from working on Sunday at his or her trade or calling, and also prohibits employers from working such persons on Sunday unless the work performed is one of necessity or charity. Whether a person working on Sunday is engaged in a work of necessity or charity depends upon the facts in each case. I do not think that any exact rule can be established. There is no provision in this Act or the Sunday law requiring days of rest for persons working, or worked, on Sundays.

3. You ask, in reference to the exemptions in the first paragraph of section 1808, covering bookkeepers, stenographers, cashiers, office assistants, buyers, managers or assistant managers and office executives, whether these persons who are exempt under subsection (a) are exempt without reference to the character of work provided in subsections (b) and (c).

In my opinion, the persons exempt under subsection (a) are unconditionally exempt if they work full time in any of the capacities mentioned in that subsection, and that exemptions under subsections (b), (c) and (d) have no connection with the exemptions mentioned in subsection (a).

Unless this construction as to the exemption of females employed at full time under subsection (a) is correct, the exemption of bookkeepers, stenographers, cashiers, office assistants, buyers, managers or assistant managers and office executives would be meaningless, and they would enjoy no exemption as such as they would come within the same category of exemptions as all other females under the provisions or subsections (b), (c) and (d).
Apparently, it was the purpose of the Legislature to exempt women employed in clerical or responsible administrative positions and to include, in the operation of the hours provision, laborers and those performing less responsible duties.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

MARRIAGES—Incest—Conflict of Laws.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 7, 1937.

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

My Dear Governor Peery:

You have referred to me a letter of November 29 addressed to you by Honorable Cordell Hull, Secretary of State, in which you asked, in the case of a marriage incestuous under section 5084 of the Code of Virginia, in which one person residing in Virginia goes to another State or to a foreign country for the purpose of marrying a resident thereof, and then returns to Virginia, if such a person would be subject to prosecution under section 4540 of the Code of Virginia.

Of course, I cannot say how the court before whom the prosecution is instituted would rule, nor would any opinion of this office be binding on the court. My view, however, is that there is a strong probability that in the case put by the Secretary of State the individual involved would be found guilty. I say this despite the fact that the section provides that "they shall be as guilty" as if the marriage were performed in this State.

The Secretary of State next says:

"The Department would like to be informed also whether an uncle and niece who had been lawfully married in a foreign country may live together as husband and wife in the State of Virginia, whether or not they are subject to prosecution under section 4540 of the Virginia Code."

This raises a question about which there is considerable division of authority. Virginia recognizes that the rule that a marriage valid where celebrated is valid everywhere else is not always applicable to a marriage entered into in a foreign country in contravention of the public policy and statutes of Virginia. Greenhow v. James, 80 Va. 636. The precise case of a marriage between uncle and niece, valid in the foreign country in which the marriage took place, has never been before our Virginia court. I am somewhat troubled by the fact that incestuous marriages under our statute are not declared to be void without any decree of divorce or other legal process, as are marriages between a white person and a colored person or polygamous marriages. See sections 5087 and 5088 of the Code. However, there is language in opinions in certain Virginia cases which leads me to believe that our court is inclined to go rather far in recognizing the exceptions to the rule that a marriage valid where performed is valid everywhere else. See Greenhow v. James, supra; Kinney v. Commonwealth, 30 Gratt. 858; Jones v. Commonwealth, 80 Va. 538; Heflinger v. Heflinger, 136 Va. 289.

The rule as to incestuous marriages is thus stated in 5 R. C. L., page 997:

"* * * The conclusion with reference to incestuous marriages seems to be that the marriage is, in the first instance, to be tested by the lex loci; if it meets that test, it may still be held invalid because incestuous by the common consent of Christendom, as previously explained; and if valid by the lex loci, and not incestuous according to the general consent of Christendom, it may still be held invalid because contrary to the distinctive national policy of the forum."
There are interesting notes on the question in 60 A. S. R. 942 and 57 L. R. A. 161. The American Law Institute in its Restatement of Conflict of Laws, pp. 197, 201, supports the rule announced in Ruling Case Law.

On the other hand, the Maryland Court of Appeals, in a comparatively recent case, _Fensterwald v. Burke_, 129 Md. 131, flatly holds that Maryland will not refuse to recognize a marriage between uncle and niece, valid where contracted, although its statutes prohibit such marriage, relying, among other authority, on Mr. Bishop's Work on Marriage and Divorce. There is other authority supporting the view of the Maryland court, which it is not necessary to detail here.

On the whole, I am again inclined to believe that an uncle and niece who have been lawfully married in a foreign country would not be permitted to live together as husband and wife in this State, although, as I have indicated above, this would be a matter that would have to be determined by the court in which the prosecution was instituted, which court would not in any way be bound by the opinion of this office. I do not think that in such a case a prosecution could be had under section 4540 of the Code, where neither of the parties was a resident of Virginia at the time of the marriage, having gone out of the State for the purpose of having the ceremony performed. The only prosecution that could be instituted would be for some such offense as illicit cohabitation.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE—License—Where Obtained.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 11, 1937.

Hon. C. C. Brannon, Clerk,
Circuit Court of Frederick County,
Winchester, Virginia.

My Dear Mr. Brannon:

I am in receipt of your letter of August 9, in which you state:

"The clerk's office of the Circuit Court of Frederick County, Virginia, is situated within the corporate limits of the City of Winchester.

"Please advise me if it is legal for a non-resident to obtain a marriage license from this office and be married in the City of Winchester."

Section 5072 of the Code provides, in a case in which the female to be married is not a resident of this State, the license shall be issued by the clerk of the circuit court of the county or the corporation court of the city in which the marriage is to be solemnized. I do not think the fact that the clerk's office of the county may be located in a city in the county can be said to alter the provision that the license shall be issued by the clerk of the court of the county or city in which the marriage is to be performed.

In the case you put I am of opinion that the license should be issued by the clerk of the Corporation Court of the City of Winchester.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
MAYORS—Fees for Trying Ordinance Cases.

HON. FERDINAND F. CHANDLER,
Attorney for the Commonwealth,
Montross, Virginia.

My Dear Mr. Chandler:
I am in receipt of your letter of May 16, in which you ask the following question relating to the Mayor of Colonial Beach:

"Is it legal for the Council of the Town of Colonial Beach to grant me as compensation as mayor the fees in cases tried before me in the Mayor's court of the Town, provided the said fees do not come out of the town treasury, such compensation being in addition to a salary of $50 per month previously provided for by the Council?"

I call your attention to subsection 12 of section 4987f of the Code (Michie's, 1936), which is the section continuing in mayors, under certain circumstances, the jurisdiction to try cases involving violations of city and town ordinances. This section reads in part as follows:

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

As you will see, the general law on this subject is quite plain. It may be, however, that there is some provision of the charter of the town of Colonial Beach, or of an ordinance enacted pursuant thereto, which would alter the situation. It is my suggestion, therefore, that the charter and ordinances be examined.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

MEDICAL EXAMINERS—State Board of—Summons to Testify Before— Form, and Costs of Service.

Dr. J. W. Preston, Secretary-Treasurer,
State Board of Medical Examiners,
Roanoke, Virginia.

My Dear Doctor Preston:
Replying to your letter of October 29, I beg to advise that I will be very glad to have some representative from this office present at the trial which has been set for Wednesday, December 8, at 8 o'clock p. m. at the John Marshall Hotel in the city of Richmond, upon charges brought by H. U. Stephenson, member of the Board of Medical Examiners of the Third District against Dr. Robert Clay Hogue.

In your letter you also request my opinion upon the two following questions:

The first question is whether or not the Board of Medical Examiners should issue the summonses for witnesses which may be requested by the defendant in the trial.
It is my opinion that the Board should issue these summonses and same should be signed by the Secretary of the Board.

Your second question is as to who should pay the costs of executing or serving these summonses upon the witnesses, and the attendance fees of the witnesses.

It is my opinion that, under the provisions of section 1614a, subsection g, paragraph 4, of the Code of Virginia, these costs should be paid by the defendant.

As requested, I am enclosing herewith a suggested form to be used by the Board for summoning these witnesses. I call your attention to the fact that the officer has to have an extra copy of the summons in order to make his return thereon, showing that same has been served upon the witness. He is supposed to serve the summons after receiving the fee prescribed therefor by the statute, which, as above indicated, is to be paid by the defendant if the summons is requested by him.

When the summons is requested by the member making the charges, the form above suggested should be changed so that it would read as follows: “to testify and the truth declare on behalf of the Commonwealth of Virginia in a certain matter,” and so forth.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLES—Certain Violations of Act—Punishment for.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 23, 1938.

HONORABLE C. E. REAMS, JR.,
Trial Justice Culpeper County,
Culpeper, Va.

My Dear Sir:

Your letter of June 11th requesting my opinion relative to the status of a violator of section 113 of chapter 342 of the Acts of the General Assembly of Virginia of 1932, known and designated as the Motor Vehicle Code of Virginia, has been received.

As pointed out in your letter a violation of the provisions contained in section 113 is expressly made a misdemeanor by the same section, and the further provision therein contained that such violation shall be punishable as provided for in section 119 of the Act which deals exclusively with felonies presents the situation where no specific punishment is provided for by the section defining the violation. Therefore it seems that no punishment is set up in sections 113 or 119 for a violation of section 113. It is my opinion that under the wording contained in section 118 a violation of the first section would be punishable thereunder. Section 118 (second paragraph thereof) reads as follows:

“Every person convicted of a misdemeanor for a violation of any of the provisions of this act for which no other penalty is provided shall for a first conviction thereof be punished, etc. * * *”

Therefore, since no penalty is otherwise provided in the act for a violation of section 113 the above wording from 118 would undoubtedly bring the violation under this section for punishment.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLE LAW—Chauffeur’s License—Of Whom Required.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 5, 1937.

HON. J. G. JEFFERSON, JR., Trial Justice,
Amelia and Powhatan Counties,
Amelia, Virginia.

My Dear Sir:

I have your letter of July 30 in which you request my opinion in regard to chauffeurs’ license being required for men employed to work on farms and who are from time to time required in the course of their employment to operate a truck.

It is my opinion that such people so employed would not in contemplation of the statute be deemed to be employed for the principal purpose of operating a motor vehicle, the principal purpose of their employment being to perform the general farm work, and the operation of a truck from time to time being only incidental thereto.

I am of the opinion, however, that when a farm owner hires his truck to the State and one of his regular employees is detailed to operate this truck, the principal purpose of his employment then would be to operate a motor vehicle, and it would become necessary that he procure chauffeur’s license.

The law governing these matters is contained in the definition of “chauffeur”, which is subsection (a) of section 1 of the Virginia Operator’s and Chauffeurs’ License Act (Michie’s Code, 1936), 2154 (170), which reads as follows:

“Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property.”

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MUSEUM OF FINE ARTS—Executive Committee of Powers—Issuing Revenue Bonds.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
RICHMOND, VA., June 10, 1938.

HONORABLE J. H. BRADFORD, Director,
Division of the Budget,
Richmond, Virginia.

Dear Mr. Bradford:

I am in receipt of your letter of May 27, in which you state that the Virginia Museum of Fine Arts has submitted to the Governor for his consideration a proposed application to the Public Works Administration for a grant of $112,500 for payment in part of the cost of an addition to the Museum. You further state that the Executive Committee of the Museum is planning to obtain a loan and issue its revenue bonds in the amount of $100,000 for the purpose of raising additional funds to be used in the construction of the addition. You then state that the Governor has asked you to obtain the opinion of this office “as to whether, or under what conditions, if any, the Board of Directors of this institution can issue bonds to incur indebtedness of $100,000 for the purpose of building an addition to the Museum, under the plan indicated in the attached letter from the President of the Board.”

The plan indicated is to issue revenue bonds bearing interest at the rate of 3½%, payable semi-annually, maturing in denominations of $1,000 serially over
REPORT OF THE ATTORNEY GENERAL

a period of thirty years, commencing in 1940. These bonds will be payable from, and secured solely by, the income from the Museum other than State appropriations for maintenance.

The Virginia Museum of Fine Arts was created by an Act of the General Assembly, approved March 27, 1934 (Acts 1934, page 270). This Act provides for a Board of Directors, and sets forth the powers and duties of such Board. The Act was amended in 1936 (Acts 1936, page 336). I have carefully read each of these Acts and find in neither of them any authority given to the Board to borrow money and issue bonds as is now proposed. You are, of course, familiar with the Act of 1933 (Acts 1933, page 83), authorizing certain educational institutions of the State to borrow money for the purpose of erecting buildings and to issue revenue bonds therefor, but the Virginia Museum of Fine Arts is not included within the scope of this Act.

My conclusion is that, under existing law, there is no authority in the Board of the Virginia Museum of Fine Arts to borrow money and issue bonds under the proposed plan.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

NIRA—Loans Under—Time Limit for.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 20, 1938.

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

MY DEAR MR. BRADFORD:

I am in receipt of your letter of June 16, from which I quote as follows:

"Under an act of the General Assembly approved September 12, 1933, (extra session of 1933, page 83), as amended by an act approved March 6, 1936, (page 212, Acts of Assembly 1936), State institutions of higher learning are authorized to borrow or accept money under the Act of Congress known as the National Industrial Recovery Act.

'Section 19 of the amendatory act of 1936 reads as follows:

"'Except as may be required in any contract or agreement of the institutions theretofore entered into by it with any Federal agency, no institution shall borrow any money or enter into any lease pursuant to the provisions of this act on and after July first, nineteen hundred and thirty-eight.'"

"Will you please give me your opinion as to whether an institution comes within the time limit prescribed in section 19 of the amendatory act of 1936, if the application for such loan is filed on or before July 1, 1938, but the agreement or contract with the Federal Government is not signed until after July first and bonds are not issued until after July first?"

It seems to me reasonably plain from section 19 of the amendatory act of 1936, as quoted by you, that the contract with the Federal agency must be entered into prior to July 1, 1938. I am of opinion that the language admits of no other construction and that, therefore, no contracts under which bonds are to be issued may be entered into on and after this date.

I am further of the opinion that under the language of this section, if the
contract is entered into before July 1, 1938, then the bonds provided for in such contract may be issued in accordance with the terms thereof, even though they are not actually issued until after July 1, 1938.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

NATIONAL INDUSTRIAL RECOVERY ACT—Continuing Authority of State Institutions to Accept Benefits of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 26, 1938.

DR. W. T. SANGER, President,
Medical College of Virginia,
Richmond, Virginia.

DEAR MR. SANGER:
This is in reply to your letter of May 26, which is as follows:


"In your opinion does the amendment to this act (Acts, 1936, chapter 123, page 212) limit the authority of our institution to receive grants from the Public Works Administration, these grants to be outright gifts and not to be repaid by the recipient?"

The Act of 1933 to which you refer expressly authorizes the institutions therein named, among which is the Medical College of Virginia at Richmond, to "do and perform all such acts and things as may be necessary, proper or advisable for the purpose of obtaining and/or securing grants, loans and/or financial assistance of any kind or sort in connection therewith under the National Industrial Recovery Act."

The "National Industrial Recovery Act", as defined by section 2(g), has not only embraced the original Act passed by Congress under that title, but also "any acts amendatory thereof and any acts supplemental thereto and revision thereof, and any further act of the Congress of the United States of America to encourage public works, to reduce unemployment and thereby to assist in the national recovery and promote public welfare."

By the terms of section 19 of said Act of 1933, it is provided that no institution shall borrow any money pursuant to the provisions of said Act on and after two years and six months from the day on which the Act should go into effect.

By an Act contained in the Acts of the General Assembly of Virginia for the year 1936, page 212, section 19 of said 1933 Act was amended so as to extend the time until July 1, 1938, within which the institutions named in said Act might borrow money pursuant to its provisions. This last mentioned Act was not an additional restriction upon the power of the institutions, but was an extension of the time within which such institutions might secure such loans.

I find nowhere in the original Act, nor in the amendment of 1936, any provision limiting the time within which the institutions named in said Act may secure grants from the United States under an Act similar to the original Act of Congress known as the National Industrial Recovery Act. The Act now pending in Congress, providing for appropriations to be used for similar purposes, is, in my opinion, embraced within the provisions of the said 1933 Act of the General Assembly of Virginia.

It follows that I am of opinion that the Medical College of Virginia has ample authority to secure and accept grants from the United States of America,
which may be authorized by Act of Congress similar to said National Industrial
Recovery Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES—Fees—Deed Acknowledged by Several Persons.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 30, 1937.

Mr. Henry Ratliff,
Notary Public.
Grundy, Virginia.

My Dear Mr. Ratliff:
I am in receipt of your letter of August 26, in which you ask:

"Should there be more than one person signing and acknowledging the
deed, would the notary be allowed to charge a fee for each person acknowledging
the deed? Or does this mean the same fee regardless of how many acknowledge same?"

Section 3480 of the Code, paragraph 3, in reference to the fees of notaries,
provides:

"For taking and certifying the acknowledgment of any deed or other
writing $0.50."

I realize that the practice as to the charging of fees by notaries in such cases
varies throughout the State, some notaries taking the position, especially where
all the signers acknowledge the deed at one time, that they will only charge one
fee. However, it may be that a number of persons sign a deed and acknowledge
it at different times, so that it is necessary for the notary to make a number of
certificates. I am sure that in such cases the quoted section of the statute does
not intend that the notary is to receive only one fee for the series of acknowledg-
ments and certificates. However, I do not see that the statute makes any distinc-
tion between acknowledgments taken at separate times and those taken at the same
time, and I am, therefore, of the opinion that under the wording of the statute a
notary has authority to charge a fee for taking and certifying each acknowledgment
by each person.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

NOTARIES—Necessity for Indicating Expiration of Commission; Id.—Affiant
Not Appearing Before Notary.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 22, 1938.

The Honorable
The Surgeon General,
United States Public Health Service,
Washington, D. C.

Sir:Attention: Mr. R. L. Harlow,
Chief, Accounts Section.

This will acknowledge receipt of your letter of April 19, in which you ask
the following questions:

"1. Is it necessary that a Notary Public state the date his commission
expires on a jurat when said jurat is being executed to a travel expense
voucher, which voucher will be audited and paid by a Department of the Federal Government?

"2. What laws govern where a paper is notarized and the person signing does not appear before the Notary Public?"

1. In reply to your first question, our statutes do not provide any particular form for notarization except with reference to certain specific documents, not including, of course, vouchers of the type to which you refer. This being the case, it would seem that the sufficiency of any given form would depend upon a construction of the statute requiring the particular instrument to be notarized. Thus the answer to your question would seem to depend upon a construction of the Federal Act requiring such voucher to be notarized.

2. As to your second question, it again appears that our statutes make no provision covering such acts of notaries generally, and again the legal effect of such a notarization would depend upon a construction of the Federal Act involved and not upon any Virginia statute.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Bonds—Commissioner of Labor.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 16, 1938.

COLONEL LEROY HODGES,
State Comptroller,
Richmond, Virginia.

DEAR COLONEL HODGES:

This is in reply to your letter of April 12, in which you request my opinion upon the question whether or not Thomas B. Morton, the new Commissioner of Labor, should furnish a bond with surety, conditioned upon the faithful performance of the duties of his office.

I went over and had a talk with Mr. Morton, and find that, except for a petty cash amount usually not running over $20 or $25 which is used for the payment of incidental expenses and obtained on vouchers drawn by his office upon the Comptroller, no funds are handled by his office. Under these circumstances, it is my opinion that it is not necessary for Mr. Morton to enter into a bond with surety, as the cost of same would probably exceed the amount of any loss the State could possibly sustain by reason of any improper use of said petty cash amounts.

With reference to vouchers drawn upon the Comptroller's office, the propriety of these vouchers is passed upon by the Comptroller prior to issuance of a warrant for same, and I do not think it is necessary that a bond should be issued covering the performance of this function.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
OFFICERS—Clerks, Sheriffs and Sergeants—Right to Practice Law.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 30, 1937.

HONORABLE J. E. THOMA,
Clerk of the Circuit Court,
Berryville, Virginia.

My Dear Mr. Thoma:

This is in reply to your letter of December 29, in which you request my opinion upon the question whether or not the provisions of section 3426 should be construed as a prohibition against a clerk, sheriff, or a sergeant, who is an attorney at law, practicing his profession as such attorney in litigation in any other court than that in which such attorney is clerk, sheriff or sergeant.

It is my opinion that the prohibition is directed solely to such practice in the court in which the said attorney is an officer, and does not extend to any other court.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—County—Use of Check Signing Machine.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1937.

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

Dear Mr. Lacy:

I have your letter of October 19, explaining further the operation of the Todd Check Signer about which you wrote me some days ago.

There is no statute in Virginia relating to the use of signing machines by any officer other than the State Treasurer. The use of such a machine by this officer is covered under the provisions of section 2181 of the Code. He is authorized to allow its use by his deputies, but is required to carefully safeguard the machine against use by others.

With reference to the use of a similar machine by the clerk, treasurer, and chairman of the board of supervisors of your county, I note that you have provided for separate plates, each containing the name of one of these officers.

I am unable to find any court decisions bearing upon this question, but it is my opinion that the use of this machine is proper and lawful provided each officer retains the custody of his own plate and does not allow its use by anyone other than himself or in his personal presence. In other words, I am of opinion that none of these officers has the authority to delegate to another the right to sign his name on a signing machine.

Used in the manner above stated, it is my opinion that this machine is lawful for the purpose of signing county warrants as indicated in your letter.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
OFFICERS—Interest in Public Contracts—City Treasurer Receiving Commission on Official Bonds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., OCTOBER 19, 1937.

HONORABLE E. S. ASHBY,
City Treasurer,
Harrisonburg, Virginia.

Dear Mr. Ashby:

I have your letter of October 12, inquiring as to whether or not, in my opinion, it is permissible for you as city treasurer to receive a commission on the official bond of yourself as city treasurer, and also of your assistants.

I am enclosing herewith a copy of a letter which I wrote to Honorable L. McCarthy Downs, Auditor of Public Accounts, with reference to the same question in relation to a county treasurer, which I think is equally applicable to a city treasurer. This may be found in the Report of the Attorney General for the year 1935-1936 at page 164.

In addition thereto, I note your reference to section 2708 of the Code, as amended by chapter 232, page 383, of the Acts of 1936, which contains the following provision:

"* * * No officer of a city or town, who alone or with others is charged with the duty of auditing, settling or providing, by levy or otherwise, for the payment of claims against such city or town, shall, by contract, directly or indirectly, become the owner of or interested in any claim against such city or town. Every such contract or sub-contract shall be void, and if any such claim be paid, the amount paid, with interest, may be recovered back by the city or town, within two years after payment, by action or motion in the circuit or corporation court having jurisdiction over said city or town."

While it is not free from doubt whether the above language would apply to a contract of the nature you refer to, I am rather inclined to the opinion that, inasmuch as the ultimate burden for paying for the premium on these bonds is placed upon the city and State, and inasmuch as the duties of the office relate to the settling of claims against the city, a claim for the premium on the bond would come within the general purposes of the statute.

The amount of the commission on the premiums on these bonds is not large and, in my opinion, it would be wise to refrain from having a personal interest therein.

With my best wishes, I am,

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Clerk as Delinquent Tax Collector.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 20, 1938.

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

My Dear Mr. Lacy:

In accordance with your request, Honorable C. H. Morrissett, State Tax Commissioner, has referred to this office your letter to him of April 15.

It seems that you desire an opinion as to whether you, as clerk of the cir-
cuit court of New Kent county, may also hold, under appointment by the board of supervisors, the office of delinquent personal property tax collector in New Kent county.

Section 2702 of the Code provides that "No person holding the office of ** county clerk ** shall hold any other office, elective or appointive, at the same time **." The section then goes on to provide for certain exceptions, but none of them includes the office of delinquent tax collector.

I presume that your appointment as delinquent tax collector was made by the board of supervisors under the authority of section 394 of the Tax Code of Virginia.

In view of the plain provisions of the statute from which I have quoted, I am of the opinion that the clerk of the circuit court of a county may not hold the office of delinquent tax collector. I am sure you will agree with me that the Legislature has spoken on the question, and that the statute will not permit of any other construction.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Deputy Sheriff as Town Marshal.

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

MR. J. E. QUILLIN, SHERIFF,
GATE CITY, VIRGINIA.

DEAR MR. QUILLIN:

This will acknowledge your letter of October 22, in which you state that one of your deputies has been elected town marshal for the town of Dungannon, and request the opinion of this office as to his right to hold the offices of deputy sheriff and town marshal at the same time.

Your question seems to be controlled by Virginia Code (Michie 1936) section 2702, which provides that "No person holding the office of county treasurer, sheriff", etc., "shall hold any other office, elective or appointive, at the same time, except" (the statute enumerates certain exceptions not germane here).

In view of the fact that, under Code section 2701, a deputy sheriff may exercise all the powers of his principal, it might be contended that the prohibition against holding another office as quoted above is applicable to deputies as well as to the sheriff himself. The statute quoted, however, does not expressly mention deputies, and, in my opinion, ought not to be extended in its operation beyond the plain requirements of its language. Furthermore, if the Legislature had intended this prohibition to extend to deputies as well as to the principal officers named, it seems that the statute would have followed the language used in section 31 of the Virginia Constitution, which provides that "No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, ** shall be appointed a member of the electoral board", etc.

It is the opinion of this office, therefore, that the offices of deputy sheriff and town marshal are not incompatible and may be held by the same person at one time.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
OFFICES—Compatibility—Member of General Assembly as Member of County School Board.

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

MR. E. JORDAN TAYLOR, Chairman,
The Democratic Executive Committee,
Driver, Virginia.

My Dear Mr. Taylor:
I have your letter of August 31, in which you advise me that at the recent primary you were nominated as a candidate of the Democratic party for the General Assembly. You further state that you have been on your County School Board for a number of years and that your people wish you to continue if possible. You desire my opinion as to whether you may be a member of the General Assembly and at the same time continue to be a member of the County School Board.

While, as you will see from the enclosed card, I have no authority to give you an official opinion, I may say that this office has heretofore ruled that a member of the General Assembly may not serve as a member of a County School Board. Section 644 (1) of the Code (Michie’s 1936) provides:

“No Federal, State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as a member of a County School Board * * *.”

There are certain exceptions in the statute, but a member of the House of Delegates is not included therein. You can see, therefore, that the situation you present is covered in terms by the statute.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Member of General Assembly as Commissioner in Chancery.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 11, 1938.

HON. VIVIAN L. PAGE,
Norfolk, Virginia.

My Dear Senator Page:
In your letter of June 9, you desire to know “whether or not there is any statutory or constitutional provision which in any way would prohibit a member of the General Assembly from being a Commissioner in Chancery.”

I know of no such provision. In my opinion, a member of the General Assembly may also be a Commissioner in Chancery. I call your attention to section 44 of the Constitution, which provides in part:

“But no person holding a salaried office under the State Government * * * shall be a member of either house of the General Assembly during his continuance in office * * *.”

Even if a Commissioner in Chancery be treated as an officer, he is certainly not a “salaried” officer.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
OFFICES—Compatibility—Registrar as Game Warden.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 8, 1938.

HONORABLE E. T. HUMPHRIES,
Fentress, Virginia.

MY DEAR MR. HUMPHRIES:

I am in receipt of your letter of April 6, in which you ask if a State game warden may serve as precinct registrar.

Section 86 of the Code provides, referring to registrars, as follows:

"* * * The acceptance of any other office, either elective or appointive, by such registrar except that of precinct judge of election during his term of office shall, ipso facto, vacate the office of registrar."

Under this provision, I am of opinion that a registrar may not at the same time be a State game warden.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Registrar as (1) Member of National Guard (2) Commissioned Officer in Army or Navy (3) Fire Chief (4) Special County Police.

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

HONORABLE C. J. ASHWORTH,
Member of the House of Delegates,
R. F. D. No. 1,
Danville, Virginia.

DEAR MR. ASHWORTH:

This is in response to yours of December 4, in which you request my opinion upon the eligibility of a person holding the positions hereinafter set forth to also hold the position of registrar of election. The positions referred to will be treated separately and are as follows:

1. Where such person holds a position as a member of the Virginia National Guard.

Section 31 of the Constitution of Virginia provides that no person holding any office or post of profit or emolument under the United States government shall be appointed a registrar or judge of election.

In my opinion a member of the National Guard does not come within the above provision of the Constitution. The National Guard is provided for by chapter 106, sections 2673(1) to 2673(123) of the Code of Virginia (Michie 1936). Under the provisions of this statute, the National Guard consists of those who are members of the militia of the State of Virginia, and others who in subsequent enlistments are not more than sixty-four years of age. The Governor is commander-in-chief of the militia and appoints and commissions all officers of the National Guard.

While it is true that the United States pays a certain per diem to members of the Virginia National Guard while they are in training camp, it is my opinion that this is to be considered as a contribution toward the training of the National Guard which in time of war or emergency is subject to call in the militia service of the United States. Primarily, however, the organization is the State militia
and is created by statute, and the members of the guard, in my opinion, do not hold a position of profit or emolument under the United States government within the meaning of section 31 of the Constitution hereinabove referred to.

2. Where such person holds a commission in the United States Army or Navy for which he receives no compensation.

Since no compensation is received, a member of the United States Army or Naval reserve does not come within the prohibition of section 31 of the Constitution hereinabove referred to.

Section 290 of the Code provides that no person shall be allowed to hold any office of honor, profit, or trust, under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, civil or military, under the government of the United States, or who receives from it in any way any emolument whatever. The provisions in section 290, however, are qualified by the provisions in sections 291, 291a and 291b of the Code.

Section 291 exempts from the operation of section 290 “soldiers on account of the recompense they may receive from the United States when called out in actual duty.” This will apply to a reserve officer only when he is actually called out, if compensation is then received. In so far as the money paid to a member of the National Guard while in training camp may be effected by this provision, I am of opinion that such compensation within the meaning of this section of the Code would be deemed to be paid for service in actual duty in training camp.

Section 291a provides that no person, by reason of being a member of the United States military or naval reserve force and receiving pay therefor, shall be disqualified from holding any office under the government of the Commonwealth, or under any county, city, town, magisterial district or school district thereof.

Section 291b provides that no State, county or municipal officer shall forfeit his title to office by reason of engaging in the war service of the United States.

It is my opinion, therefore, that a person holding the position above referred to is not thereby rendered ineligible to be appointed to the position of registrar of election.

3. Where such person holds a position as chief of a local fire department, and a special county police officer.

There is no Constitutional or statutory provision which would render such a person ineligible to be appointed a registrar of election by reason of holding either or both of these two positions.

In view of the foregoing, it follows that it is my opinion that a person holding any one or all of the positions hereinabove referred to is not thereby rendered ineligible to be appointed a registrar of election.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Registrar as Notary for Purpose of Absent Voters' Law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 17, 1938.

HON. A. S. BRIDGFORTH,
Treasurer of Lunenburg County,
Victoria, Virginia.

My Dear Mr. Bridgforth:

I have your letter of May 16, in which you ask the following question:

“Can a registrar who is a notary public witness signatures on absentee ballots? This information is asked for the benefit of the registrars of this county.”

The registrar has more duties in connection with voting by mail than any other election officer. The application for the ballot is made to the registrar, the ballot
and the other papers in connection therewith are forwarded by him, and the ballot after it has been voted by the elector is returned to the registrar together with the voucher. See sections 203, 205 and 208 of the Code. It is quite true that the statutes involved do not prohibit the registrar, who is also a notary public, from witnessing the signing of the voucher by the elector. However, in my opinion, upon a consideration of all the statutes, it would be inconsistent for the registrar to act both as such and as a notary public in connection with voting by mail. It is a general principle of law that a person cannot act in incompatible offices, and I am of opinion that the better view is that the offices of notary public and registrar in connection with the statutes dealing with absent voters are incompatible.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility—Supervisor as Registrar of Births and Deaths.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 4, 1937.

HON. M. R. STALLARD, Chairman,
Board of Supervisors, Scott County,
Dungannon, Virginia.

Dear Mr. Stallard:

I have your letter of October 2, requesting the opinion of this office as to whether you may properly accept an appointment as local registrar under the Bureau of Vital Statistics while holding your office as a supervisor.

The statute to which you refer, Code section 290, in my opinion, is clearly inapplicable, as it seems to deal exclusively with the incompatibility of state and federal offices.

The only other pertinent statute seems to be section 2702 of the Code, which provides that no person holding the office of county treasurer, sheriff, supervisor, etc., shall hold any other office at the same time. This section, however, expressly authorizes any of the enumerated county officers, including supervisors, to hold the position of local registrar of deaths and births.

It seems clear therefore that you may properly accept this appointment while serving on the board of supervisors.

With kindest personal regards, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Interest in Public Contracts—Member of School Board Agent for School Equipment Distributor.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 27, 1937.

DR. SIDNEY B. HALL,
Superintendent Public Instruction,
Richmond, Virginia.

Dear Doctor Hall:

This is in reply to your letter of October 26, in which you request my opinion upon the following question submitted to you by Mr. Hugh V. White, Superintendent of the Nansemond County Schools:

"Can an individual, who is a bona fide agent of a regularly constituted and organized school equipment company, be a member of any school board and still be considered eligible to sell this equipment to the same board for school purposes?"
The answer to this question is found in section 708 of the Code of Virginia, which makes it unlawful for any member of a school board to have any pecuniary interest, directly or indirectly, in any contract, or in supplying books, maps, school furniture or apparatus for the public schools, "except by permission of the State Board of Education evidenced by resolution spread on the minutes of said board."

I am of opinion, therefore, that, unless there is a resolution passed by the State Board of Education giving the required permission for transactions of the nature referred to in the inquiry submitted, it is unlawful for a member of the school board to have any interest in contracts of the type referred to.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Trial Justice as U. S. Commissioner.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 20, 1938.

Mr. A. E. Cooley,
Trial Justice,
Hillsville, Virginia.

My Dear Mr. Cooley:

I am in receipt of your letter of June 16, in which you ask the following question:

"I have been recently appointed as Trial Justice for Carroll County for the term beginning July 1, 1938. At the present time I am holding the office of U. S. Commissioner and it seems I cannot determine definitely whether it will be necessary to resign as U. S. Commissioner in order to legally serve as Trial Justice. I would be glad to have your opinion in the matter."

Section 290 of the Code of Virginia provides in part as follows:

"No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; ***

The office of Trial Justice is included as one of the offices mentioned in the "preceding section".

Unquestionably the office of U. S. Commissioner is a "post of profit, trust, or emolument ** under the government of the United States.

I am, therefore, of opinion that a person may not be a Trial Justice and also a U. S. Commissioner, in view of the provisions of the statutes to which I have referred you.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OSTEOPATHS AND CHIROPRACTORS—Use of Term "Doctor."

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 9, 1938.

Honorable Dave Satterfield,
House of Representatives United States,
Washington, D. C.

Dear Dave:

In your letter of April 7, you ask if osteopaths and chiropractors are permitted to use the appellation of "Doctor."
Under the Virginia law, both are entitled to use this appellation. However, an osteopath or a chiropractor must not profess to treat human ailments under a system or school of treatment or practice other than that for which he or she holds a certificate. It is customary for them in their advertisements to designate themselves as osteopathic physicians or chiropractic physicians, but it is perfectly proper for them to place the title "Doctor" before their names.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OSTEOPATHS—Status of, in General.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 31, 1938.

HON. DAVE E. SATTERFIELD, JR.,
Member House of Representatives,
Washington, D. C.

Dear Dave:

In your letter of March 30 you ask what the Virginia law is with respect to Osteopathic physicians, and whether they have the same status as medical doctors in the practice of medicine.

Osteopathic physicians do not have the same status as ordinary physicians. The certificate granted to them entitling them to practice is a certificate to practice osteopathy and not a certificate to practice medicine. Their practice must be limited to the field of osteopathy.

However, Osteopathic physicians, as ordinary physicians, are under the control and supervision of the Board of Medical Examiners and must, with certain exceptions, submit to an examination by this Board before receiving a certificate. The examination given them is slightly different from that given ordinary physicians. Practically the same qualifications are required, however. The Board of Medical Examiners has the same powers over them with respect to granting, revoking, or suspending the certificate as it does over ordinary physicians. Osteopaths are subject to the same requirements as to registration of their certificates. Sections 1608-1639 of the Code of Virginia are the statutory provisions dealing with this question.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OYSTER AND SHELLFISH LAWS—Boat Licenses—“Buy Boat” Owned by Crab Picking Plant.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 9, 1937.

HONORABLE RICHARD ARMSTRONG,
Commissioner of Fisheries,
Newport News, Virginia.

My dear Mr. Armstrong:

I am in receipt of your letter of November 30, which reads as follows:

“Please read subsection 7, of section 3265, and advise if a crab picking house sends a buy boat belonging to the house to buy crabs to bring to his own house for picking has to procure a license for the boat in addition to his license for picking.”
I can find nothing in subsection 7 of section 3265 of the Code which exempts a licensed crab picking house from securing a license for each boat belonging to such house used for the purpose of buying crabs. Subsection 7 does provide that:

"* * * Any person who has procured a license for a boat under subsection five hereof shall have the privilege of using said license for the purpose of taking hard crabs with patent trot lines or with any other device allowed to be used under this section for the remainder of the season in which the license was issued during the season not prohibited by law."

This language is confusing, for I do not find that subsection five imposes a license on any boat, but, in any event, this exception does not cover a boat used in buying crabs.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—State Colony—Whom Admitted—Resident Aliens.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 9, 1937.

Dr. G. B. Arnold, Superintendent,
State Colony for Epileptics and Feeble-minded,
Colony, Virginia.

My dear Dr. Arnold:
I am in receipt of your letter of December 7, which I quote as follows:

"This morning I received a letter from a charitable organization in Roanoke asking that I admit into the Colony a 16-year-old, deteriorated epileptic girl. The girl was born in Roanoke; has always lived in Virginia. "However, (and this is the catch), her parents are Syrians, and though they have been living in Roanoke since 1908, they have never been naturalized. "Please let me know whether or not, in your opinion, this girl is eligible for institutionalization in the Colony."

Section 1077 of the Code deals with who may be admitted to the State Colony for Epileptics and Feeble-minded and provides, among other things, that they shall be "legal residents of Virginia." I am of opinion that the words "legal residents" are not used in the same sense as are similar words in the election laws. In my opinion, a girl who was born in Roanoke of parents who have lived there since 1908 is unquestionably a legal resident within the meaning of that term as used in section 1077. I do not think the fact that the parents have not been naturalized alters the situation.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PENSIONS—Veteran in Soldiers’ Home of Another State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 26, 1937.

Honorable E. R. Combs,
State Comptroller,
State Library Building,
Richmond, Virginia.

Dear Mr. Combs:
I am in receipt of your letter of August 21, in which you state:

“We have a pensioner on our roll, a Confederate soldier, who since he was enrolled as a resident Confederate veteran of this State, has taken up
residence in Higginsville, Missouri. We have been paying his pension monthly up to July 1st, but find in his annual certificate, which should have come in before July, and not received here until August 21st, that he is in the Confederate Soldier’s Home in Missouri.

“We are referring the case to you to determine whether or not he is entitled to continuance of pension from this state under a clause in section 5 of the Confederate pension law, please see marked copy herewith, page 8. This is an old recommendation of the pension law, and I believe it applies to the Soldier’s Home in this state, to prevent any case being a double charge on the state, that is maintenance at the home and pensioned also by this state.”

Obviously, the intent of the acts granting pensions to Confederate soldiers was to provide, as far as the State could afford so to do, support for those veterans who were unable to take care of themselves. Section 2647 of the Code, specifying to whom the pension act shall apply, excepts from the provisions of the act one “who is an inmate of a soldier’s home.”

I assume that the soldier about whom you write is being provided for in the Soldier’s Home of Missouri. In view of the provision which I have quoted, I am of opinion that the act does not apply to him, and that therefore he is no longer entitled to the pension. If the act should be construed to except only those who are inmates of a soldier’s home in this State, then the intention would be imputed to the legislature to treat those who are inmates of soldier’s homes in other states better than those who are inmates of a soldier’s home in our own State. I feel sure that you will agree with me that this could not have been the intention of the legislature.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PHYSICIANS—Use of Terms “Dr.,” “M. D.,” Etc.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 10, 1938.

Dr. J. W. Preston, Secretary,
State Board of Medical Examiners,
Roanoke, Virginia.

My Dear Dr. Preston:

I am in receipt of your letter of June 9, enclosing a communication from Dr. H. U. Stephenson, of your Board. The second paragraph of Dr. Stephenson’s letter reads as follows:

“After considerable discussion and examining the Medical Practice Act Law, Judge Haddon suggested that I ask the Attorney General to give an official opinion in the matter of persons to practice medicine or any of its branches having a legal right to use the word ‘Doctor’, ‘Dr.’, ‘Professor’, ‘M. D.’, or ‘Healer’, especially those holding a certificate from the Board as Homeopaths, Osteopaths, Chiropractors, or Chiropodists. He stated that such an opinion from the Attorney General would be of immense value to the courts and Commonwealth’s Attorneys through the State and would, of course, be uniform.”

I assume that the opinion of this office is desired on whether or not persons holding a certificate from the State Board of Medical Examiners as Homeopaths, Osteopaths, Chiropractors, or Chiropodists may use the word “Doctor”, “Dr.”, “Professor”, “M. D.”, or “Healer” in connection with their names.
The practice of medicine is defined by section 1622 of the Code in these words:

"Any person shall be regarded as practicing medicine within the meaning of this chapter (1) who opens an office for such purpose, or announces to the public in any way a readiness to practice medicine in any county or city of the State, or prescribe for, or give surgical assistance, diagnoses or treats, heals, cures, or relieves those suffering from injury or deformity or disease of mind or body, or advertises, or announces to the public in any manner a readiness or ability to heal, cure or relieve those who may be suffering from injury or deformity, or disease of mind or body for a compensation; (2) or who shall use in connection with his name the words or letters 'Dr., 'Doctor,' 'Professor,' 'Md. D.,' or 'Healer,' or any other title, word, letter or designation intending to imply or designate him as a practitioner of medicine in any of its branches, or of being able to heal, cure, or relieve those who may be suffering from injury or deformity or disease of mind or body. This section shall also apply to corporations."

From this definition and from other provisions of the sections of the Code dealing with the practice of medicine, it is plain that the practice of either Homeopathy, Osteopathy, Chiropractic or Chiropody is treated as a branch of the practice of medicine. The sections of the Code in question nowhere prohibit the use by those practicing these professions of the words you mention, except the use of "M. D.", for, as I understand it, these letters indicate the degree of Doctor of Medicine. My opinion, therefore, is that such persons as you describe are not prohibited from using the words you mention in connection with their names, with the exception, as above stated, of "M. D."

Dr. Stephenson also desires to know "if those holding certificates from the State Board of Medical Examiners to practice the different branches of medicine enumerated above can legally use the word 'Doctor', etc., and whether they should carry in their office sign and advertising sign the specific branch of medicine they are licensed to practice."

The statutes do not appear to contain any such requirement. Subsection (e) of section 1614a of the Code provides that the Board may revoke the certificate of one of its certificate holders who is guilty of the "advertising of medical business in which grossly improbable or extravagant statements are made, or which have a tendency to deceive or defraud the public, or impose upon credulous or ignorant persons. * * *

"Under this provision I think it is unquestionably true that, if a chiropodist, for example, should by advertising or other means attempt to deceive the public as to the character of services he renders or is authorized to render, his certificate could be revoked. The same thing would apply to the other branches of the profession. The question of whether any individual is guilty of such a practice would have to be determined by the facts in each particular case. However, I do not find any requirement that the office sign of a practitioner of one of the branches of medicine should show the specific branch in which the practitioner has a certificate.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

PITTSYLVANIA COUNTY—Special Act Referring to—Change in Population Since Census.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 20, 1938.

HON. W. E. RAMSEY,
Commissioner of the Revenue,
Chatham, Virginia.

My Dear Mr. Ramsey:

I am in receipt of your letter of June 14, in which you state:

"I note in the new Acts of the General Assembly, page 5, that citizens in certain counties are required to get a permit from commissioners to construct certain buildings, the cost exceeding $250."
"Since I have different opinions from several attorneys here, I shall appreciate your opinion as to whether or not this is applicable to Pittsylvania county.

"The census of 1930 gave Pittsylvania county sixty-one thousand. However, since that date the City of Danville has annexed some territory. Should the last census be our guide? Shall thank you for an early reply."

The Act in question amended section 262 of the Tax Code (Acts 1938, page 5) and insofar as its applicability to Pittsylvania county is concerned provides:

"* * * in any county having a population in excess of fifty-eight thousand according to the United States census. * * *"

The last official United States census is, of course, that of 1930, and this must be the census to which the Act refers. This census gives to Pittsylvania county a population of 61,424. In fact, according to the 1930 census, Pittsylvania is the only county in the State having a population in excess of 58,000. I think it plain, therefore, that the General Assembly in using the language quoted above must have intended the Act to apply to Pittsylvania county; otherwise, this portion of the Act is of no effect at all.

My conclusion is that the Act refers to the status of the county as it existed in the United States census of 1930 and that, Pittsylvania having a population in excess of 58,000 according to that census, the amended section applies to that county.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

POLLUTION—"Inland Waters"—What Streams Constitute.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 14, 1937.

HONORABLE RICHARD ARMSTRONG, Chairman,
Commission of Fisheries,
Accomac, Virginia.

DEAR MR. ARMSTRONG:

I have your letter of July 13, with reference to Virginia Code (Michie 1936) section 3305(43), which makes it a misdemeanor "to * * * knowingly cast any noxious substance or matter into any water course of this State by which fish therein or fish spawn may be destroyed." You request my opinion as to whether this statute applies to a purely tidal stream formed by the waters of the Chesapeake Bay.

This statute, being section 42 of the Game, Inland Fish and Dog Code, is part of chapter 247, Acts 1930, page 634, entitled:

"An ACT to revise, simplify, arrange and consolidate into one act the general game, inland fish and dog statutes of Virginia, which act shall constitute and be designated and cited as 'the game, inland fish and dog Code of Virginia.'"

Section 8 of this Act uses the phrase "fish in the inland waters" as synonymous with the term "inland fish" used in the title, and provides that such waters "shall be construed to mean and to include all waters above tidewater and the brackish and fresh water streams, creeks, bays, including Back bay, inlets, and ponds in the tidewater counties."

In view of these provisions of the statute, and more especially in view of the purposes to which the Act is restricted by its title, it is my opinion that Code
section 3305(43) is not intended to refer to purely tidal, salt streams, but should be construed simply to prohibit the pollution of "inland waters" for the protection of "inland fish."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Employees—Salaries.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 11, 1938.

Dr. William H. Stauffer,
Commissioner of Public Welfare,
Richmond, Virginia.

My Dear Dr. Stauffer:

Your letter of June 9 has been received. You ask for the opinion of this office in connection with the following:

"Section 4 of the Appropriation Act requires approval by the Governor of each officer and employee who enters the service of the Commonwealth of Virginia during the period which begins July 1, 1938, and ends June 30, 1940, shall be fixed for the said biennium at such rate, * * * * with the proviso 'that this section shall not apply to any employee whose salary or wage amounts to an annual rate of not exceeding $1,000.00.'

"Section 3, Title 2, of Chapter 379, says that 'all salaries or remuneration in excess of twelve hundred dollars per annum shall first be approved by the Governor.'

"Inasmuch as there will be certain additions to the personnel of the staff of the Department after July 1, whose salaries will probably fall within the range of the differential between $1,000 and $1,200, I am anxious to have a ruling as to which construction applies."

In my opinion, as to those who enter the services of the Commonwealth in your Department during the period July 1, 1938, to June 30, 1940, whose salaries are paid from the appropriations made to your Department by section 4 of the regular Appropriation Act, that Act applies.

In the same way, as to those who enter the services of the State between the dates mentioned whose salaries are to be paid from the appropriation contained in the Virginia Public Assistance Act of 1938, the limitation contained in section 3 of that Act applies.

In my opinion, the above is a reasonable interpretation to be placed upon the two Acts of the General Assembly in question, and it gives effect to both Acts.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

POLICE BENEFIT AND FIREMEN'S AID ASSOCIATIONS—Refund of Taxes to—Construction of 1938 Act.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 26, 1938.

Honorable LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

This is in reply to your letter of May 23, 1938, in which you request my opinion as to what action the Comptroller should take with respect to issuing a
warrant upon a claim for refund of a part of the taxes paid by the Police Benefit Fund Association of Lynchburg, Virginia, for the years 1930 to 1935, inclusive, the amount of said refund claim being $821.83.

This claim is made pursuant to the provisions of chapter 429 of the Acts of 1938, at page 965, which Act makes an appropriation not in excess of twenty thousand dollars to be used for the purpose of refunding to police pension fund associations, police benevolent associations, or firemen's mutual aid associations, all amounts in excess of twenty dollars per year paid by such associations for State taxes upon intangible personal property assessed against them for the tax years 1929 through 1935, both inclusive.

The said Act further provides that said refund shall be paid out of any balance remaining unexpended, for the 1938 biennium, in the appropriation for that biennium to assist counties and cities and provide assistance for destitute persons (Acts 1936, page 374). The Act also further provides that all payments out of the appropriation shall be made by the Treasurer of Virginia on warrants of the Comptroller issued on statements of the proper tax collecting officers showing the payment by such associations of the taxes so assessed.

You have sent to me along with your letter a copy of the Constitution and By-laws of the said Lynchburg association.

Article II of said Constitution provides for four classes of membership:

1. Active members confined to persons who are qualified members of the regular police force of the city of Lynchburg.

2. Reserve members consisting of such active members as may have heretofore been or may hereafter be retired by the regularly constituted authorities of the city of Lynchburg from active duty in the police department by reason of old age or physical disability, but who are retained in the department and carried on the pay roll as reserve officers.

3. Contributing members composed of persons outside of the police force who may be duly elected, and who shall pay into the treasury of the association each year the sum of five dollars.

   Life members which shall consist of similar persons who shall pay into the treasury the sum of twenty-five dollars.

   The general objects of the association are, as stated in Article III, to accumulate a fund from dues, contributions, and gifts, for the purpose of paying sick and death benefits to active members who are disabled or prevented from the discharge of their duties by reason of sickness or injuries, or who shall die while active members.

   Article IV specifies the amount of such death benefit and pension payments.

   By an amendment to the Constitution it was further provided that after April 1, 1930, reserve members should have certain rights in case of disability, or death of their wives.

   Neither the so-called contributing members or life members are granted any rights or privileges whatever to participate in pension or benefit payments, or any payments of any kind, and Article II of the Constitution contains this provision:

   "No contributing or life member shall be entitled to vote in the meetings of the association."

Under the said Act of 1938, the associations which are entitled to receive the refunds provided for are stated to be those "in which the membership therein is restricted to the personnel of the police and fire departments of the political subdivisions of this State."

I have been advised by Mr. Andrew H. Christian, attorney for these organizations, that substantially all, if not all, of the police pension fund associations, police benevolent associations, and firemen's mutual aid associations, have so-called contributing memberships and life memberships, but that no rights whatever are conferred upon any such contributing or life members.

You desire my opinion upon the question whether or not the said Lynchburg association, by reason of the fact that its Constitution provides for contributing and life memberships composed of persons outside of the personnel of the police department, is entitled to receive the benefit of the refund provided for in the said 1938 Act.
It is my opinion that, while the Constitution applies the term members (and membership) to those making the required contributions who are not members of the police department of the city of Lynchburg, nevertheless, since no rights of any kind whatever are conferred upon them, they are not as a matter of law actually legal members of the association. The obvious purpose of applying this term to such contributors is to confer upon them a designation which will encourage the making of such contributions.

It was well understood when this matter was pending before the General Assembly what classes of assessments were intended to be affected by the legislation and, since practically all of such associations have similar provisions in their constitutions and by-laws with respect to such contributing life memberships and members, it is my opinion that the language as used in the statute should be construed to embrace such organizations within the benefits conferred by the statute.

With reference to the provision contained in the 1938 Act regarding a statement from the proper tax collecting officer showing the payment by the association of the taxes assessed, it is my opinion that the statement accompanying your letter is not a sufficient compliance with the statute. It is my opinion that the Lynchburg association should provide a written statement signed by the treasurer of the city of Lynchburg, in which he certifies that the taxes in question have been actually paid to him as treasurer, or to his predecessor in office.

In conclusion, it is my opinion, therefore, that when a statement signed by the said treasurer showing the payment of said taxes by the Lynchburg association has been presented to the Comptroller, it is his duty, under the provisions of said chapter 429 of the Acts of 1938, to issue a warrant as provided for in the said Act for the amount of the said taxes so paid, less the sum of twenty dollars per year for each year in which such taxes were paid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC CONTRACTS—Bonds—Sureties—Foreign Corporations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 4, 1938.

HONORABLE PEARNE E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

I have your letter of even date, requesting the opinion of this office as to whether a corporate surety on a bond to secure faithful performance of a State contract must be a Virginia corporation or one licensed to do business in Virginia.

It is the opinion of this office that, in view of Virginia Code (Michie 1936) section 282, such a surety company must be either a domestic corporation or one licensed to do business in Virginia.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC CONTRACTS—Officers Interested in—School Board Purchasing Land From Wife of Supervisor.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 14, 1938.

HONORABLE W. E. KIDD,
Division Superintendent of Schools,
Lovingston, Virginia.

My Dear Mr. Kidd:
I have your letter of May 13, in which you ask my opinion upon the following question:

"The school board has selected a site for a new school building, and the land happens to be owned by the wife of the member of the Board of Supervisors from this particular district. The question has been raised as to the legality of the purchase of this land by the school board on account of the fact that he is indirectly interested in it. Kindly advise whether or not there is any such law prohibiting such a purchase by the school board."

Section 2707 of the Code prohibits a member of the board of supervisors from being or becoming in any manner, directly or indirectly, interested in any claim against the county, and also contains other prohibitions with reference to members of the board of supervisors entering into contracts with the county, or in the sale of any materials or supplies to the county.

It is my opinion, however, that this section has no application to the purchase of property by the school board, since the board of supervisors has no authority either to select the property or to control the price paid therefor. While the power of the board of supervisors to control the appropriation of money might in some cases have an indirect bearing on the purchase of property by the school board, it is, in my opinion, too remote to bring the transaction to which you refer within the prohibitions of section 2707. I am, therefore, of opinion that there is no legal objection to the purchase of this property by the school board.

With best wishes, I am

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Duty of Depository Bank to Identify Payee—Unemployment Compensation Checks.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 27, 1938.

HONORABLE EDWIN B. JONES,
Treasurer of Virginia,
Richmond, Virginia.

Dear Mr. Jones:
I have your letter of June 21, in which you enclose a letter from Mr. James M. Ball, Jr., Cashier of the First and Merchants National Bank, Richmond, Virginia, in which the office of State Treasurer is asked whether the banks will be held responsible for proper identification of the individuals presenting for payment Commonwealth of Virginia Unemployment Compensation checks.

I do not think the State Treasurer's office is authorized to make a ruling which in any way qualifies or abrogates the general legal principle of responsibility of banks in regard to the handling of checks made payable to individual payees.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.
PUBLIC FUNDS—Money Recovered on Fidelity Bond—Disposition of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 14, 1937.

HONORABLE J. H. BRADFORD, Director,
Division of the Budget,
Richmond, Virginia.

DEAR MR. BRADFORD:

This is in reply to your request for my opinion as to the proper disposition, on the books of the Comptroller, of the sum of $7,500 recovered on the bond of the assistant superintendent of Piedmont Sanatorium in reimbursement of defalcations by said assistant to the superintendent.

It appears that of this amount, $375 represents a defalcation subsequent to the close of the fiscal year of June 30, 1936, and that the sum of $530 represents defalcations made in accounting for funds and property of patients intrusted to the sanatorium for safe-keeping in compliance with the rules and regulations of the sanatorium.

It further appears that the appropriation act for the period ending June 30, 1935, included an item of $8,000 to pay off a deficit which had been incurred in the support fund of the Piedmont Sanatorium. This deficit was no doubt occasioned to a large extent by the defalcations referred to above.

Under the foregoing facts, it is my opinion that, of the amount of $7,500 paid into the State Treasury as reimbursement for these defalcations, the items of $375 and $530 referred to above should be credited to the special fund of the Piedmont Sanatorium and made available to the sanatorium for the payment of general operating expenses during the remaining portion of the present biennium, and for the purpose of reimbursing patients whose funds were misappropriated. This makes a total of $905 which should be credited to the special fund of the sanatorium, and the balance of $6,595 should be credited to the general fund of the State.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Payment of Salary Accruing After Death of Employee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 28, 1937.

HONORABLE H. C. FARMER,
High Constable,
City Hall, Virginia.

DEAR MR. FARMER:

This is in response to a request contained in your letter of December 27, for my opinion upon the question whether or not the State Compensation Board would have authority to allow as an expense of your office an additional half month’s pay accruing after the death of one of your employees.

I have talked with Mr. Combs with reference to this question and we have reached the conclusion that, if the effect of paying this unearned salary should be to reduce the amount of the excess of your office, the Compensation Board would have no authority to allow it. Of course, if you have no excess, it would come out of your personal compensation. Therefore, in the event there is a surplus or excess of the earnings of your office above the salaries and expenses allowed by the State Compensation Board, the payment with reference to which you inquirer could not be allowed as an expense of the office. If there is no excess, it would be immaterial whether or not it is allowed.

We have had frequent occasions in the past to consider similar questions, and
it has uniformly been the ruling of this office that there is no authority in the law to make a donation of this kind to the widow or family of a deceased employee, where the same must be borne directly or indirectly by the State.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Payment of Salary Accruing After Discharge.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 28, 1937.

HONORABLE JOHN G. SAUNDERS,
City Sergeant,
Hustings Court,
Richmond, Virginia.

Dear Mr. Saunders:

This is in reply to your letter of December 21, in which you request my opinion upon the question whether or not the State Compensation Board would have authority to allow, as an expense of your office, the sum of seventy dollars should you pay the same to a discharged employee covering a period of time after the date of his discharge.

In my opinion, the Compensation Board would have no authority to allow payment of any salary, or any sum in lieu of salary, by the sergeant’s office except for services actually rendered by the employee or for the time a regular employee is on a reasonable vacation.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC HEALTH—Quarantine—Reimbursement of County for Expenses of Maintaining.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 23, 1937.

HONORABLE DANIEL WEYMOUTH,
Attorney for the Commonwealth,
Heathsville, Virginia.

Dear Mr. Weymouth:

This is in reply to your letter of November 16, in which you state that the county and State health authorities, with the cooperation of the board of supervisors of Northumberland county, have found it necessary to quarantine a crew on a fishing steamer on account of a case of spotted fever contracted by one of the members of the crew.

You state further that the county has found it necessary to employ a guard to prevent the members of the crew from leaving the vessel, and also to employ cooks and furnish food for the thirty-one members of the crew during the existence of the quarantine. In view of these facts, you desire my opinion upon the question whether or not the county may require the owner of the vessel to reimburse the county for the expenses thus incurred.

I concur in your view that section 1541 of the Code is restricted in its applications to cases arising in cities and towns, and section 1519 is confined to the expenses of removing an infected person with a dangerous disease, and maintaining, nursing and curing him, or expenses incurred in entering any lot, house or
vessel suspected of having a person or things infected with a dangerous, contagious or infectious disease therein, or removing a person to a hospital or other place for reception therefor. This section provides that such expenses shall be paid by the owner of the lot, house, or vessel, as the case may be; but, if not paid by such owner, they shall be chargeable to the city, town or county in which such expenses were incurred.

I have been unable to find any provisions in the statutes which, in my opinion, are broad enough to impose upon the owner of a vessel the care and feeding of persons not actually infected with an infectious or contagious disease, where such persons are quarantined because of the fact that they had previously been exposed to such disease, and where the case arises in a county and not in a town or city.

It is also extremely doubtful whether, under the general law applicable in the absence of statute, there is any such liability upon the owner of the vessel. See 12 R. C. L., pages 1289 to 1292; Dodge County v. Diers, 5 Am. and Eng. Ann. Cas., page 232 (and Note). See also 47 A. S. R. 536 et seq. (Note).

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—County Agricultural Demonstration Agents—As State or Federal Officers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 24, 1938.

Dr. Julian A. Burrell, President,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

Dear Dr. Burrell:

I am in receipt of your letter of even date, in which you ask the opinion of this office as to whether County Farm and Home Demonstration Agents are employees of the State, or joint employees of the State and Federal government by reason of the fact that certain monies are appropriated by the Federal government to the State of Virginia out of which, in part, the salaries of the above mentioned officials are paid. Your letter is accompanied by statements of Honorable Edwin B. Jones, Treasurer of Virginia, and Honorable E. R. Combs, Comptroller.

According to Mr. Jones’ statement, the Federal appropriation is paid out upon the order of the Virginia Polytechnic Institute.

Mr. Combs states that the salaries of the above mentioned officials are paid by warrants drawn by the Comptroller upon the State Treasurer, just as are all employees in the State Departments.

I understand further that the Federal appropriation is of a lump sum to each of the States, and that the County Farm and Home Demonstration Agents are appointed by Mr. John R. Hutcheson, Director of the State Agricultural Extension Work, an official of the State of Virginia. I am informed that the Director is appointed by the Board of Visitors of the Virginia Polytechnic Institute, who are in turn appointed by the Governor of Virginia.

The positions held by these agents are created by or pursuant to State statutes. Therefore, in my opinion, County Farm and Home Demonstration Agents are State employees and are not joint State and Federal employees by reason of the fact that the Federal government aids the state by an appropriation out of which part of their salaries are paid.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICERS—Incompatible Offices—Clerk of Circuit Court as Clerk of Trial Justice's Court.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 3, 1937.

HONORABLE R. I. BARNES, Clerk,
Circuit Court, Richmond County,
Warsaw, Virginia.

DEAR MR. BARNES:
I am in receipt of your letter of July 1, inquiring if the clerk of the circuit court of a county may serve as clerk of the trial justice court of a county.

Section 2702 of the Code provides among other things that no person holding the office of county clerk shall hold any other office elective or appointive at the same time, with certain designated exceptions.

The office of clerk of the trial justice court does not come within these exceptions, and I am therefore of the opinion that, under section 2702 of the Code, the clerk of the circuit court may not be appointed clerk of the trial justice court.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Interest in Public Contracts—Members of Boards of Supervisors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 20, 1938.

HON. J. J. TEMPLE,
Commonwealth's Attorney,
Prince George, Virginia.

DEAR MR. TEMPLE:
This is in reply to your letter of January 18 from which I quote as follows:

"Please advise me whether or not, in your opinion, the compensation of a member of the Board of Supervisors, on either a per diem or quantum meruit basis, for personal services performed by such supervisor, at the request of the Board, in the supervision of the construction of a water supply and seweage disposal system in a Sanitary District, would be in violation of Section 2707 of the Code of Virginia, or any other statute."

Section 2769-a of the Code, as appears at pages 42-43 of the Acts of the Extra Session of the General Assembly of Virginia 1936-1937, provides that each member of the board of supervisors of each county shall be paid a salary to be fixed as provided in said section for his services in attending the meetings of the board and in discharging the duties imposed by law upon him.

It appears from the foregoing quotation that the salary fixed in accordance with said statute constitutes full compensation for all work performed in discharging the duties of the office of a supervisor. Therefore, if the work of the supervision of the construction of the water supply and seweage disposal system in a Sanitary District be considered an official duty, then it is obvious that the salary fixed as provided in said section is in full compensation for such service and no additional compensation is permitted.

On the other hand, if the service contemplated in your inquiry does not come within the scope of the official duties of the supervisor, then the only way by which such officer could become entitled to receive compensation would be pursuant to a contract, express or implied, between himself and the board of supervisors. Whatever amount such supervisor would be entitled to be paid under
said contract would, when he is entitled to receive same, become a claim against the county upon the validity of which the board of supervisors is required by law to pass judgment and allow or disallow as the case may be.

Section 2707 of the Code provides that no supervisor shall "become interested, directly or indirectly, in any claim against his county, whether the same shall have been passed upon by the board of supervisors or not."

In view of the foregoing provision of the statute, I am of opinion that it is in violation of section 2707 of the Code for a member of the board of supervisors to make a contract with the board for compensation for services outside of the scope of the duties of his office, and that no additional compensation is permissible for services performed within the scope of the duties in such office.

I will add that this conclusion is in harmony with the general rule of law, independent of statute, that a fiduciary cannot in his fiduciary capacity make a valid contract with himself in his individual capacity so as to receive compensation from the trust estate or other funds under his control as such fiduciary.

I am enclosing herewith an opinion substantially to the same effect rendered by this office during the term of my predecessor which appears at page 23 of the Annual Report of the Attorney General of Virginia for the year 1934.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Interest in Public Contracts—Members of School Board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
HONORABLE JOSEPH A. BILLINGSLEY,
RICHMOND, VA., FEBRUARY 3, 1938.

DEAR MR. BILLINGSLEY:

This is in reply to your letter of January 26, requesting my opinion as to the proper construction of section 708 of the Virginia Code as applied to certain facts set out in your letter with reference to the transportation of children in school busses by a member of the school board under a contract made between the school board and Henderson and Clift. It appears that Henderson and Clift were really acting as undisclosed agents for one of the members of the school board, who was the real principal and performed the contract for the transportation of the children to and from the public schools.

Section 708 of the Code prohibits the school board from employing any of its members in any capacity. This section also contains various other prohibitions against making sales of building supplies, books, maps, school furniture or apparatus, and other things to the school board by any member thereof, following which is found this provision:

"Any contract of sale made in violation of this section shall be void, and if the claim or bill arising out of such a transaction be paid, the amount paid, with interest, shall be recovered by action or suit."

You ask my opinion especially with reference to the interpretation to be given the word "transaction"—that is, whether the said word refers only to a contract of sale of the prohibited articles, or to any other transaction prohibited in the section.

In the case of Commonwealth v. Barrow, 118 Va. 257, it was held that this section, being highly penal, must be strictly construed, and that its terms cannot be extended by doubtful implication. In view of this rule of construction to be applied, it seems very questionable whether the court would construe the word transaction as applying to any other transaction than that of the prohibited contracts of sale. However, the statute is quite ambiguous and it might be construed either way.

Under these circumstances, your duty to institute a suit against the school
board member would seem to me to depend upon whether, under all of the circumstances and facts of the case which may be known to you or disclosed by an investigation, you are of the opinion that the statute should be so interpreted as to provide for the recovery of the amount paid by the county school board for the transportation of the children to and from school. A question of this kind is inherently one which would have to be determined by the courts and, where the meaning is not clear, I do not feel that it would be proper for this office to express a definite opinion as to what action the attorney for the Commonwealth should take in the absence of knowledge of all of the surrounding facts and circumstances which would not be disclosed in the report of an auditor.

Your next inquiry is directed to the question whether or not the other members of the school board are guilty of a misdemeanor along with the offending member.

In my opinion, this would depend upon whether or not the other members of the school board had guilty knowledge of the transaction, and could be said to have aided and abetted the alleged violation of the statute. In the latter event, I am of opinion that they would be equally guilty.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Terms of Office—Constitutionality of Statute Changing.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 23, 1938.

DR. W. H. PERRY, RICHMOND, VA.

DEAR DR. PERRY:

In regard to your inquiry concerning the constitutionality of a bill amending the charter of the Town of Dungannon, Virginia, which will change the term of office of certain officers of the town and would have the effect of cutting short the term of the present incumbents, I advise as follows:

An office created by statute is within the control of the legislature and the duration of the term of office may be altered at any time by the legislature in the absence of a constitutional limitation on that power. Branham v. Long, 78 Va. 352 and Lipscomb v. Nuchols, 161 Va. 936. The provisions of the Constitution of Virginia giving the legislature power to provide for the organization and government of towns does not prescribe any definite term of office for the officers of towns. In view of this fact, there would be no constitutional objection to the proposed bill.

Yours very truly,

ABRAM P. STAPLES, Attorney General.

PUBLIC PRINTING—Competitive Bids—Ruled Forms for Bureau of Insurance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 30, 1938.

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

On my return to the office I found your letters of June 24 and 25, enclosing two letters from Honorable George A. Bowles and requesting my opinion as to whether you should grant the requests made in Mr. Bowles' letters.
Mr. Bowles first asks your permission to order, from a printing establishment in Nashville, Tennessee, copies of certain forms used by the Bureau of Insurance in obtaining reports from the various insurance companies licensed to do business in Virginia. These forms are specially prepared for the use of this Bureau to the extent of having the title of the Commissioner of Insurance of the Commonwealth of Virginia inserted on the cover, and at some two or three places in the form.

Section 382 of the Code of Virginia, as amended by chapter 168, Acts of 1938, provides that "The public printing and binding for the Commonwealth shall be under the supervision and control of the Director of the Division of Purchase and Printing **".

Section 383, as amended by the same 1938 Act, requires the Director to "have all the printing, binding, ruling, lithographing, and engraving required by any department, division, institution, officer or agency of the State, and authorized by law to be done, or required in the execution of any law, executed upon competitive bids, and shall award the work to the lowest responsible bidder, having due regard to the facilities and experience possessed by such bidder.".

I can find no authority for exempting from the operation of this statute the work which the Commissioner of Insurance wishes to have done in connection with the preparation of these forms. Hence it would seem impossible, under the law, to grant his request in this connection.

The Commissioner's second request is for permission to obtain directly from the Michie Publishing Company copies of excerpts from the Michie Code relating to the duties of the Bureau of Insurance. It appears from the correspondence enclosed that the Michie Company proposes to print specially for the Bureau the appropriate portions of the Code, using the type which has already been set for printing the entire Code.

In this case, as in connection with the procurement of the insurance forms referred to, it seems obvious that there can hardly be any useful purpose accomplished by inviting competitive bids. Nevertheless, in view of the statutory provisions quoted above, it again seems that the requirements of the statute can be satisfied only by following the procedure outlined in the statute. It is the opinion of this office that the Commissioner's request cannot be granted.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Children's Homes—Institutions Subject to Supervision, Etc., by State Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 18, 1937.

HONORABLE W. L. PAINTER, Director,
Children's Bureau, Department of Public Welfare,
1014 East Clay Street,
Richmond, Virginia.

DEAR MR. PAINTER:

This will acknowledge your letter of even date, referring to the file submitted to this office several days ago containing information relative to the Kingswood Schools and Homes. You request the opinion of this office as to whether this institution is covered by the provisions of sections 1935a of the Virginia Code (Michie 1936), and following, which sections provide for the supervision, visitation, licensing, etc., of certain institutions by the State Board of Public Welfare.

The statute to which you refer defines the class of institutions to which it shall apply as including "every agency, public, semi-public or private which engages in the business for gain or otherwise, of receiving and caring for children or placing, or boarding them in private homes."

Under the provisions quoted, the question of whether any particular institution
does or does not come within the operation of the statute is a question of fact—viz., the question whether that institution is in fact engaged in the business of receiving and caring for children, or placing them in private homes.

From the documents submitted to us in your file, it is not possible for this office to say that Kingswood Schools and Homes is, as a matter of law, engaged in such a business and thus subject to the provisions of Code sections 1935a and following. It does appear, however, that the charter of this institution will permit it to engage in such a business, and that there is at least some evidence tending to show that the institution is so engaged.

This being the case, it is the opinion of this office that the Board of Public Welfare would be justified in asserting the supervisory power authorized by the statute if, after a careful investigation, it comes to the conclusion that the institution is in fact engaging in the business described by section 1935a.

I return herewith your file.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Public Assistance Act of 1936 Construed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 6, 1937.

HONORABLE ARTHUR W. JAMES, Commissioner,
Department of Public Welfare,
Richmond, Virginia.

DEAR MR. JAMES:

I have before me the letter of Mr. A. David Bouterse, dated September 17, 1937, which you have referred to this office for an official opinion on the question which Mr. Bouterse has raised.

The question which has arisen relates to the construction of the Public Assistance Act of 1936 (Acts 1936, Ch. 223, pp. 374-7). This Act appropriates certain State funds for each of the two fiscal years, 1936-1937 and 1937-1938, to supplement county and city appropriations for public welfare work, the grant to each locality to be based on its population, but on the condition that it shall be matched by local appropriations equalling at least sixty percentum of the State contribution. At the beginning of each fiscal year, the Commissioner of Public Welfare allots to the various localities their respective shares of the State appropriation for that fiscal year.

It appears that certain cities, during the fiscal year 1936-1937, made and expended appropriations equal to more than sixty percentum of the State grants allocated to them for that period; that these cities, in applying for a share of the grants for 1937-1938, ask credit for this excess appropriation of last year, including it in their statement of local appropriations to match sixty percentum of the current allotment. You request the opinion of this office as to whether such a credit should be allowed under the statute.

From the context of the entire Act, it is apparent that the Legislature contemplated annual appropriations to match grants out of the annual appropriations made by the Act, and no provision was made for carrying over credits for one year's excess local expenditures in computing allotments for the succeeding year. This view of the statute is borne out by the provision that, in making the allocations,

"** no part of the funds herein provided for shall be distributed to any county or city unless the said county or city shall provide and have available for like purpose local funds in an amount equal to sixty percentum of the amount received by said county or city under the provisions of this law. **"

(Italics supplied.)
Obviously, funds which, at the time of the allotments for 1937-1938, have been appropriated and expended during the past fiscal year, are not "available."

It is my opinion, therefore, that allotments out of the appropriation for 1937-1938 must be made on the basis of local appropriations for that fiscal year, and excess local expenditures for the preceding year should not be credited.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—State Board of—Resettlement of Families Removed from Shenandoah Parks—Construction of Buildings.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., December 16, 1937.

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

My Dear Governor:

This is in reply to your letter of December 9, in which you request my opinion upon a question raised in a letter addressed to you by Honorable Arthur W. James, Commissioner of Public Welfare, under date of December 3, 1937.

The question presented is whether or not, under the provisions of chapter 21 of the Extra Session of 1936-1937, the State Board of Public Welfare is authorized, in addition to buying lands for the purposes referred to in said statute, to contract for the erection of a residence building thereon.

The statute authorizes the said Board "to buy, lease, own and operate property, real and personal, in Virginia, for the custody, care, use, or benefit of dependent, delinquent, or defective persons under its care, supervision, or control, who are now, or were formerly residents of the Shenandoah National Park Area," out of funds acquired from the United States for such purpose. The board is further authorized to sell, convey, or lease any property so acquired.

Considering the purpose for which this act was passed; namely, the taking care of persons referred to, I think the language should be liberally construed to accomplish the purposes expressed, and that the letting of a contract for the building of a house upon a tract of land, whether said contract constitutes part of the original contract of purchase of the land or whether the same be a separate contract, should be construed as embraced within the power to buy, own and operate property, real and personal, within the meaning of said chapter 21 of said Acts.

I am returning to you herewith Mr. James' letter which you sent me.

Respectfully yours,

ABRAM P. STAPLES,
Attorney General.

RELIEF LEGISLATION—Eligibility—Residence—“Legal Settlement.”

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., December 9, 1937.

HONORABLE ARTHUR W. JAMES, Commissioner,
Department of Public Welfare,
Richmond, Virginia.

Dear Mr. James:

This is in response to your request for an opinion upon the question whether or not it is necessary that the settlement provisions of section 2800 of the Code (1936)
must be met before relief may be granted in accordance with chapter 223 of the Acts of 1936.

I beg to advise you that, in my opinion these statutes are essentially separate enactments and have no relation to one another, and, therefore, relief may be granted under chapter 223 of the Acts of 1936 without regard to the settlement provisions of section 2800 of the Code.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Appropriations—“Discretionary Fund.”

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 11, 1938.

Dr. Sidney B. Hall,
Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR DR. HALL:
I am in receipt of your letter of March 26, from which for purposes of reply I quote as follows:

"Within the past several years the United States Park Service and the Naval Mine Base located in York county have taken several thousand acres of land and improvements from the taxable values assessable for local taxes in said county. This has caused a direct loss to the public school system in taxes in York county amounting to approximately $2,800.00.

"In this reservation of the United States there are about fifteen children of school age, who under the Federal law, are entitled to the benefit of the public schools in York county. As a matter of convenience and economy, these children are sent to the public school in the city of Williamsburg, and for this service the school board for York county pays to the school board for Williamsburg a tuition for these pupils.

"Due to lack of funds for maintaining the public schools in York county for a nine months term, the school board for York county has requested the State Board of Education for an allotment of $1,700.00 from the discretionary fund to cover the loss of revenue as herein stated and for reimbursement for tuition paid to the city of Williamsburg.

"Has the State Board of Education the right to make this allotment from the discretionary fund?"

In addition to the facts stated by you, you have advised me orally that your question is directed to the year ending June 30, 1938, and you have also told me that for the year in question York county has sufficient funds available to maintain the public schools in said county for a period of eight months.

The appropriation to the discretionary fund is made "to insure the maintenance of a school term of not less than eight months in each county." See Acts of Assembly, 1936, pages 915, 916. The effect of your question is to ask whether an allotment may be made to a county from the discretionary fund to insure the maintenance of a school term of not less than nine months.

I am of opinion that this may not be done under the plain terms of the appropriation, which provides that this fund shall be used to insure the maintenance of a school term for not less than eight months.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS—Local Boards—Construction of Buildings.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 26, 1938.

Dr. Sidney B. Hall,
Superintendent of Public Instruction,
Richmond, Virginia.

My Dear Dr. Hall:
I am in receipt of your letter of May 23, from which I quote as follows:

"Accordingly, I am asking you to interpret section 656 of the school code and also the Constitution pertaining to the control, operation and maintenance of the public schools of the State. The specific question in mind is this: Is it the duty and responsibility of the local school board, under the Constitution and section 656, to construct or erect school buildings, establish and maintain a school system, or is the responsibility of the school board only to maintain a school system, with the buildings being erected or constructed by some other authority? As I read section 656 of the school code, it is clearly the responsibility and function of the school board, but, in spite of my own opinion, I am anxious to have your opinion on this."

Section 656 of the Code provides, among other things, that the local school board "shall have authority * * * to provide for the erecting, furnishing, and equipping of necessary school buildings and appurtenances and the maintenance thereof; * * * ."

In view of this language, it is my opinion that the supervision of the erection of school buildings and the equipment and maintenance thereof, including the letting of contracts, is within the jurisdiction of the local school board.

Very sincerely yours,

Abram P. Staples,
Attorney General.

SCHOOLS—Bonds—Issuance of to Refund Literary Loans—Referendum.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 14, 1938.

Honorable G. Tyler Miller,
Superintendent of Schools,
Front Royal, Virginia.

Dear Mr. Miller:
I have your letter of April 8, in which you request my opinion upon the following two questions:
1. Whether or not, under the laws of Virginia, the school board and board of supervisors of a county may issue and sell to the public, or to some banker or other person desiring to purchase same, bonds issued for the purpose of funding or refunding an outstanding Literary fund loan, without submitting the same to the qualified voters in a referendum election.

This office has heretofore ruled that under the provisions of section 115a of the State Constitution no debt of the kind to which you refer may be contracted by any county school board, or school district of a county, without such a referendum election.

To permit the school board to obtain a Literary fund loan and then retire the same by a bond issue without any election would be a clear evasion of the
REPORT OF THE ATTORNEY GENERAL

constitutional provisions referred to. Our Supreme Court of Appeals has held that the requirement for the referendum election does not apply to loans from the Literary fund, because that is a governmental agency and the loan is from one governmental agency to another. A loan of the type to which you refer, however, is not a loan from one governmental agency to another, but is a sale of bonds to the public and is prohibited by the Constitution without a referendum.

2. You also inquire whether a county may, after having a referendum election and securing the approval of a majority of the qualified voters voting thereon, issue bonds for the purpose of retiring a loan from the Literary fund.

This office has ruled that a bond issue of this kind, which has been approved by the qualified voters, is permissible.

I am advised that generally speaking the State Board of Education permits the school boards to anticipate payment of the Literary fund loans. I would suggest, however, that you take this up with Dr. Hall, Superintendent of Public Instruction.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Conducting Moving Picture Shows.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 28, 1938.

Hon. C. Champion Bowles,
Attorney for the Commonwealth,
Goochland, Virginia.

My dear Mr. Bowles:

Reply to your letter of February 17 has been delayed on account of the unusual press of official business incident to the present session of the General Assembly. You raise the following question:

"Will you kindly advise whether or not in your opinion it is contrary to the statutes or public policy for the county school board to use county school funds derived from the tax levy for the purpose of entering into the business of operating a motion picture show in a school building? These pictures will not be for educational purposes alone, but will be of a general nature and admission will be charged the public. The receipts of the enterprise, if successful, after paying for the equipment, will be turned over to the school fund."

I must advise that I can find no statute which can be construed so as to authorize the county school board to go into the motion picture business. I observe that the pictures will not be shown for educational purposes, but that they will be of a general nature, and the public will be charged admission. In other words, I assume that the business is to be operated just as any other motion picture theater. As I have above stated, I do not think that any statute authorizes the board to do this.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

SCHOOL CONTRACTS—Officers Interested in—Members of State Board of Education as Member of Mercantile Firm Selling to Local Boards.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 29, 1938.

Dr. Sidney B. Hall,
Superintendent of Public Instruction,
Richmond, Virginia.

My Dear Dr. Hall:
I am in receipt of your letter of March 25, in which you state:

"A member of the State Board of Education is also a member of a mercantile firm, who in the regular course of business furnish material and supplies to contractors for school buildings and also to school boards for building, altering and equipping school buildings.

"Under section 708 of the Code, can this member of the State Board of Education, with the approval of the State Board of Education, continue as a member of said board and have his firm continue to furnish material, supplies and equipment to school boards and to contractors working under school boards?"

Section 708 of the Code, to which you refer, specifically provides that "it shall be unlawful for any member of the State Board of Education except by permission of the State Board of Education evidenced by resolutions spread upon the minutes of said board" to do certain things, including selling materials, supplies and equipment, to school boards and to contractors working under school boards. However, that part of the section which I have quoted makes it plain that these things may be done with the permission of the State Board of Education evidenced by resolutions spread upon the minutes of the said board.

I also enclose for your information copy of a letter written by me under date of July 15, 1936, to Mr. Blake T. Newton, Superintendent of Schools, Hague, Virginia, dealing generally with this question.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Counties—Appropriations to Provide Transportation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., September 27, 1937.

Honorable Chas. P. Ferrell, Clerk,
Circuit Court of Craig County,
New Castle, Virginia.

My Dear Mr. Ferrell:
Your letter of September 23 has been received.
You desire to know whether the Board of Supervisors of Craig County may make an additional appropriation from the general county fund for the transportation of high school pupils.

Section 656 of the Code authorizes the School Board "to provide * * * for the transportation of pupils whenever such procedure will contribute to the efficiency of the school system."

Section 698 of the Code provides that in addition to the regular appropriation for school purposes "the board of supervisors of any county * * * may appropriate from any funds available such sums as in the judgment of such board
of supervisors * * * may be necessary or expedient for the establishment, main-
tenance and operation of the public schools in such county.”

I am of opinion that the above quotation from section 698 clearly gives to
the Board of Supervisors of Craig County the authority to make an additional
appropriation for the purpose mentioned.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Counties—Person Hired to Supervise Construction and Repair of
Buildings—Out of What Funds Paid.
Highways—Sidewalks—Counties—Authority of, to Contribute to Construction.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 3, 1938.

HONORABLE PHILIP KOHEN,
Commonwealth’s Attorney for Botetourt County,
Buchanan, Virginia.

My Dear Mr. Kohen:

I am in receipt of your letter of April 29, in which you refer to mine of April
26 to Mr. H. M. Painter, Superintendent of Schools.

In my letter to him I assumed, of course, as Mr. Painter’s letter indicated,
that the supervisor of repair and construction work was under the joint super-
vision of the Board of Supervisors and the School Board; in other words, that
he was the supervisor of repair and construction work in connection with all of
the county buildings, although his work was largely confined to school buildings.
Your letter of April 29 indicates that this employee is under the sole supervision
of the School Board and that his work is entirely confined to school buildings.

If the facts are as I assumed them when writing my letter of April 26, I am
of opinion that the conclusion reached by me in that communication was correct.
If, however, the employee in question is hired by the School Board and his work
is confined entirely to school buildings, then I think it would be proper for his
entire salary to be paid by the School Board. As a practical matter, of course,
the Board of Supervisors, if the funds are available, could appropriate to the
School Board sufficient funds to pay the entire salary, or the School Board could
pay it out of funds already in hand if they are sufficient. The question of exactly
how the salary should be paid depends, as I have indicated, entirely upon the facts.

You next inquire if the Board of Supervisors of Botetourt County has the
authority to make an appropriation to pay for fifty per cent of the sidewalks along
the Lee Highway in the village of Troutville in Botetourt County, which you
state is an unincorporated town. There is some doubt in your mind as to whether
the Board of Supervisors has authority to make such appropriation, my understand-
ing from your letter being that the Board is entirely willing to make the
appropriation if it has the authority.

Chapter 133 of the Acts of 1938 provides for the State Highway Commis-
sion to acquire under certain circumstances necessary lands for the construction
of sidewalks and walkways along the highways of the State outside of cities and
incorporated towns, and to construct such sidewalks provided “the county will
pay fifty per cent of the cost thereof.” It seems to me that this Act construed
with section 2743 of the Code indicates that it was the intention of the General
Assembly to give to the Board of Supervisors the authority you mention. If this
were not true, chapter 133 of the Acts of 1938 would be meaningless.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS—County Boards—Buses—Use of for Certain Purposes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 3, 1938.

HONORABLE CHARLES W. CRUSH,
Attorney for County School Board,
Christiansburg, Virginia.

My dear Mr. Crush:
I am in receipt of your letter of February 1, in which you ask the following question:

"The County School Board of Montgomery requests your opinion upon the legality of use of the county school buses in transporting the students from the Radford State Teachers' College to the Virginia Polytechnic Institute at Blacksburg to attend concerts, musicals and other entertainments of an educational nature. Both of these State schools are in Montgomery county, and the college authorities desire to make the facilities at V. P. I. available to the young ladies at the State Teachers' College. Reimbursement of the expenses of the County School Board, and transportation of the students in the use of their buses and drivers and gas and oil are proposed by the colleges for this service."

In my opinion, the County School Board does not have authority to use its school buses in the manner you have described and receive compensation therefor. It seems to me that by so doing the School Board would in effect go into the transportation business, and I can find no authority in the statute for it so to do. I do not think it can be reasonably said that the relation between the county of Montgomery on the one hand and the State Teachers' College and Virginia Polytechnic Institute on the other is such as to justify this as an activity of the County School Board.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—County School Tax—Charter Exempting Town Property—Constitutionality.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 3, 1938.

HONORABLE H. PRINCE BURNETT,
House of Delegates,
Richmond, Virginia.

My dear Mr. Burnett:
I am in receipt of your letter of January 31, in which you inquire as to the constitutionality of the amendment by the Legislature of the charter of a town constituting a separate school district, the effect of the amendment being to prohibit the county or counties in which the town lies from levying a county school tax on property located in the town.

I must advise that in the case of the County of Brunswick v. Peeples & Purdy, 138 Va. 348, our Supreme Court of Appeals has held that section 136 of the Constitution of Virginia confers upon a county the right to impose county school taxes on property in towns embraced within the territorial limits of the county. The court in this case not only held that this right was given the county by this section of the Constitution, but quoted with approval the following language in Robertson v. Preston, 97 Va. 296, 300:
"This section of the Constitution confers upon each county the right to levy a tax upon property for public free schools which the General Assembly has no power to take from it."

The opinion in Robertson v. Preston, supra, further holds that the right of a county to levy such a tax embraces the right of the county to impose such a tax upon property within the corporate limits of a town. The court further quoted with approval the following language in Supervisors v. Saltville L. Co., 99 Va. 643-5:

"The levy of a county school tax is manifestly for a county purpose. It is made so by the Constitution, and the right of the county to impose the tax being derived from the Constitution cannot be taken away by the General Assembly. Robertson v. Preston, 97 Va. 296 (33 S. E. 618). This being so, it follows that so much of section two of the charter of the town as declares that property within its corporate limits shall be exempt from county public school taxes is unconstitutional and void." (Italics supplied.)

In view of the decisions of our Supreme Court of Appeals to which I have referred, I am of opinion that the charter provision such as you describe would be invalid in that it would be contrary to the provisions of section 136 of the Constitution.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—District Levy for Amortization of Literary Loan.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 26, 1937.

Hon. Robert B. Ely,
Commonwealth's Attorney,
Jonesville, Virginia.

My Dear Mr. Ely:
I am in receipt of your letter of August 19, the effect of which is to request my opinion as to whether a district levy may be made to pay the interest on and create a sinking fund for the repayment of a loan made from the Literary Fund for the purpose of erecting a school building in a district. I note that you have advised your Board of Supervisors that such a district levy may be made. I agree with your conclusion.

The loan, of course, has to be made to the school board of the county. Section 636 of the Code. The other more pertinent sections in connection with your inquiry are sections 644, 653, 673 and 698 of the Code. After careful consideration of all of these sections, I am constrained to be of the opinion that it is within the discretion of the Board whether or not the levy is to be made as a general county levy or as a district levy in the district in which the school building is to be erected. The sections are not altogether as clear as they might be, but a consideration of all of them together leads me to conclude that the district levy may be made, if the Board so decides. I have not gone into an elaborate discussion of these sections and the history thereof, but I have considered them carefully, not only from the standpoint of proper legal construction of the statutes themselves, but also, for obvious practical reasons, I am of opinion that this discretion is within the Board.

I do want to especially call your attention to the fact that section 698 of the Code was enacted twice at the 1936 Session of the General Assembly, the
first act being broader in some respects than the second. I had occasion to dis-
cuss the effect of these two enactments in a letter to Honorable Douglas S. 
Mitchell, Attorney for the Commonwealth of West Point, Virginia, under date of 
March 2, 1937, and herewith enclose for your information a copy of that com-
munication. It is perfectly true that in recent years the tendency of acts of the 
General Assembly has been toward the development of the county as the unit of 
administration of public schools, but I cannot say that the transition from the old 
system to the new system has gone so far as to prohibit levying of the tax in a 
school district to pay a loan made from the Literary Fund for the erection of a 
school in that district.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Division Superintendents—Salaries—Source of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 17, 1938,

HONORABLE JOHN B. BOATWRIGHT,
House of Delegates,
Richmond, Virginia.

MY DEAR MR. BOATWRIGHT:
I am in receipt of your letter of February 14, in which you state that the 
School Board of Buckingham County desires my opinion on the following ques-
tion:

"Under the present law the State pays one-half of the salary of the 
Division Superintendent of Schools, and the other half is paid by the county. 
What they desire to know is whether this half which is to be paid by the 
county should be paid out of the general levy for county purposes, as the 
Commonwealth's Attorney's salary and the Clerk's salary are now paid?"

The answer to the question that you ask may be found in section 615 of the 
Code of Virginia, which, as to the payment of the salary of the Division Superin-
tendent of Schools, provides as follows:

“One half of the salary thus determined shall be paid by the State 
treasurer in monthly installments out of the available funds on the warrants 
of the Comptroller upon the approved voucher or vouchers required by the 
Comptroller, and the other half shall be paid by the city council or county 
board of supervisors out of the general fund of the city or county. The local 
school board may, out of the local fund, supplement the salary above prescribed 
and provide for the traveling and office expenses of the superintendent; * * *"

It seems to me plain that the county's half of the base salary of the Division 
Superintendent should be paid out of the general fund of the county and not out 
of the school fund.

As requested, I am sending a copy of this letter to the School Board of 
Buckingham County, Buckingham, Virginia.

Very sincerely yours,

ABRAM P. STAPLES
Attorney General.
REPORT OF THE ATTORNEY GENERAL


COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 14, 1938.

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

MY DEAR MR. WHITEHEAD:
I am in receipt of your letter of January 5, which for purposes of reply I quote as follows:

"The school board would like to know whether or not the school board is required by law to educate the children of the Hughes Memorial Orphanage in elementary or high school and offer said children transportation.

"The following is a clause from the will of the late John E. Hughes under which the said Hughes Memorial Orphanage was created and is operating:

"'That they cause to be created under the laws of the State of Virginia, a corporation to be properly named, for the purpose of establishing, organizing and maintaining an orphanage for the white children of the State of Virginia and North Carolina, wherein said children may be properly cared for, educated and trained in useful trades and life vocations.'

"This orphanage is, of course, located in Pittsylvania county and has an endowment sufficient to maintain the orphanage and any necessary schools for the education of these children."

Section 682 of the Code provides in part as follows:

"The public schools, except as otherwise provided, shall be free to all persons between the ages of seven and twenty-one years residing within the county or city, * * *"

There are certain other provisions and exceptions in this section which are not material here.

I am of opinion that under this provision the public schools are open to all persons meeting the prescribed requirements, and I do not think that the fact that there is a private fund designated for the education of certain children releases the appropriate governmental agency from this imposed obligation. For example, surely it could not be successfully contended that, if a father by a clause in his will provided funds for the education of his children, such children would on that account be deprived of the right to attend public schools.

With best wishes, I am

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

SCHOOLS—Funds—Appropriations by Boards of Supervisors to Supplement School Funds.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 14, 1938.

HON. RALPH L. LINCOLN,
Commonwealth's Attorney,
Marion, Virginia.

MY DEAR MR. LINCOLN:
I am in receipt of your letter of January 12, from which I quote as follows:

"In July, 1937, at the end of the last fiscal year the Smyth County School Board exceeded its budget by approximately $13,000.00. It thus became
necessary to secure a loan to take care of this balance. Thereupon, the Board of Supervisors agreed to repay the same. The following month, in August, 1937, from funds received from the A. B. C. Board about $7,000.00 was paid on this loan, leaving a balance of approximately $5,500.00 which the School Board owes, but which the Board of Supervisors has agreed to pay from additional funds which will be secured from the A. B. C. Board in August, 1938."

I also received a letter from Mr. Robert F. Williams, Division Superintendent of Schools, from which I gather that he does not think that the School Board has exceeded its budget, but rather that the levy laid by the Board of Supervisors did not yield the amount of the school budget. You state that the School Board "exceeded its budget by approximately $13,000.00."

Assuming, first, that the Board did not exceed its budget, but that the yield of the levy was not equal to the amount of the budget, it seems to me plain that an appropriation may now be made by the Board of Supervisors to make up the difference. See section 657 of the Code.

But, even if the Board has exceeded its budget, I call your attention to section 698 of the Code, which provides that, in addition to the regular school levy or appropriation, "the board of supervisors of any county * * * may appropriate from any funds available such sums as in the judgment of such board of supervisors of such county * * * may be necessary or expedient for the establishment, maintenance and operation of the public schools in such county * * *"

It seems to me clear, therefore, that, even in the event the budget has been exceeded, if funds are available, the additional appropriation may be made by the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Funds—Erection of Home Economics Building.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 12, 1937.

DR. SIDNEY B. HALL,
Superintendent Public Instruction,
Richmond, Virginia.

DEAR DR. HALL:

I have your letter of July 23, enclosing copy of Mr. T. D. Foster's letter to you under date of July 20. You request the opinion of this office on the questions put by Mr. Foster's letter.

Mr. Foster states that the School Board of Sussex County contemplates the erection in Waverly of a home economics building and would like to use for this purpose proceeds of an insurance policy on an old school building in Newville District, which building has not been used for some years, since the consolidation of the schools of Waverly and Newville Districts. He wishes to know whether these funds may be so applied, how the transfer should be made, and whether the consent of the Board of Supervisors is necessary.

Under sections 646, 656 and 676 of the Virginia Code (Michie 1936), it seems clear that the insurance funds referred to are a part of the general school fund, applicable to the erection, maintenance and operation of school buildings, or to any other school purposes within the discretion of the county school board. This being true, I see no reason why these funds should not be used in the manner proposed.

As to the manner of transferring these monies, I call attention to the fact that they have always belonged to the county school board, there being nobody empowered to hold property for any particular district. Hence, it would seem proper to disburse them on warrants of the county board. I know of no pro-
vision of law requiring the consent of the Board of Supervisors to such a transaction.

Mr. Foster also wishes to know whether, in case the insurance funds are not used for the erection of a new building, but are applied to the reduction of the Newville District levy, that levy (which is now only 50c) may be omitted altogether.

Section 698 of the Code provides that "Each county * * * is authorized to raise sums by a tax on all property, subject to local taxation, of not less than fifty cents * * *" for school purposes.

Code section 653 provides, in substance, that all school taxation shall be by the county as a whole, except that "Nothing in this section, however, shall be construed to prohibit the board of supervisors in the counties of Henrico and Sussex from continuing to levy a district tax for the operation of the schools."

From the context of the latter section, it seems clear that the paragraph quoted intends to permit the district levy as a substitute for the general county levy. This being true, it follows that this district levy was intended to be subject to the same requirements as to maximum and minimum amounts as the general county levies provided for in other counties.

It is therefore the opinion of this office that the Newville District levy of 50c can be reduced or omitted only with the express permission of the State Board of Education, as provided in Code section 698.

All that I have said above is based on the assumption that the Town of Waverly does not constitute a separate school district. If this is not true, kindly advise me.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Funds—Use of by County Board to Employ Teachers at Industrial School, Where Immediate Reimbursement Made by State Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 4, 1938.

Mr. J. R. Mort, Clerk,
Warwick County School Board,
Morrison, Virginia.

My Dear Mr. Mort:

I have your letter of March 25, in which you advise that the State Board of Education has agreed in writing to repay funds that may be advanced by the Warwick County School Board for the payment of teachers in the State Industrial Trade School at Fort Eustis. There is no question on the part of the County School Board that the State Board of Education will reimburse them for these payments, but the County School Board questions its authority to pay out its money for this purpose.

I am informed by Dr. Hall that the reason for handling the matter this way is that the money available to the State Board for this purpose comes partly from the Federal Government, and that the money will not be turned over by the Federal Government until it is shown that these salaries have actually been paid. Therefore, if the School Board has the funds in hand, I see no reason why the matter should not be handled as the State Board of Education suggests. It seems it is only a matter of two or three days each month before the School Board is repaid. I, therefore, do not see how this action on the part of the County Board could be reasonably questioned.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Joint Operation—More Than Two Counties.
Id.—Literary Fund Loans—Title to Building—Defeasible Fee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 19, 1938.

Dr. Sidney B. Hall,
Superintendent Public Instruction,
Richmond, Virginia.

Dear Doctor Hall:

This is in reply to your letter of March 17, in which you request my opinion upon the questions hereinafter set out with reference to a proposed negro school located in Prince William County. It seems that there is now being operated at Manassas a school under the private ownership and the present owners of the property are willing to convey same jointly to the school boards of Prince William, Fauquier, Fairfax and Rappahannock counties, the deed of conveyance to contain a provision that the property shall at all times in the future be used as a school for the education of negro youth.

The first question you ask is whether or not a negro high school can be owned and operated jointly by the school boards of these four counties.

It is my opinion that, reading section 667 of the Code along with section 670, it is permissible for this to be done. Section 667 was reenacted in 1936 and contemplates joint ownership and operation by two or more counties, and to that extent, in my opinion, it should be construed as enlarging the provisions of section 670 of the Code which applies to only two counties.

Your second question is whether or not the condition proposed to be inserted in the deed requiring a continued use of the property for the education of negro youth would be such a restriction or objection to the title as to preclude the making of a Literary loan to these counties for the purpose of constructing new buildings or improving those already located on the property.

It is my opinion that this provision would not be objectionable from the standpoint of a Literary loan.

Sincerely yours,

Abram P. Staples,
Attorney General.

SCHOOLS—Loans—Loan by County Board to District.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 17, 1938.

Hon. Robert Whitehead,
Commonwealth's Attorney,
Lovingston, Virginia.

My dear Mr. Whitehead:

I am in receipt of your letter of February 9, in which you state:

"The County School Board of Nelson County has been requested to build a high school in one of the magisterial districts of the county. It has under consideration a proposal that the cost of construction be financed as follows: (1) Two-thirds by a loan from the literary fund; and (2) The other one-third by an appropriation from the Board, of which one-third is not to be repaid by the District, but the other two-thirds to be repaid by the imposition of a tax in an amount sufficient over a period of years to take care of the same, the idea being that the levy shall be sufficient to take care of this item, and also the loan from the literary fund."
The effect of your letter is to request my opinion as to whether or not the County School Board may make a loan to the District, the loan to be repaid over a period of years by funds derived from a levy made by the Board of Supervisors on property in the District.

In my opinion, this method of financing, since no provision is made for submission to the qualified voters of the District, would be contrary to section 115a of the Constitution of Virginia, and especially the following portion thereof:

"* * * and the general assembly shall not authorize any county, or any district of any county, or any school board of any county, or any school district in any county, to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of the said county, board or district for the then current year, or to redeem a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote of the qualified voters voting in an election, of the question of contracting such debt; and such approval shall be a prerequisite to contracting such debt. * * *

From the facts which you state I can see no escape from the above conclusion, but, if you are of opinion that such a loan would be valid and will give me the benefit of your views on the subject, I shall be glad to consider the matter further.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local Boards—Paying Dues and Sending Delegates to School Trustees' Association of Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 11, 1938.

DR. SIDNEY B. HALL,
Superintendent Public Instruction,
Richmond, Virginia.

DEAR DOCTOR HALL:

This is in reply to your letter of January 6, in which you request my opinion upon the question whether or not there is any legal prohibition against the payment by the local school boards of the membership fee or charges in the School Trustees' Association of Virginia, and the payment of the expenses of a member or members in attending the annual meeting of said association.

I beg to advise that there is no statute dealing with this question. I do not have accurate knowledge as to the activities of the School Trustees' Association, but I understand that the purpose of same is to bring about conferences and discussions relating to the problems confronting the various school boards throughout the State.

In my opinion, the question of the payment of the dues and expenses referred to is within the discretion of the board and is dependent upon whether, under all of the circumstances surrounding each particular school board, such as the amount of money available, the problems confronting it, and other similar questions, the work incident to this association is deemed to be so closely related to the discharge of the duties of the members of the school board, and the prospective benefit to be derived therefrom is sufficient, to justify the payment of the dues in question.

In other words, I think the question is largely within the discretion of the board and is one solely for each local school board to pass upon.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS—On Military Reservations—Disbursement of School Funds for.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 21, 1938.

DR. SIDNEY B. HALL,
Superintendent Public Instruction,
Richmond, Virginia.

Dear Doctor Hall:

This is in response to your request for my opinion as to whether or not, under the facts set out in a letter addressed to you by Honorable R. C. Haydon, Division Superintendent of Schools for Prince William County, the State Board of Education has any authority to pay out of State appropriations any part thereof for the operation and maintenance of a school being conducted at the Marine Barracks at Quantico, known as the Post Children’s School.

It appears from Mr. Haydon’s letter that this school is being operated and managed entirely by officers in the Marine Barracks, and that the county school authorities do not have any connection with it whatever.

Quantico is on a government reservation acquired prior to 1936 for military and naval purposes, and our Supreme Court of Appeals has held that under the terms of our Virginia statutes then in effect exclusive governmental jurisdiction has been ceded to the United States. For all practical purposes this reservation is not a part of the State of Virginia. No taxes are levied upon property on the reservation, nor are the persons there subject to assessment for income taxes, poll taxes, or any other tax.

In view of this situation, it is my opinion that the State Board of Education has no authority to disburse any funds as a contribution to the maintenance and operation of said Post School.

You also inquire whether or not the board of supervisors of Prince William County have authority to appropriate from the monies received from the school levies any sums for such a purpose.

For the reasons above set forth, it is my opinion that the said board of supervisors is also without any authority to appropriate any money for that purpose.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Sister of Board Member as Teacher—One Who Has Previously Held Position Before Time of Present Act.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 3, 1938.

HONORABLE S. J. THOMPSON,
Commonwealth’s Attorney,
Rustburg, Virginia.

My Dear Mr. Thompson:

I am in receipt of your letter of April 28, in which you ask if it is proper for a lady to be employed as a school teacher in Campbell county under the following circumstances:

“A lady, who up until July 1, 1937, was employed by the School Board of Campbell County and had been employed for a number of years, but since July 1, 1937, has not been employed as a teacher in this county, and who is a sister of a member of the School Board, is applying for a position for the session 1938-39.”
REPORT OF THE ATTORNEY GENERAL

Section 660 of the Code was amended at the last session of the General Assembly (Acts 1938, page 637) so as to provide as follows:

"* * * that it shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee, from the public funds if said teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law, or daughter-in-law, sister-in-law, or brother-in-law of the superintendent, or of any member of the school board, provided, however, that this provision shall not apply to any such relative employed by any school board at any time prior to the effective date of this act. * * *"

I call your particular attention to the language: "that this provision shall not apply to any such relative employed by any school board at any time prior to the effective date of this act." This language, even literally construed, is very broad. The lady to whom you refer, inasmuch as she was at one time employed by the School Board of Campbell County as a teacher, certainly comes within the scope of the language "at any time prior to the effective date of this act", and I am of opinion, therefore, that her future employment is not now prohibited by the act. If the General Assembly had desired to further restrict such employment, it certainly would have used language to indicate it more plainly.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—In Counties—Teachers' Compensation—How Fixed.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 16, 1938.

HONORABLE W. O. FIFE,
Attorney for the Commonwealth,
Charlottesville, Virginia.

MY DEAR MR. FIFE:
I am in receipt of your letter of May 12, in which you state the following:

"The School Board of Albemarle County has requested an opinion from you as to whether that Board or the Board of County Supervisors should fix teachers' salaries in this county.

"You probably recall that Albemarle county operates under the Executive Form of Organization and Government found in sections 2773(26) to 2773(50), and your attention is respectfully called to section 2773(45), which treats of the schedule of compensation.

"Approximately a year or more ago the two Boards at a joint meeting fixed a schedule of salaries for teachers in the county. There is no friction whatever between the two Boards, yet some members of the School Board feel that some of the items in the scale are too low, and the School Board has requested that I take the matter up with you and secure an opinion from you as to which one of the two Boards has the prerogative in fixing these salaries."

Section 2773(45) of the Code provides as follows:

"The board of county supervisors shall establish a schedule of compensation for officers and employees which shall provide uniform compensation for like service. The compensation prescribed shall be subject to such limitations as may hereafter be made by general law."
However, section 2773(38) provides that:

"* * * Except as herein otherwise 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. * * *"

I think it is reasonably clear that, if the County School Board has authority to fix the salaries of teachers "under general law", then the quoted provision in section 2773(38) overrides the provisions of section 2773(45) so far as the compensation of teachers is concerned.

Section 660 of the Code prescribes the general powers and duties of the School Board in connection with the school laws and states, among other things, that "the school board shall employ teachers and place them in appropriate schools on recommendation of the division superintendent, * * *"

I am informed by the State Board of Education that it has been the practice for many years throughout the State for the School Boards to enter into contracts with teachers and to fix their compensation. While the statutes do not appear to be as specific as they might be, yet, in view of the language of the statutes to which I have referred and the long continued practice, I am of opinion that the better view is that the School Board has the authority to fix the compensation of teachers.

Of course, there should be co-operation between the Board of Supervisors and the School Board in connection with any matter of finance, and I am glad to note that this is the case in Albemarle county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Textbooks—Agents for Distribution of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 20, 1938.

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

MY DEAR MR. WHITEHEAD:
I am in receipt of your letter of April 15, from which I quote as follows:

"By virtue of a recent act enacted by the General Assembly of 1938 the county school board is authorized to distribute the school books throughout the county. The local school board would like to know whether or not they have the authority to employ an agent or agents to distribute these books at the different schools."

The act to which you refer amends sections 619, 620, 621, 622 and 623 of the Code. It contemplates, in section 621, that:

"The local board and the division superintendent shall provide an adequate supply of basal and supplementary textbooks for sale directly to the pupils in each public school building on the first day of each regular school term, or within five days thereafter. A reasonable supply of such basal and supplementary textbooks shall be kept on hand for resale directly to pupils in each consolidated high or elementary school with six or more teachers for a period of not less than ten days from the date of the beginning of the school term, or the date upon which such supply is first provided."

While the sections do not authorize the local school board to employ an agent or agents to distribute these books to the different schools, there is nothing therein
prohibiting such a practice, and, if this practice is deemed by the county school board the most practicable way to handle the matter, if funds are available for the purpose, I know of no reason why it may not be done. Section 623 of the act does, however, provide that no compensation shall be allowed the division superintendent of schools, when acting for the board in the sale and distribution of the books.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Transportation of Pupils—School Board Providing Transportation to Private Schools.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 27, 1938.

Dr. Sidney B. Hall,
Superintendent of Public Instruction,
Richmond, Virginia.

My Dear Dr. Hall:
I am in receipt of your letter of May 25, enclosing one from Mr. Kyle T. Cox, Superintendent of Schools of Grayson County. Mr. Cox desires to know “as to the legality of the school board using public funds to transport children to private schools.”

The authority for school boards to provide for the transportation of children is found in section 656 of the Code, which section is in part as follows:

“The school board shall have authority * * * to provide for the consolidation of schools and for the transportation of pupils whenever such procedure will contribute to the efficiency of the school system * * *.”

In view of the language used, in my opinion, this authority to provide for the transportation of pupils only extends to providing such transportation to public schools. I do not think it could be reasonably said that it would “contribute to the efficiency of the (public) school system” to provide for the transportation of pupils to private schools.

In my opinion, therefore, the school board of the county is not authorized to provide free transportation of children to private schools.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Tuition—Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 23, 1937.

Mr. W. T. R. Morris,
Clerk and Supervisor,
Richmond Public Schools,
Administration Building,
312 North Ninth Street,
Richmond, Virginia.

Dear Sir:
I am in receipt of your letter of September 22, enclosing application filed with the School Board of the city of Richmond, by Manuel Ramos, for the admission without the payment of tuition of his two children, Manuel and Isis Ramos.
It is stated on this application that Mr. Ramos is a permanent resident of Havana, Cuba; that his children have been attending school in Cuba, but that he has brought them to Richmond, Virginia, because this location offers the best opportunities to them for education and culture; that he is in business in Cuba; that at the end of the school term he will return to Richmond and take his children back to Cuba for the summer, and that his wife and the mother of the children will, during the school term, maintain a residence in the city of Richmond at 2025 West Grace Street.

The question is asked as to the right or privilege of the Ramos children to attend the public schools of Richmond without the payment of the tuition required of non-residents.

This office, in a number of cases very similar in character, has expressed the opinion that children who are sent or brought to the public schools of a city for the purpose of obtaining an education are not entitled to attend such schools without the payment of tuition; that the same principle of law applies even though the parents may accompany the children, and that it is only when the stay of the parents is permanent or indefinite, and there is an actual bona fide residence of one or more of the parents, that the children are entitled to enter the public schools free of tuition charges.

Mr. Ramos has been very frank in his statement that he is permanently located in Havana, Cuba; that his children were brought by him to Richmond for the purpose of attending the public schools here, and that at the expiration of the present session he will take them back with him to Cuba.

Under these circumstances, I am of the opinion that the School Board of the city of Richmond has a right to require the payment of tuition for the Ramos children.

I am returning the application which accompanied your letter.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—School Boards—Construction of Community Center.

COMMONWEALTH OF VIRGINIA.

Office of the Attorney General,
RICHMOND, VA., July 6, 1937.

Dr. Sidney B. Hall,
Superintendent Public Instruction,
Richmond, Virginia.

Dear Doctor Hall:

This will acknowledge your letter of July 2, enclosing a letter from Mr. T. D. Foster, Superintendent of Schools for Sussex County. You request the opinion of this office as to the question submitted to you by Mr. Foster's letter.

Mr. Foster states that in February, 1927, the Homeville school in Newville District went out of use as the result of a consolidation of the Newville and Waverly schools; that subsequently the Homeville school building has been destroyed by fire, and that the school board has been requested to apply the insurance funds for the construction of a community center.

I find no authority for the application of school funds by local school boards to any other use than school purposes, and I think it clear that the term "school purposes" cannot be construed to include the construction of a community center.

It is the opinion of this office, therefore, that Mr. Foster's question must be answered in the negative.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS—Liability of School Boards to Pupils and Others Injured on School Premises.

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

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

DEAR DR. HALL:

I have your letter of August 6, enclosing the inquiry of Mr. Leslie D. Kline, Superintendent of Schools, Division of Frederick County, Winchester, Virginia. Mr. Kline requests my opinion concerning the liability of county school boards as such and the personal liability of individual members of said boards for injuries to pupils and other individuals while on the school premises.

1. As to the liability of the board for injuries to pupils, this office has consistently followed the statement found in 9 A. L. R. 911, to the effect that:

   "The general rule in this country is that a school district, municipal corporation, or school board is not, in the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation, or board, in maintaining schools, acts as an agent of the state, and performs a purely public or governmental duty, imposed upon it by law for the benefit of the public, and for the performance of which it receives no profit or advantage."

   See also: 14 A. L. R. 1392;
   21 A. L. R. 1328;
   24 A. L. R. 1070;
   56 A. L. R. 164;
   66 A. L. R. 1282;
   Maia v. Eastern State Hospital, 97 Va. 507,
   34 S. E. 617 (1899).

2. It appears to me that the board is not liable for injuries occurring to individuals, other than pupils, while attending school functions. It has been said:

   "In harmony with the doctrine of the cases cited in the annotation just referred to, which denies liability for injury to a pupil, it is established that ordinarily a school board, school district, or municipal corporation operating a school is not, in the absence of statute, liable to one other than a pupil for personal injuries sustained on account of the condition of the school premises, since, in maintaining such school, it exercises a public function as an agent of the state, from which it receives no benefit or profit. * * *" (40 A. L. R. 1091.)

3. It seems that the board members are not individually liable to pupils and other individuals for torts resulting from the negligent performance of their duties to the public as members of the school board. In Antin v. Union High School District, et al., 280 Pac. (Ore.) 664, 66 A. L. R. 1271, it was held:

   "* * * it is clear that a public officer is immune from liability for the misfeasances or nonfeasances of persons properly employed by him in the discharge of his official duties. A public officer, however, is responsible to a private party for his own negligence or wrongful acts when acting beyond the scope of his authority, or when acting within the scope of his authority, if the wrong done is not a violation of a duty which he owes solely to the
public. If the duty is solely a duty which the officer owes to the public, then the officer is not subject to the suit of a private party, even though it has resulted in injury to such party. But if the duty is one which the officer owes both to the public and to a private individual, and the private individual is injuriously affected specially, and not as a member of the public, then for such violation the injured party may sue for the wrong done. But, in so far as a public officer executes the authority or performs the functions of government, the exemption of the state for wrong applies to him. * * *" (66 A. L. R. 1271, 1280.)

I might add here that it has been held that a school is within the purview of the Virginia Workmen's Compensation Act and must have insurance, or provide for self-insurance, for injuries that might occur to its employees while acting within the scope of their employment.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local School Boards—Tort Liability and Liability Insurance for Busses.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 16, 1937.

DR. SIDNEY B. HALL,
Superintendent of Public Instruction,
Richmond, Virginia.

DEAR DR. HALL:

This is in reply to your letter of the 14th instant, in which you request my opinion upon certain questions presented to you in a letter dated October 13, 1937, from Mr. H. V. White, Superintendent of the Nansemond County Schools.

This letter relates to the question of liability for injuries and damages resulting from negligent operation of school busses with a view to determining whether or not it is wise for the county school board to carry liability insurance.

The first question which is asked is whether the driver of the bus is liable in the event that, due to his negligence, damages are inflicted upon the person or property of another. In my opinion there is no question about the fact that the driver is personally liable for his own negligence.

The second and third questions are whether or not the school board and superintendent are individually liable.

This office has had occasion repeatedly to give opinions upon this question and has held that there is no personal liability upon any member of the school board or upon the superintendent by reason of any negligence of the driver of a school bus.

If the board of supervisors desires to protect the general public, the insurance company may issue a special policy agreeing that suit shall not be defended on the ground that the damages are inflicted by a governmental agency. These policies usually also protect the driver and the general public in the event injury is sustained through the negligence of the driver in such a manner as to make the driver legally liable.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SEARCH WARRANTS—Life of; Justices of the Peace—Jurisdiction—Issuing Warrants in Detinue.
Id.—Id.—Admitting Prisoners to Bail.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 14, 1938.

MR. W. R. MARSHALL,
Justice of the Peace,
Saltville, Virginia.

My Dear Mr. Marshall: I am in receipt of your letter of April 9.
You first inquire how long a search warrant is "alive," that is to say, the limit of time a search warrant can be held without being executed.
There is no statute prescribing the specific time within which a search warrant must be executed. However, from the very nature of the warrant, namely, that it is usually issued for the purpose of finding a definite thing in a definite place and at a certain time, I am of opinion that, generally speaking, it should be executed promptly after coming into the officer's hands.
You next ask if a justice of the peace may issue a warrant in detinue. I am of opinion that the statute dealing with this process (section 5797 of the Code) contemplates that such a warrant shall be issued by the court or justice before whom the action is pending. Inasmuch as a justice of the peace no longer has any authority to try the action, I am of opinion that he might not issue a warrant in detinue.
Your last inquiry is whether the power of a justice of the peace to admit to bail is limited to cases of misdemeanor. I refer you to section 4828 of the Code, which provides that a justice may admit to bail in case of a misdemeanor and where "only a light suspicion of guilt falls on him" (the defendant) the justice of the peace may admit to bail in case of a felony. I believe that after a reading of the section referred to your authority will be clear to you.

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

SHENANDOAH PARK AREA—Jurisdiction Over.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 6, 1938.

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

Dear Governor Peery: I have before me your letter of January 5, in which you request my opinion upon the question whether or not, under the provisions of section 585(58) of the Virginia Code (Michie 1930), the United States has taken criminal and civil jurisdiction over lands embraced in the Shenandoah National Park area. You will probably recall that under date of December 2, 1937, you received a letter from Charles West, Acting Secretary of the Interior, advising you that, pursuant to authority conferred upon it by the acts of Congress therein referred to, the Department of the Interior had accepted the deeds tendered by the State of Virginia, Nos. 1 and 8 inclusive, conveying certain lands to the United States for the Shenandoah National Park.
In the letter to you, Acting Secretary West also states that the act of Congress approved August 19, 1937, directs him to give notice to the State of Virginia through its Governor that the United States assumes police jurisdiction over the lands lying in the State of Virginia and included within the Shenandoah National Park, which have been conveyed and ceded to them by authority of the
REPORT OF THE ATTORNEY GENERAL

Virginia Act of March 28, 1928; which notice of assumption of police jurisdiction Secretary West thereupon proceeds to give to you as Governor.

On December 3, you, as Governor, acknowledged receipt of said letter. It is my opinion that, under the provisions of the Virginia statute referred to above, the jurisdiction which was ceded by said statute to the United States, together with the reservations therein made to the State of Virginia, became effective on the 3rd day of December, 1937, upon receipt of said letter from Acting Secretary West by you as Governor.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation—Fee from Commonwealth Where Defendant Acquitted or Insolvent.

Special County Officers—Id.

COMMONWEALTH OF VIRGINIA,
OffICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 27, 1937.

MR. L. C. ANCELL, Deputy Clerk,
Circuit Court of Norfolk County,
Portsmouth, Virginia.

My Dear Mr. Anzell:

Your letter of September 20 has been received. Your inquiry is as follows:

"Would appreciate it if you would give me your opinion of Section 3504 (or any section) of the Code of Virginia as to whether the Sheriff of Norfolk County, or the Special Police Officers of said County who are paid a monthly salary by the County, are entitled to bill the Commonwealth for services rendered before the Trial Justice Court, such as making arrests, mileage, etc., where the defendant is acquitted, or committed to jail, where costs are not recovered from the defendant."

The sheriff of a county is, in my opinion, entitled to the regular fees provided by law for services rendered by him in making arrests, mileage, etc., where the prosecution is before the Trial Justice Court, these fees being payable by the Commonwealth where the defendant is acquitted, or, if convicted, where the costs are not recovered from the defendant. See sections 3504, 3508 and 4961 of the Code.

Special police officers paid a regular salary by the county do not receive any fees for services rendered in a criminal case from the State. See section 3511 of the Code.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Compensation—Mileage Fee in Criminal Cases; also, Special County Police.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., November 3, 1937.

HONORABLE W. FRANCIS BINFORD, Sec. & Treas.,
Association of Trial Justices of Virginia,
Prince George, Virginia.

My Dear Mr. Binford:

I am in receipt of your letter of November 1, in which you inquire whether a sheriff or a deputy is entitled to mileage when he is directed by a justice of the
REPORT OF THE ATTORNEY GENERAL

peace or trial justice to go to a distant part of his county and make an arrest and transport a defendant to jail, and if the amount of the mileage, if any, should be taxed as a part of the costs.

You state that there are two conflicting statutes, one providing a mileage of 5 cents and another providing a mileage of 8 cents. The two conflicting statutes to which you refer are, of course, sections 3487 and 3508 of the Code. This office, however, has ruled a number of times over the last few years that the section applicable in a criminal case is section 3508, the allowance for mileage in that section being 8 cents per mile. Section 3487 seems to deal primarily with civil cases.

You also desire an opinion as to whether mileage should be taxed for the benefit of the county where the officer is a salaried county police officer, the said mileage being paid into the county treasury when paid by the defendant.

Please note that section 3508 of the Code only applies to a sheriff, sergeant, coroner, crier, or constable. I am of opinion that under that section no provision is made for mileage for a special county police officer who is paid a salary. The last Act of Assembly amending the Code (Acts 1918, page 627) makes it plain that this section (3508) only applies to a sheriff, sergeant, coroner, crier, or constable. I assume, of course, that you refer to a special county police officer appointed under authority of section 4797 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 26, 1937.

HONORABLE CHARLES C. CURTIS, Sheriff,
Hampton, Virginia.

DEAR MR. CURTIS:

This is in reply to your letter of November 24, in which you enclose a copy of a paper which notifies the defendant in a divorce suit of two separate and distinct matters: first, that on the day named a petition will be filed in court for the enlargement of a mensa et thoro divorce decree to an absolute divorce; and, second, that on the day named depositions will be taken in support of said petition. You request my opinion as to whether one fee or two fees should be paid to the sheriff for the service of such a paper.

Inasmuch as the work of the sheriff is confined to delivering one paper and making his return upon only one, I am of the opinion that only one fee for serving same can be charged.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Fees—Serving Process—Certain Counties.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 12, 1938.

HONORABLE M. W. PULLER, Clerk,
Circuit Court of Henrico County,
Richmond, Virginia.

MY DEAR MR. PULLER:

I am in receipt of your letter of May 10, in which you inquire as to the proper fees to be allowed the Sheriff of Henrico County under section 3487 of the Code for service of process in civil cases.
Section 3487 of the Code provides in the second paragraph that a sheriff for this service is entitled to a fee of 75 cents except where the process is directed to more than three defendants or witnesses, in which case a fee of 50 cents is allowed for each additional defendant or witness in excess of three.

I am of opinion that the Sheriff of Henrico County is entitled to the fees as above indicated. I am further of the opinion that the exception in the statute for cities with a population of 170,000 or more is applicable to the officers of those cities and not to the officer of any county who may have jurisdiction to serve process in that city.

The same reasoning applies to the third paragraph of section 3487. In other words, I am of opinion that the exception in that paragraph of cities having a population of 170,000 or more applies only to officers in such cities.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Mileage—Transporting Prisoner from Outside County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
HONORABLE ALTON I. CROWELL, RICHMOND, VA., APRIL 4, 1938.

My dear Mr. Crowell:

I am in receipt of your letter of March 28, in which you refer to an account allowed by the Circuit Court of Pulaski County to the deputy sheriff for transporting a prisoner to jail from beyond the limits of the county.

Section 3508 of the Code provides that a sheriff shall be allowed “for carrying a prisoner to jail under order of a justice, for each mile traveled of himself in going and returning, eight cents; for each mile traveled of the prisoner in carrying him to jail where the distance is over ten miles, eight cents; * * *.” This provision means that within his county a sheriff is allowed his own mileage both going and returning and the mileage of the prisoner from the point where the prisoner is taken to the jail. In other words, the sheriff is allowed his own mileage both ways and the prisoner’s mileage one way.

Section 4960 provides for an allowance by the Judge of a court to an officer for services in certain cases where no other compensation is provided, and in the case you present this is in the section under which the mileage is allowed. The section has this proviso:

“Provided, however, that the amount of compensation to officers for execution of process, outside of the respective counties of such officers, shall not exceed the fees or allowances now provided by law for the execution of process without a county including the provision for the allowance of mileage for officers and prisoners within a county; and, provided further, that not more than eight cents per mile shall be allowed for officers using automobiles for travel, irrespective of the number of guards or prisoners conveyed in automobiles.”

It seems reasonably clear and I am of opinion that, when this proviso is read with section 3508, its effect is that the sheriff shall be allowed his own mileage both going and returning, and that of the prisoner one way, the amount allowed not to exceed eight cents per mile, and also that, no matter how many officers or prisoners are in the automobile, the sheriff is entitled only to his own mileage and the mileage for one prisoner.

It has been suggested that the proviso which I have quoted means that the sheriff shall be allowed only his own mileage where he goes out of his county and no mileage for the transportation of the prisoner. If this view be correct, we have the rather illogical result that, when the sheriff takes a prisoner in his county, he will get mileage for him. But, if he has to go outside of his county, he will
not get any mileage for him. I do not think this is a reasonable construction of the proviso, and am of the opinion that it should be construed as I have indicated.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

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STATE COLLEGES—Athletic Associations—Surplus Funds of—Reversion to State Treasury.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 4, 1937.

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

DEAR MR. DOWNS:

This is in reply to your letter of December 3, in which you request my opinion upon the question whether any funds which may remain in the hands of the Virginia Military Institute Athletic Association at the end of the biennium would revert to the general treasury of the State.

The status of this Athletic Association is dealt with in an opinion of this office rendered by Colonel Saunders in January, 1929, approving the payment out of the treasury to the Athletic Association the sum of $10 for each cadet enrolled in the Institute. That opinion was based upon a letter from General W. H. Cocke, Superintendent of V. M. I., dated January 4, 1929, in which he sets forth clearly the status of the Athletic Association. He states that the Association is a separate organization from the Institute and is not operated by the Institute, nor is the Institute liable for any of its assumed obligations. He states further that the Institute has an agreement with the Association that it will admit cadets to all athletic contests during the year for an annual charge of $10 per cadet. Under this contract this office rendered an opinion, as above stated, that it was proper to pay this money to the Association. Of course, this money is paid as an obligation of the Institute for which it receives in return the admission of the cadets to all athletic contests. The Institute charges a fee of $10 to each cadet to reimburse the Institute for this outlay.

It is my opinion, therefore, that since the Athletic Association is not a part of the Institute, it is in no sense a State agency, but is a voluntary association of individuals, separate and apart from the Institute. The funds which it receives are not appropriated to the Association by the State, but are acquired from admission charges to games, among which is included the $10 paid by each cadet. The funds of the Association, therefore, are not in any sense public money, and any amount on hand at the end of the biennium will not revert to the State treasury.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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STATE COLLEGES—Student Loan Fund—Disbursements from for Collections.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 17, 1938.

MR. EDGAR E. WOODWARD, Treasurer,
State Teachers College,
Fredericksburg, Virginia.

MY DEAR MR. WOODWARD:

This is in reply to your letter of January 13, in which you request my opinion upon whether or not it is permissible for the State Teachers College to pay the
costs of collection of notes, evidencing loans made to students out of the Student Loan Fund of the College, out of the money collected by the collection agency. I have given a great deal of thought to this matter and have talked it over with Mr Bradford, Director of the Budget, and we have reached the conclusion that the provision in the statute prohibiting depletion of the Student Loan Fund is intended to prevent the use of this fund for other purposes of the College, and that the costs of collection of notes may be paid out of the Fund.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—Tuition—Prohibiting Remission of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 4, 1938.

MAJOR-GENERAL C. E. KILBOURNE, Superintendent,
Virginia Military Institute,
Lexington, Virginia

DEAR GENERAL KILBOURNE:
I am in receipt of your letter of May 27, the first paragraph of which reads as follows:

"In a summary of bills passing both branches of the General Assembly, the Superintendent of Public Instruction described the bill as one: ‘To prevent state institutions from refunding tuition to out of state students.’ This I interpreted as covering the refund of part tuition to out-of-state cadets who leave the Institute prior to the close of the session."

You request my opinion as to the correctness of this interpretation. This Act to which you refer is chapter 243 of the Acts of 1938 (Acts 1938, page 382), and I quote below the complete Act:

"Be it enacted by the General Assembly of Virginia, That any and all State owned and State supported institutions of higher learning be, and they are hereby, prohibited from awarding tuition remission scholarships to students coming from any State other than Virginia."

As you will see, this Act has nothing to do with the refunding of tuition paid by out of State cadets who may leave the Institute prior to the close of the session.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—Tuition—“Resident”—“Citizen”.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 5, 1937.

MR. EDGAR E. WOODWARD, Treasurer,
State Teachers College,
Fredericksburg, Virginia.

DEAR MR. WOODWARD:
Pardon my not having replied sooner to your letter of July 22, in which you request my opinion in reference to the privileges of residents or citizens of Virginia to reduced tuition charges and other privileges accorded by law to such residents or citizens in your college as applicable to the status of Mr. Karl H. Stutzman.
You state that Mr. Stutzman's home is in Williamsport, Pennsylvania, but that for the past four years he has been teaching and living in Virginia, and that he has made application for admission to your college as a Virginia student, although he maintains his legal residence in Pennsylvania.

You seem to be of the opinion that Mr. Stutzman's status does not comply with the statute of Virginia relative to citizenship, and you ask my opinion as to whether he is chargeable with tuition under the laws of this State.

The law to which you refer is evidently chapter 331 of the Acts of 1936, found on page 535. That Act provides:

"* * * no person shall be entitled to the admission privileges, or the reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia, in the State Universities, Colleges and other institutions of higher learning unless such person has been a bona fide citizen or resident of Virginia for a period of at least one year prior to admission to said institution, provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

Taking your question to have reference to the law and as excluding any and all regulations adopted by the board of your college, I am of the opinion that Mr. Stutzman is entitled, under the facts given in your letter, to the privileges accorded by law to other residents of Virginia. I do not think that the fact that he maintains a legal residence in Pennsylvania is an obstacle to the granting of such privileges. Your statement that Mr. Stutzman has been teaching and living in Virginia for the past four years makes him a resident within the meaning of the Act of the General Assembly of Virginia, to which I have referred.

I may add that my opinion is strengthened because of the definition of the word "resident" in section 23 of the Tax Code of Virginia, 1934, in which it is said that the word "resident", for the purpose of taxing a person's income, applies to every "person who, for more than six months of the taxable year, maintained his place of abode within this State, whether domiciled in this State or not."

It would thus seem that Mr. Stutzman's income is, by law, taxable in Virginia because of his abode in this State, and that this is so without reference to whether or not he is, by legal fiction, domiciled in Pennsylvania.

Yours very truly,

EDWIN H. GIBSON,
Assistant Attorney General.
I call your attention to chapter 331 of the Acts of 1936 (Acts 1936, page 535), which reads as follows:

"Be it enacted by the General Assembly of Virginia, That no person shall be entitled to the admission privileges, or the reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia, in the State Universities, Colleges and other institutions of higher learning unless such person has been a bona fide citizen or resident of Virginia for a period of at least one year prior to admission to said institution, provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

and particularly to the last clause of the Act, which is in these words:

"provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

You can see from the quoted language that, even if it were proper for this office to comply with Mr. Duke's suggestion, absolute uniformity could not be maintained, for, after the minimum requirements are met, the boards of the various State institutions have authority to set up additional requirements, the exercise of this authority being within the discretion of these boards.

The only specific question that Mr. Duke raises is the status of children of persons stationed on military reservations in this State. On this question this office has already ruled, the effect of the ruling being that, under our Constitution and statutes, particularly the one to which I have above referred, the mere fact that an individual is the child of an officer in the U. S. Army or Navy, or of a soldier or sailor stationed on a military reservation does not of itself entitle such a person to be admitted to the State institutions of higher learning as a State student.

Of course, a soldier or a sailor may be a bona fide resident of Virginia and thus meet the requirements of the statute to which I refer. If this is the case, the children of such a person stationed on a military reservation may be admitted as State students, but the ruling of this office to which I have referred relates to the case where the only claim for admission is that the father or mother of the child is stationed on a military reservation.

Where the claim is made that a person is entitled to be admitted as a State student because his or her parents are actually residents of Virginia, in addition to being stationed on a military reservation, then the merits of this claim will have to be determined by the facts in each particular case. The question of actual residence is primarily one of fact and cannot be determined in any particular case except upon a consideration of the facts.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES—Tuition—Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 3, 1937.

Mr. H. K. Gibbons, Business Manager,
The State Teachers College,
Harrisonburg, Virginia.

My Dear Mr. Gibbons:

I am in receipt of your letter of November 2, in which you inquire if a prospective student of The State Teachers College at Harrisonburg, who is a minor and whose parents are residents of the District of Columbia, is entitled to free tuition.
Section 1003-1 (a) of the Code (Michie's, 1936; Acts 1936, page 535) provides in effect that no person shall be entitled to admission privileges, or reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia in the State colleges, unless such person has been a bona fide citizen or resident of Virginia for a period of at least one year.

Under this section, I am of opinion, from the fact stated in your letter, that the prospective student is not entitled to free tuition.

Yours very truly,

ABRAM P. STAPLES,
Attorney General,

STATE COLLEGES—V. M. I.—Excluding Trespassers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 7, 1938.

GENERAL C. E. KILBOURNE, Superintendent,
Virginia Military Institute,
Lexington, Virginia.

DEAR GENERAL KILBOURNE:

In your letter of March 2, you ask if there is any statute under which the superintendent of the Virginia Military Institute would be authorized to remove from the Institute grounds any person acting in a manner detrimental to good order, and proceed against such person for trespass if he refused to obey the order given.

There is no special statute of Virginia dealing with military reservations similar to the Federal law to which you referred in your letter. However, the situation would be covered by section 4480a of the Virginia Code, which is of general application. This section provides:

“If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge or possession of such land, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than twenty-five dollars.

Under this statute, in view of the fact that the Legislature has imposed upon the authorities of the Institute the duty of preserving the grounds and properties of the Institute and of the fact that the Military Corps under the command of the superintendent is constituted the guard of the Institute, the superintendent would, in my opinion, have ample authority in the premises.

Yours very truly,

ABRAM P. STAPLES,
Attorney General,

STATE FUNDS—Deposits—Collateral—PWA Bonds of Colleges.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., AUGUST 19, 1937.

HONORABLE A. B. GATHRIGHT,
Treasurer of Virginia,
Richmond, Virginia.

DEAR MR. GATHRIGHT:

This will acknowledge your letter of August 14, requesting the opinion of this office as to whether bonds issued by educational institutions of the Commonwealth
under authority of the National Industrial Recovery Act and Chapter 49, Acts of Extra Session 1933, may be accepted as collateral security for deposits of State funds.

As you point out in your letter, section 12 of chapter 49, Acts of Extra Session 1933, provides as follows:

"Any bonds issued pursuant to the authority of this act are hereby made securities in which all public officers and bodies of this State and all political sub-divisions thereof, all insurance companies and associations, all savings banks and savings institutions, including savings and loan associations, in the State may properly and legally invest funds in their control."

Section 2158 of the Virginia Code (Michie 1936), dealing specifically with the deposit of State funds, provides that any State depositary must either post a commercial surety company's bond, or deposit with the treasurer "registered or coupon bonds of the State of Virginia or State highway certificates, registered or coupon bonds of any municipality, county or sub-division thereof, of the Commonwealth of Virginia, issued in compliance with the statutes authorizing same," or certain other bonds of the Federal government or its agencies.

Since the bonds issued under chapter 49 of the Acts of the Extra Session of 1933 are revenue bonds, payable only out of revenues of the projects being financed, they are clearly not within the classes described in Code section 2158.

Section 12 of the Acts of 1933, authorizing public officers of the State to invest in the bonds issued by the colleges under that act, might possibly be construed to authorize the acceptance of such bonds as collateral if no more specific provision on the subject had been made. In view, however, of the fact that section 2158 expressly deals with the nature of the collateral to be accepted, and definitely excludes such bonds as were issued under the act of 1933, I concur in your opinion that these bonds are not legally acceptable collateral for State deposits.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

STATE INSTITUTIONS—Liability for Negligence of Employees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 26, 1938.

Dr. W. T. SANGER, President,
Medical College of Virginia,
Richmond, Virginia.

Dear Dr. Sanger:

This is in reply to your inquiry concerning the liability of the Medical College of Virginia, its officers and agents for injuries to patients in the Memorial Hospital resulting from negligence of the officers and employees of the Hospital.

The corporation itself, since it is a public corporation governed and controlled by the State and acting exclusively as an agency of the State, is not liable in damages for a personal injury inflicted on one of its inmates in consequence of the negligence or misconduct of the persons administering the powers of the corporation or their agents or employees. Of course, the individual officers and agents would be personally liable if the injury resulted from their personal negligence. Any particular officer would not be liable for the misconduct, negligence or omissions of their official subordinates unless such officer failed to exercise proper and reasonable care in the choice of such subordinates or in the superintendence of them in the discharge of their allotted duties.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Automobile Licenses—Trucks Used by Water Freight Company for Making Free Deliveries.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 24, 1938.

HON. DANIEL WEYMOUTH,
Attorney for the Commonwealth,
Heathsville, Virginia.

MY DEAR MR. WEYMOUTH:
I have your letter of May 18, requesting my opinion relative to the proper automobile license tax to be assessed upon delivery trucks owned and operated by a Virginia corporation in making deliveries of freight received at its wharf and in picking up freight for shipment from the same point. I notice you state that this corporation owns and operates a boat line between a point in Northumberland county, Virginia, and Baltimore, Maryland, and that their rates are based entirely upon the transportation service furnished between two points and no extra charge is made for the delivery service or for gathering the freight for shipment.

Under the facts it appears that no compensation is either required or accepted for this extra service, the same being entirely gratuitous for the apparent purpose of building up trade. Therefore, it would appear to follow that the usual private license tax as at present assessed is proper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Collection—Delinquent Tax Collectors for Counties.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 14, 1938.

HON. S. W. LACY, Clerk,
New Kent, Virginia.

MY DEAR MR. LACY:
I am in receipt of your letter of January 5, in which you ask if the board of supervisors has the power to appoint a collector of local delinquent personal property taxes, including those taxes mentioned in list No. 3 as set out in section 387 of the Tax Code, such taxes being on tangible personal property, machinery and tools, merchants' capital, and taxes on other subjects segregated for local taxation exclusively except real estate.

I am of opinion that, under the third paragraph of section 394 of the Tax Code, the board of supervisors has the authority to make this appointment and to provide for compensation for doing this work "upon such terms as may be agreed upon." I am further of the opinion that, under the language of the section, the sheriff of the county may be appointed as such delinquent tax collector, and that he may be paid such compensation "as may be agreed upon."

I have not heard of the ruling of the court to which you refer. However, if, pursuant to the provisions of section 394 of the Code, at the end of the third year the board of supervisors has taken over the delinquent list No. 3, including the tax tickets, I am of opinion that, in order for payments of the taxes appearing thereon to be made, there should be a delinquent tax collector appointed to receive such taxes.

In reply to the last paragraph of your letter, I know of no statute prescribing any limitation on the time within which local personal property taxes which have been properly assessed may be collected.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 31, 1938.

HONORABLE O. B. WATSON,
Treasurer of Orange County,
Orange, Virginia.

My Dear Mr. Watson:

The State Comptroller has asked me to reply to your letter of January 27, in which you ask if it would be possible for him to allow a commission for the collection of the State's portion of delinquent real estate taxes. You state that it is your purpose to have an attorney employed to collect these taxes, including delinquent local real estate taxes.

In view of the fact that by section 405a of the Tax Code the State's portion of all delinquent taxes on real estate and tangible personal property has been refunded to the localities, I am of the opinion that it would not be proper for the Comptroller to allow any commission to be paid out of the treasury for the collection of such taxes. In reality the State no longer has any pecuniary interest in these taxes, as all of them eventually go to the localities. I should think, therefore, that in fixing the compensation for the collection of taxes any particular locality could take into consideration the fact that the State taxes, if collected, would eventually go into the local treasury. Mr. Combs states that, so far as you need any authority from the Comptroller to bring these suits, he will be glad to give it to you.

I do not understand that you are asking for an opinion as to whether these taxes could be collected by a delinquent tax collector. However, this office has recently had occasion to express an opinion on the authority of a county to appoint a delinquent tax collector, from which I quote as follows:

"Upon such examination of the statutes as I have been able to make, I have found no statute giving authority to a county to appoint a delinquent tax collector for the collection of taxes on land which has been heretofore sold for delinquent taxes.

"As you know, section 403 of the Code provides for suits to be brought for the collection of delinquent taxes. However, this section plainly contemplates that the suits shall be instituted and conducted by the attorney for the Commonwealth upon request of the treasurer of the county, or certain other designated officials. It seems to me that, if it is desirable that these suits be brought by some other person designated by the board of supervisors or other officials of the locality, then legislative action is necessary to accomplish this purpose."

I bring this matter to your attention at this time with the thought that possibly you would want to look into the question of the desirability of legislative action.

Yours very truly

ABRAM P. STAPLES,
Attorney General.

TAXATION—Employment of Commonwealth's Attorney by County for.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 28, 1938.

HONORABLE EMMORE L. CARLTON,
Commonwealth's Attorney,
Tappahannock, Virginia.

Dear Mr. Carlton:

I am in receipt of your letter of June 24, in which you ask if, under section 403 of the Tax Code of Virginia as amended in 1938 (Acts 1938, page 157), the
board of supervisors may employ the attorney for the Commonwealth to bring suits for the collection of local delinquent taxes on real estate.

The amended section provides that suits may be brought by such attorney as the board may employ for the purpose, and I know of no reason why the Commonwealth's Attorney may not be employed to do this work.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Computation of Interest and Penalties—Time from Which Computation Made.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 15, 1937.

Mr. V. W. Nichols, Clerk,
Bedford, Virginia.

My Dear Mr. Nichols:

I am in receipt of your letter of December 13, in which you refer to section 372 of the Tax Code as amended in 1936. You call attention to the following provision of the section:

"Interest at the rate of six per cent per annum from the 30th day of June of the year next following the assessment year shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid, which penalty and interest shall be collected and accounted for by the officers charged with the duty of collecting such taxes or levies, along with the principal sum thereof."

You ask for what tax year you should begin to calculate interest from the 30th day of June instead of from the 15th thereof.

I am informed that the Auditor of Public Accounts is advising various treasurers of the State that the change in the calculation of interest is first effective for the tax assessment year 1935 and that this administrative ruling has been acquiesced in and acted upon by the officers involved. In my opinion the act is susceptible of the construction placed upon it by the Auditor of Public Accounts and I, therefore, concur therein.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Corporate Franchise Tax and Registration Fee—Exemptions—Virginia Rural Rehabilitation Corporation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 11, 1938.

Hon. William R. Shands, Director,
Bureau of Statutory Research and Drafting,
Capitol Building,
Richmond, Virginia.

My Dear Mr. Shands:

I am in receipt of a copy of your letter of April 5 to Mr. Robert Wright Strange, Regional Attorney, United States Department of Agriculture, and two letters from Mr. Strange under date of March 15 and April 2, in which he asks for a ruling as to whether the Virginia Rural Rehabilitation Corporation is subject
to the registration fee and franchise tax imposed by the laws of Virginia on a corporation organized under its laws.

It seems that this is a corporation chartered under the laws of Virginia, which has received a bill covering a franchise tax amounting to $10 and registration fee amounting to $5 for the year 1938. The taxes in question are imposed for the privilege of being a corporation in Virginia. From the facts stated to me by you, I think it probably could be satisfactorily shown that the Virginia Rural Rehabilitation Corporation is a State agency. The taxes in question are imposed by sections 210 and 211 of the Tax Code of Virginia. A reading of these sections will disclose that there is no exemption afforded therein for such a corporation.

It is quite possible that, if a proper proceeding were instituted before the State Corporation Commission under section 408 of the Tax Code of Virginia, that body might hold that, being a State agency, it was not the intention of the sections to impose these taxes thereon, but, on the other hand, the Commission might hold that, on account of the nature of the tax and there being no exemption afforded by the statutes, they were properly assessed. Certainly the Commission cannot relieve the corporation from taxes unless a proper proceeding is commenced under section 408.

In view of the doubt existing and the very small amount involved and the fact that you have told me that the corporation has funds in hand with which to pay the taxes, my suggestion is that they be paid. However, if after further consideration Mr. Strange thinks it best to have the liability of the corporation to these taxes adjudicated, then my suggestion is that a proceeding be instituted as I have indicated.

The enclosures contained in your letter are herewith returned.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Liens for Delinquent Taxes—Release.

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

HONORABLE E. R. COMBS,
STATE COMPTROLLER,
RICHMOND, VIRGINIA.

MY DEAR MR. COMBS:

I am in receipt of your letter of December 10, enclosing correspondence between Mr. T. E. Didlake of Manassas and yourself, relative to two certain judgments obtained in Prince William County in 1887 in favor of the Commonwealth of Virginia against W. N. Berkeley, Trustee of N. L. Berkeley. You state that records in your office disclose that these judgments were obtained for taxes on real estate. You desire my opinion as to whether the liens of same have been released by section 282 of the Tax Code of Virginia.

The first sentence of section 282 reads as follows:

"All liens upon real estate for taxes and levies due and payable to the Commonwealth or any political subdivision thereof prior to the tenth day of July, nineteen hundred and two, are hereby released."

Inasmuch as the judgments were obtained in 1887, the taxes whereof of course due and payable prior to the 10th day of July, 1902. In my opinion the liens acquired by virtue of the aforesaid judgments are included in the statutory provision covering "all liens" and are therefore released.

I am returning the correspondence which you enclosed in your letter. In my opinion it would be proper for the clerk of the court to make an endorsement upon the margin of the judgment lien docket as to the conclusions set forth in this letter.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Merchants' License Taxes—Merchant Operating Wholesale House and Retail Stores.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 20, 1938.

HONORABLE JAMES H. PRICE,
Governor of Virginia,
Richmond, Virginia.

DEAR GOVERNOR PRICE:

I have before me the letter which you just sent to this office from Mr. P. G. Longest of Biscoe, Virginia, from which it appears that he is dissatisfied with the license taxes which have been assessed against him by the State Department of Taxation. It seems that Mr. Longest operates two retail grocery stores and a wholesale grocery store. He also uses his wholesale grocery store as a distributing house through which he distributes merchandise to his retail stores.

Section 188 of the Tax Code provides for the assessment of a State wholesale merchants' license tax based on the amount of purchases. A merchant paying this license tax is entitled to the privilege of selling at wholesale to other retail merchants for resale only. This same section of the Tax Code contains the following provision:

“For every distributing house or place in this State (other than the house or place of manufacture) operated by any person, firm or corporation engaged in the business of a merchant in this State, for the purpose of distributing goods, wares and merchandise among his or its retail stores, a separate license shall be required, and the goods, wares and merchandise distributed through such distributing house or place shall be regarded as purchases for the purpose of measuring the license tax, which tax shall be the same as the license tax imposed hereby on a wholesale merchant.”

Mr. Longest seems to feel that his wholesale license should permit him to distribute merchandise through his wholesale house to his retail house and treat the same as a sale under his wholesale license. It is very clear, however, that the law does not recognize the possibility of a person selling to himself, and that, if he operates two retail stores and uses the building in which he conducts his wholesale business also as a distributing house for such retail stores, this clearly comes within the provision above quoted. If he operates only one retail store, however, he does not operate a distributing house within the meaning of the statute, for the reason that the statute uses the words “distributing goods, ware and merchandise among his or its retail stores”. The word stores being in the plural would not cover a single retail store.

Of course, the merchandise distributed by Mr. Longest to his retail store would not be considered as purchases under the wholesale license, and his wholesale license tax would be based solely on the value of the goods purchased and resold to retailers.

The original purposes of this tax, as you no doubt remember, were to impose upon chain stores who do not buy through wholesalers, but operate their own distributing plants, a tax which would equalize the tax burden on the goods after they reached the retail stores of the chain store with the burden borne by goods in the retail stores of the independent merchant. The case presented by Mr. Longest seems to be a hard one, but nearly every law which has a good purpose results in some hardships which seem to be unavoidable.

Mr. Longest states that R. H. Norris and Son of Kilmarnock, Virginia, have a setup similar to his. I am advised by the State Department of Taxation, however, that R. H. Norris and Son have only one retail store and, therefore, do not come within the provisions of the above quoted language of the Tax Code imposing the tax upon a distributing house. Such an establishment is not deemed to be a distributing house unless it distributes to at least two retail stores.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Real Estate—New Assessment by Commissioner of Revenue Upon Subdivision of Farmlands.  
Id.—Personal Property Where Security Title Held by Nonresident.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., APRIL 20, 1938.

HON. S. A. ELLIS,  
Commissioner of the Revenue,  
Gate City, Virginia.

MY DEAR MR. ELLIS:  
I am in receipt of your letter of April 19, in which you ask two questions.  
Your first question is as follows:

"There are people in this county who are dividing land that was formerly used for agricultural purposes into twenty-five foot lots and selling them as such, solely for the purpose of building. Is it my duty to reassess this land as lots, if the valuation stands as it is, as so much an acre, each lot will carry a valuation of less than one dollar."

Under the law as it exists now (see section 265 of the Tax Code), you should assess the value of each lot, but the total assessed value of the lots in the subdivision may not be greater than the value at which the whole tract is at present assessed. However, I may say that the last General Assembly added a new section to the Tax Code, which is section 265a. The new section in effect provides that you may assess the various lots at the fair market value of each, "without regard to the value at which such tract of land was assessed as acreage, but with regard to other assessments of lots in such county or city, and such assessment shall stand until the next general reassessment of real estate in such county or city." However, the amended section does not carry an emergency clause and will not be effective, therefore, until June 21 of this year.

Your second question is as follows:

"Another matter I would like to have your advice upon is concerning cars that are not paid for. Naturally the payments are in the hands of a finance company. There are a great many of my taxpayers who seem to think that, because of the finance company being in Tennessee, they should not have to give in their cars in the State of Virginia."

I presume you are referring to the assessment of these automobiles as tangible property and that the automobiles are in Virginia. The fact that the finance company making the loan is in Tennessee has no bearing on the assessment of the cars in Virginia as tangible personal property, and the cars should be assessed by you to the owners thereof.

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

TAXATION—Real Estate—Collectors—Compensation.  
Id.—Id.—Clerk’s Fee.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., JUNE 17, 1938.

HONORABLE ROBERT R. JONES,  
Attorney for the Commonwealth,  
Powhatan, Virginia.

MY DEAR MR. JONES:  
Your letter of June 14 has been received during the absence of Senator Staples from his office on account of illness, and I am, therefore, taking the liberty of replying.
You direct attention to section 403 of the Tax Code, as amended in 1938 (Act 1938, page 157) and to section 251 of the Tax Code, as amended in 1938 (Acts 1938, page 426), and desire to know if under these sections, as amended, the Board of Supervisors may appoint a delinquent tax collector to collect delinquent taxes on real estate.

Inasmuch as the amendment to section 403 of the Tax Code is broader than that to section 251, I will look to that section. This section generally provides that the payment of State and local taxes may be enforced "by warrant, motion, action of debt or assumpsit, bill in chancery or by attachment before a trial justice, civil and police justice, and courts of record within this State in the same manner as now exists or may hereafter be provided by law for the enforcement of demands between individuals." The first part of the third paragraph of the amended section provides that the proceedings shall be instituted "in the name of the county, city or town in which such taxes or levies are assessed, at the direction of the board of supervisors or other governing body of the county, or council or other governing body of the city or town, by such attorney or attorneys as such board, council, or other governing body may employ for the purpose."

In my opinion, the quoted language gives to the Boards of Supervisors authority to employ an attorney to bring suits for the collection of delinquent taxes on real estate. If the Board of Supervisors chooses to designate such an attorney as a delinquent tax collector, I see no reason why this may not be done, but the authority of such an attorney is as set out in the amended section.

As to the compensation of the attorney so employed by the Board, I am of opinion that this is a matter of contract between the attorney and the Board.

Your next question is as follows:

"And where suit is brought to collect the same and it is sold for delinquent taxes by the attorney appointed by the Board of Supervisors, does the clerk have a right under the present law to charge 5 per cent commission for collecting the same, or is there any section authorizing the clerk to charge the county 5 per cent on all of the taxes paid through his office belonging to the county?"

From such examinations as I have been able to make I find no statute which provides for the payment of a commission of 5 per cent to the clerk of the court on account of the collection of local taxes on real estate.

Yours very truly,

W. W. MARTIN,
Assistant Attorney General.


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 9, 1938.

HON. A. D. LATANE, CLERK,
Circuit Court of Essex County,
Tappahannock, Virginia.

MY DEAR MR. LATANE:
I am in receipt of your letter of June 7, in reply to mine of June 4, relative to the tax to be assessed in the case of recordation of deed of release between Emma Hemsley and the Works Progress Administration of Virginia.

This deed on its face purports to release both Emma Hemsley and the Works Progress Administration from all obligations assumed under a certain agreement entered into between these parties on the 31st day of May, 1937. Insofar as the deed purports to release the deed of the Works Progress Administration, a Federal agency, I am of opinion that the tax imposed for the recordation of such a deed
by section 121 of the Tax code should not be assessed. I need not at this time go
into the reason for this opinion other than to say that this is in accord with the
uniform rule of this office in case of a recordation tax proposed to be assessed
against Federal agencies.

However, the deed also releases Mrs. Emma Hemsley, an individual, from the
obligations of the aforesaid agreement. Insofar as it releases Mrs. Hemsley, I
am of opinion that the tax of 50 cents upon the deed of release should be assessed
against her. If, therefore, the 50 cents tax has been paid by the Works Progress
Administration, I think you would be justified in considering that it is paid on
behalf of Mrs. Hemsley, since I understand that the Federal agency is making
no application for a refund of the tax.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

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TAXATION—Recordation of Instruments—Contract and Deed Recorded To-
gether.

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

HONORABLE C. T. GUINN, CLERK,
Circuit Court of Culpeper County,
Culpeper, Virginia.

MY DEAR MR. GUINN:

I am in receipt of your letter of July 14.

The effect of your inquiry is whether a contract for the sale of real estate and
the deed conveying the real estate when the contract is completed are both sub-
tected to the recordation tax imposed by section 121 of the Tax Code of Virginia.

The aforesaid section imposes a tax on the recordation of both deeds con-
veying real estate and contracts relating to real estate. If the parties desire to
have both the contract and the deed recorded, inasmuch as they are two separate
instruments and are subject to the tax, I am of opinion that the tax should be
imposed in each case.

It seems to me that no other conclusion can be reached if the parties desire to
record both instruments.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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TAXATION—Recordation Tax—Computation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 18, 1938.

HONORABLE C. W. EASTMAN, CLERK,
Middlesex County Circuit Court,
Saluda, Virginia.

DEAR MR. EASTMAN:

I have before me your letter of January 15, in which you request my opinion
upon the question whether or not the proper tax upon a deed of conveyance should
be based or computed upon the actual value of the property conveyed, or upon the
consideration stated in the deed.
The first paragraph of section 121 of the Tax Code provides as follows:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be twelve cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater."

Under the clear provisions of this act, if the actual value of the property is in excess of the consideration stated in the deed, the tax should be based upon the actual value of the property.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 17, 1938.

Honorable E. C. Lacy, Clerk,
Circuit Court of Halifax County,
Halifax, Virginia.

My Dear Mr. Lacy:

I am in receipt of your letter of February 12, in which you enclose copy of an instrument whereby the North Carolina Joint Stock Land Bank of Durham conveys certain property to the Depositors’ National Bank of Durham, as Trustee for the Reconstruction Finance Corporation, securing a debt of $1,850,000. You ask whether any recordation tax should be imposed on the recordation of this instrument.

I beg to advise that this office has heretofore ruled that, pursuant to the statute creating the Reconstruction Finance Corporation, it is exempt from our recordation tax where instruments are offered for recordation securing a loan made by the Reconstruction Finance Corporation.

The instrument which you enclosed is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation—Deed from Trustee to Sole Beneficiary—Computation of Tax.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 17, 1938.

Honorable Olin J. Payne, Clerk,
Circuit Court of Alleghany County,
Covington, Virginia.

My Dear Mr. Payne:

I am in receipt of your letter of February 12, in which you ask my opinion on the following situation:

“I am taking the liberty of writing you in regard to fixing of the State tax on a deed left in my office from Ruth Hooper, Executrix of B. R. Hooper, deceased, to the Gasoline Service Stations, Inc. A number of years ago the Gasoline Service Stations, Inc. conveyed to Mr. B. R. Hooper, Trustee, to
handle the same in case of sale, or in the purchase of other property, in place
and stead of the said Corporation. Since the transfer to Mr. Hooper, Trustee,
the Trustee has died, and it is now the intention of the Gasoline Service
Stations, Inc. to have his Executrix re-convey the property to it."

Section 121 imposes a tax on the recordation of every deed which is admitted
to record, based on the consideration of the deed or the actual value of the property
conveyed, whichever is greater. While the equitable ownership of the property
may have been in the Gasoline Service Stations, Inc., nevertheless, the deed now
offered for recordation is a deed conveying legal title to the property and, in my
opinion, is subject to the recordation tax based on the consideration of the deed or
the value of the property, whichever is greater. I can find no exception in the
statute covering a case of this character.

With best regards, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax—Lease of Indefinite Duration.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 31, 1937.

HONORABLE H. B. MCLEMORE, JR.,
Clerk of the Circuit Court,
Courtland, Virginia.

DEAR MR. MCLEMORE:

I have received this morning, pursuant to my letter of December 29, the copy
of the lease agreement to which you referred in your letter of December 28.

Section 121 of the Tax Code imposes a tax upon the recordation of instru-
mments, and contains the following provision:

"On every contract relating to real or personal property, except as herein-
after provided, which is admitted to record, the tax shall be twelve cents on
every hundred dollars or fraction thereof of the consideration or value con-
tacted for; provided, however, that the tax for recording a deed of lease for
a term of years shall be taxed according to the provisions of this section,
except where the annual rental, multiplied by the term for which the lease
runs, equals or exceeds the actual value of the property leased, then the tax
for recording the deed of lease shall be based upon the actual value of the
property at the date of lease."

An examination of the lease that you sent me discloses that it is for an in-
definite term, subject to cancellation by either party upon sixty days notice. This,
of course, may be for a period longer than that in which the annual rental multi-
plied by the number of years of the duration of the lease would be more than the
value of the property.

I discussed the matter with Mr. Morrissett, and we both agreed that the
proper basis for the tax in this case is the value of the property. It appears from
the lease that the property is valued at $12,475.60 and the tax being at the rate of
twelve cents per hundred would amount to $14.00.

If the parties to this agreement do not desire to pay this much tax, the con-
tract might be redrawn so as to provide for a lease for one year with privileges of
renewal. Upon a lease so drawn, the proper basis for the tax is the amount of the
rental for one year.

I am returning herewith the lease agreement.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation Tax—New Deed of Trust Hypothecating Same Land for Larger Amount.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 17, 1937.

Honorable C. Benjamin Laycock, Clerk,
Circuit Court of Arlington County,
Clarendon, Virginia.

My Dear Mr. Laycock:

I am this morning in receipt of a letter from Mr. Claude O. Thomas, of Arlington, in which he requests that I give you my opinion on the amount of tax to be charged for the recordation of a deed of trust under the following circumstances:

"By deed dated June 29, 1937, and recorded in Deed Book 417, Page 226, of the land records of Arlington County, Virginia, First Buckingham Community, Incorporated, conveyed to H. L. Rust, Jr., and George Calvert Bowie, trustees, certain property in Arlington County, Virginia, to secure payment of $1,670,000.00.

"It is now proposed to increase the amount secured to $1,825,000.00, and to include in the deed of trust securing the same, the property described in the deed of trust recorded in Deed Book 417, Page 226, and other property, it being the intention to release the deed of trust now on file by a deed of release, but not to cancel and surrender the note for $1,670,000.00 secured thereby. In the new deed of trust, the same note will be secured, together with an additional note for $155,000.00, this latter amount being the entire consideration for the new trust."

Mr. Thomas states that a carbon copy of his letter to me is being sent to you. He thinks that section 121 of the Tax Code should be construed so as to require the payment of the tax on the additional sum of $155,000, this being the difference between the amount secured by the first deed of trust and that secured by the second deed of trust. Section 121 of the Tax Code provides that "on deeds of trust or mortgages such tax shall be upon the amount of bonds or other obligations secured thereby." Unquestionably the amount of obligations secured by the deed of trust now proposed to be recorded is $1,825,000.00. Therefore, in view of the language of the section which I have quoted, in order to base the tax upon a lesser amount than $1,825,000.00, authority so to do must be found in the section. I have read the section very carefully and cannot find therein any exception to cover the case presented by Mr. Thomas. The section does provide that no tax shall be required—

"* * * for the admitting to record of any deed of trust, mortgage, contract, agreement, or other writing supplemental to any deed of trust, mortgage, contract, agreement, or other writing theretofore admitted to record and upon which the tax herein imposed has been paid, hereinafter called the original instrument, where the sole purpose and effect of the said supplemental deed of trust, mortgage, contract, agreement, or other writing is to convey, set over, or pledge property, real or personal, in addition to or in substitution (in whole or in part) of the property conveyed, set over, or pledged in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument; but in such case there shall be no tax for the admitting to record of said supplemental deed of trust, mortgage, contract, agreement, or other writing."

However, it is plain that it cannot be said that the sole purpose and effect of the deed of trust now proposed to be recorded is to pledge additional property to secure or to better secure the payment of the amount contracted for in the
original instrument. Indeed the instrument now to be recorded is a new deed of trust, the former deed of trust to be released by a deed of release.

It is also plain that the case does not come within the exception prescribed in the fifth paragraph from the end of section 121 of the Tax Code.

My conclusion is that the tax must be imposed on a value of $1,825,000, for I can find nothing in the statute authorizing the imposition of the tax on any lesser amount.

Inasmuch as this is a matter coming generally within the jurisdiction of the State Tax Commissioner, I have taken the liberty of advising with him and am authorized to say that he concurs in the view I am expressing herein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TAXATION—Recordation Tax—Deed to Non-Profit Cemetery Association.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 2, 1938.

COLONEL CHAS. O. SAVILLE, Clerk,
Chancery Court of City of Richmond,
Richmond, Virginia.

MY DEAR COLONEL SAVILLE:

I am in receipt of your letter of March 1 concerning the liability to the State recordation tax of a deed from Bishop L. Ireton to the Holy Cross Cemetery Association of Richmond, a Virginia non-stock corporation not organized for profit.

I have carefully considered subsection (c) of section 183 of the Constitution of Virginia, together with sections 121 and 122 of the Tax Code of Virginia. You will observe that section 122 of the Tax Code states that "except as provided in this chapter, no deed or other instrument shall be admitted to record without the payment of the tax imposed thereon by law." Certainly there is nothing in sections 121 and 122 of the Tax Code to exempt the deed in question from the recordation tax, and I am of the opinion that neither of these sections offends subsection (c) of section 183 of the Constitution exempting from taxation "private or public burying grounds or cemeteries and endowment funds, lawfully held, for their care, provided the same are not operated for profit." Unquestionably the real estate and endowment funds of this association are exempt from property tax, but I do not think that this exemption can be extended to the privilege tax imposed by section 121 of the Tax Code. Certainly the General Assembly has not so construed the Constitution in enacting section 122 of the Tax Code.

In my opinion the deed in question is subject to the regular recordation tax based on the consideration of the deed or the actual value of the property conveyed, whichever is greater.

I may say that I have advised with Honorable C. H. Morrissett, State Tax Commissioner, on the question you present, and he concurs with the views I am expressing herein.

The deed is herewith returned.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL


COMMONWEALTH OF VIRGINIA,  
Office of the Attorney General,  
Richmond, Va., November 3, 1937.

HONORABLE JOE W. PARSONS, Clerk,  
Circuit Court of Grayson County,  
Independence, Virginia.

MY DEAR MR. PARSONS:

I am in receipt of your letter of October 27, in which you ask whether or not a State recordation tax should be charged for the docketing of a deed of trust issued pursuant to chapter 336 of the Acts of 1936 (Acts 1936, page 540), the instrument to be docketed in a book known as "The Federal Farm Credit Lien Book." You say that the person offering the instrument states that he has been advised that he could have it recorded without the payment of the recordation tax.

Please note that the Act (section 5) provides that the instrument shall be docketed in the Federal Farm Credit Lien Book, and not recorded. I also call your attention to the fact that the Act provides that only such instruments shall be docketed as are "given under and pursuant to this Act."

Section 121, imposing a tax on the recordation of deeds, deeds of trust, etc., provides that the tax shall be imposed on the deeds "admitted to record."

As I have indicated above, instruments issued under chapter 336 of the Acts of 1936 are only to be docketed and, in my opinion, instruments docketed under this Act are not subject to the recordation tax.

Yours very truly,

ABRAM P. STAPLES,  
Attorney General.

TAXATION—Writ Tax—Condemnation Suits.

COMMONWEALTH OF VIRGINIA,  
Office of the Attorney General,  
Richmond, Va., April 8, 1938.

HON. V. C. RANDALL, Clerk,  
Circuit Court of Norfolk County,  
Portsmouth, Virginia.

MY DEAR MR. RANDALL:

I am in receipt of your letter of April 6, in which you inquire as to the proper writ tax on a condemnation suit where the plaintiff is not the Commonwealth or a political subdivision thereof.

The writ tax, as you know, is imposed by section 126 of the Tax Code of Virginia. The section provides that it shall be paid at the commencement of the suit, and further provides, except in chancery suits, that the tax is based upon the amount of the debt or demand for damages. I am of opinion that in a condemnation suit there is no debt or demand for damages and that, therefore, the effect of this part of the section is not to levy a tax on such a suit.

There is a writ tax on a chancery suit but I am further of the opinion that a condemnation suit cannot be said to be a chancery suit. Therefore, my conclusion is that section 126 does not levy a writ tax upon a condemnation suit and, therefore, there is no such tax on this class of suits.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TREASURERS—Disposition of Old Tax Tickets.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 8, 1937.

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

MY DEAR MR. HITE:
I am in receipt of your letter of September 3, in which you state:

"Mr. J. R. K. Cowan, Treasurer, is desirous of disposing of some of his old uncollectable tax tickets. Storage space demands that he dispose of them in some manner. Most of them are five years old. The law does not seem to be clear as to the disposition a treasurer can make of these tax tickets. Please let me know how long the treasurer is supposed to keep these tickets in his office."

No statute prescribes how long these old tax tickets shall be kept. As you know, the tax tickets themselves are not the original records of the indebtedness of taxpayers, the books of the Treasurer constituting this record. There is nothing to prevent a Treasurer from making a duplicate tax ticket when a taxpayer desires to pay his taxes.

I am, therefore, of opinion that the Treasurer may, in his discretion, destroy tax tickets that are not in his hands for collection. As a practical matter, however, I would suggest that first the consent of the Board of Supervisors be obtained before these tickets are destroyed, inasmuch as it may be that the Board could find space for their storage somewhere else.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Attachment—Process—Service and Return.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 1, 1938.

HONORABLE HAROLD F. SNEAD,
Trial Justice for Henrico County,
Richmond, Virginia.

MY DEAR MR. SNEAD:
I am in receipt of your letter of January 29, in which you raise the following question:

"Section 4987f, subsection (5) of the Code confers authority on trial justices to try and decide attachment cases where the amount of the plaintiff's claim does not exceed the sum of one thousand dollars. I should like for you to give me your opinion as to what is proper service and as to what is the proper return date on attachments instituted in trial justice courts. There is some confusion amongst the trial justices as to the proper interpretation of the law on the subject."

The section of the Code to which you refer provides that the proceedings on an attachment before a trial justice shall conform to the provisions of chapter 269 of the Code.

As to the return day, section 6387 of the Code, which is in chapter 269, pro-
vides that the attachment may be directed to the sheriff or constable of any county and that "it shall be returnable to a day of the term of the court not more than ninety days from its date of issuance nor less than ten days from the date of service, or, if the next term of court be more than ninety days from the date of issuance, then to a day of the next succeeding term of court not less than ten days from the date of service * * *." Inasmuch as there are no prescribed terms for a trial justice court, I think it plain that an attachment to be heard by a trial justice shall be returnable not more than ninety days from its date of issuance nor less than ten days from the date of service.

As to "what is proper service", I call your attention to section 6391 of the Code, also in chapter 269, which would seem to answer your question on this point.

In a case where the attachment is returned executed and the defendant has not been served with a copy thereof, subsection (5) of section 4987f provides:

"* * * the trial justice, upon affidavit in conformity with sections six thousand and sixty-nine and six thousand and seventy of this Code, shall forthwith cause to be posted at the front door of the court house of the county a copy of the said attachment and shall file a certificate of the fact with the papers in the case, and, in addition to the said posting, an order of publication shall be awarded and published in accordance with the provisions of sections six thousand and sixty-nine and six thousand and seventy of the Code of Virginia. After said copy of the attachment has been so posted and published as aforesaid, the trial justice may proceed to try and decide the said attachment."

I hope the above will give you the information you desire.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Attorneys Practicing Before—Right to Disbar.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 21, 1937.

Honorable Harold F. Snead,
Trial Justice for Henrico County,
Richmond, Virginia.

Dear Mr. Snead:

I have your letter of October 19, requesting the opinion of this office as to whether a trial justice has authority to bar an attorney from practicing in his court.

The subject of disbarment of attorneys is governed by sections 3423 and 3424 of the Virginia Code (Michie 1936). Section 3424, dealing with the revocation of an attorney's license to practice anywhere in the State, is expressly confined in its operation to courts of record. Section 3423, however, provides simply that:

"Any court before which an attorney has qualified, on proof being made that he has been convicted of a felony or of any malpractice, or of any corrupt unprofessional conduct, shall revoke his license to practice therein or suspend the same for such time as the court may prescribe."

I am of the opinion that the court of a trial justice is a "court" within the meaning and for the purposes of this section. In this connection, attention is called to the fact that the legislature has repeatedly referred to the tribunal of the trial justice as a "court." See sections 4987a, 4987g and 49871 of the Code.

It is the opinion of this office, therefore, that a trial justice is authorized, on adequate proof as prescribed by Code section 3424, to revoke or suspend the
REPORT OF THE ATTORNEY GENERAL

license of any attorney to practice before such trial justices. I might add that this section seems clearly to imply that such an attorney is entitled to a hearing on the question whether he has committed any of the offenses mentioned in the statute.

Very truly yours,  

ABRAM P. STAPLES,  
Attorney General.

TRIAL JUSTICES—Collecting Fines in Installments.  
Id.—Effect of Continuing Bonds for Appearance.  
Id.—Requiring Peace Bonds.  
Id.—Probation—Period of.  

COMMONWEALTH OF VIRGINIA,  
Office of the Attorney General,  
Richmond, Va., October 18, 1937.

HONORABLE J. CALLOWAY BROWN,  
Trial Justice,  
Bedford, Virginia.

My Dear Mr. Brown:  
I am in receipt of your letter of October 13, in which you ask a number of questions relating to the authority of trial justices. Your first question is:

"There has been a great deal of discussion about receiving fines and costs on the installment plan. Section 4952a of the Code provides that a circuit court or hustings or corporation court or the judge thereof in vacation may take a bond with surety to secure the payment of fine and/or costs. Has a trial justice such authority and, if so, I will appreciate it if you will refer me to where it is derived."

I refer you to section 1922b of the Code (Michie's 1936). Please note that this section provides for the placing of prisoners on probation and says:

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation ***."  

In view of the provisions of this section, your first question may be answered in the affirmative.

Your next question is:

"In a case where a prisoner has given a continuing bond for his appearance in the trial justice court and he appears and is convicted, has he a right under this bond to stay out of jail for a period of ten days before determining whether or not he will take an appeal, or must he elect at the close of the trial whether he will take an appeal or go to jail?"

I do not think that a person convicted in a trial justice court may elect "to stay out of jail for a period of ten days before determining whether or not he will take an appeal". However, I am of opinion that under section 1922b the trial justice may suspend the execution of the sentence for ten days if he is so inclined, and, if the condition of the bond will permit it, the bond may be continued for that period of time or a new bond may be required.

You then ask:

"I have had several cases of assault and battery after the hearing of which it clearly seemed advisable that the prisoner should be placed under a peace bond, but, as I understand the law, it is necessary to have a special hearing for that purpose unless it comes within sections 4802 and 4803 of the Code. These sections, however, seem to deal only with cases brought into court by the special police provided for therein. Are these sections ap-
plicable in a case where a sheriff, his deputy or a constable makes his arrest?

Is there any other law under which a trial justice may require a peace bond after having heard and decided a criminal case without going through the formality of having a special hearing to determine whether or not the prisoner should be required to give a peace bond?"

A specific answer to this inquiry is not so readily found in the statutes. However, my information is that the practice is quite general in certain cases of requiring a peace bond of a defendant who has been convicted, and it seems to me that section 4789 of the Code strongly supports this practice.

Your last question is:

"Can a prisoner be placed on probation for a longer period than that for which he could be sentenced?"

I am of opinion that section 1922b justifies the answering of this question in the affirmative, especially the last paragraph thereof. I also refer you to the case of Richardson v. Commonwealth, 131 Va. 802, which by strong implication supports this view.

Very truly yours,

ABRAM P. STAPLES,
Attorney-General.

TRIAL JUSTICES—Compensation—Reports to Comptroller.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 4, 1938.

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

DEAR MR. COMBS:

I have before me your request for my opinion upon the question whether or not, under the provisions of section 3516 of the Code, trial justices, who are ex-officio justices of the Juvenile and Domestic Relations Court, or the clerks of said courts, should make the report required by said section of the Code to be made by justices of the peace, civil justices, justices of juvenile courts, and clerks of civil justices. These reports are required by said section to be made to the clerk of the circuit courts of counties and the clerks of the corporation or hustings courts of cities on forms provided by the auditor of public accounts, and shall contain a statement of all fees, allowances, commissions, salary or other compensation or emolument of said officers.

Section 3516 of the Code was enacted in 1926 and is a very comprehensive section. The general scope and purpose of same is to limit the amount of compensation by way of commissions, fees and salaries which the various officers dealt with in said section were permitted to retain. This section further requires that that all such officers shall retain the maximum amount of compensation allowed them out of fees received, and the excess shall be paid in certain proportions to the county, city and State treasuries.

Subsequent enactments have rendered obsolete the provisions of section 3516 as respects certain officers who have been placed on salaries, which include trial justices and their clerks, and the provisions of said section can have no further application to them. For this reason, I am of opinion that the said provisions of section 3516 which required said reports to be made by trial justices and their clerks has been rendered inoperative by the State Compensation Act, the Trial Justice Act, and other subsequent legislation upon the subject.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TRIAL JUSTICES—Judgments—When Final and Irrevocable.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 8, 1937.

Honorable J. B. Allman,
Trial Justice,
Rocky Mount, Virginia.

My Dear Mr. Allman:
I am in receipt of your letter of November 4, in which you ask

"Assume the Trial Justice Court in trying John Smith found him guilty upon the evidence of driving while drunk, and announced verbally that the judgment of the court is that he be fined $100.00 and be sentenced to thirty days in jail. When does the judgment become final, so that the Trial Justice may not change the judgment of the court?"

It is my opinion that the judgment of a trial justice becomes final in a criminal case when the said judgment is actually entered on the warrant under which the defendant is tried. You are, of course, familiar with section 4987i of the Code which provides that trial justices shall enter in the docket all causes tried and prosecuted and all matters coming before him and the final disposition of the same.

In reply to your second question, I beg to advise that I had occasion recently to write Honorable J. Callaway Brown, Trial Justice of Bedford County, on this matter, and I enclose a copy of that communication.

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

TRIAL JUSTICES IN TOWNS—Special Acts Relating to—Constitutionality.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1938.

Honorable C. G. Quesenbery,
Member of the House of Delegates,
State Capitol,
Richmond, Virginia.

Dear Mr. Quesenbery:
I have before me your letter of January 27, submitting a copy of a proposed bill to amend sections 24 and 25 of the present charter of the town of Waynesboro, as contained in the Acts of Assembly, 1928, pages 1253 to 1255, inclusive.

These sections enacted in 1928, which it is proposed to amend, provided for the appointment by the council of a trial justice for the town, and undertook to prescribe the jurisdiction of such trial justice as well as certain procedure and practice in types of cases which would come before such trial justice.

The Trial Justice Act of 1934 (amended in 1936) confers upon the trial justice of the county exclusive jurisdiction in certain civil and criminal cases in all towns within the county for which the trial justice is appointed. The seventh paragraph of section 4988-g (Acts 1934, page 470) provides that the council of an incorporated town within the jurisdiction of any trial justice appointed under the said act may, by resolution adopted by the majority of the members of said council, "continue in the mayor or other trial officer thereof all jurisdiction now vested in such mayor or other trial officer pertaining to the issuance of warrants and the summoning of witnesses and the trial of cases involving violations of city and town ordinances." This exception in cases of violations of town ordinances...
is the only one to the general exclusive jurisdiction of the trial justice in towns.

It seems clear from the general provisions of the said Trial Justice Act, and the provisions contained in section 2 thereof (at page 474), repealing to the extent of any inconsistency all acts and parts of acts inconsistent therewith, that after the enactment of said Trial Justice Act all powers and jurisdiction of the trial justice of the town of Waynesboro were removed, with the exception of ordinance violations above referred to, which might be retained in the event a resolution of the town council should so provide.

The proposed amendment to the charter, which you have submitted to me for my opinion as to its validity under our Constitution, provides for the appointment of a civil and police justice for the town of Waynesboro, and adds a number of new sections to the charter providing in elaborate detail for the practice and jurisdiction of such civil and police justice in various specific proceedings which may be instituted and conducted before him. These provisions are, of course, in conflict with the present general trial justice statute which, as above pointed out, confers exclusive jurisdiction in such matters upon the trial justice of the county.

The proposed charter amendment also undertakes to confer jurisdiction in civil cases upon the said civil and police justice over a certain area in the county of Augusta within one mile of the corporate limits of said town. It is my opinion that the provisions as contained in the charter, certainly in so far as they undertake to regulate the practice before the proposed civil and police justice or to confer jurisdiction in certain specific cases or in civil cases arising in an area outside of the town of Waynesboro, are in violation of our State Constitution. Section 63, subsection 3, of said Constitution provides that the General Assembly shall not enact any local, special or private law "regulating the practice in, or the jurisdiction of * * * any judicial proceedings or inquiry before the courts or other tribunals."

In the recent case of Shulman v. Sawyer, 167 Va. 386, our Supreme Court of Appeals held that a special law undertaking to regulate the practice in the courts of the city of Norfolk, denying to the civil and police justice courts of that city the practice of proceedings by notice of motion for judgment, was in violation of the above quoted provision of the Constitution, and was unconstitutional and void.

I do not desire to be understood as expressing an opinion that no civil and police justice court can be established for the town of Waynesboro by a special act or charter provision, but I am of the opinion that, in the event any such court is so established, the general jurisdiction and practice in said court should be regulated by reference to the general laws, such as by conferring on such civil and police justice all jurisdiction now possessed in the town by trial justices as provided in the Trial Justice Act.

I am also of opinion that no charter provision can be validly enacted which will confer upon a trial justice or civil and police justice thereby created any jurisdiction outside of the corporate limits of the municipality for which the charter is granted.

Section 52 of our State Constitution provides that no law shall embrace more than one object, which shall be expressed in its title. It is my opinion that under this section the object of a charter amendment must be held to be inherently restricted to provisions relating solely to the municipality for which the charter is granted. Thus, it would certainly not be admissible for a charter provision to confer upon officers of the municipality jurisdiction over the entire State, or over the county in which the municipality is situated. Such legislation would be broader than the object of the act.

In my opinion, a special act conferring upon a trial justice or civil and police justice jurisdiction over a town and any portion of a county cannot take the form of a charter amendment, but must be enacted from a bill which expresses in its title the object of conferring jurisdiction upon such officer within the area stated in the title of the act.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TRIAL JUSTICES—Suspension of Sentences and Remission of Fines.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 29, 1938.

Hon. Edward P. Simpkins, Jr.,
Commonwealth's Attorney for Hanover County,
Mutual Building,
Richmond, Virginia.

My Dear Mr. Simpkins:
I am in receipt of your letter of March 24, asking if the provisions of sections 2550 to 2554 of the Code apply in cases of fines imposed by trial justices. This office has heretofore ruled that these sections are applicable to such fines.

In reply to your second question as to whether a trial justice has authority to remit fines, I call your attention to question 7 and the answer thereto on page 6 of a pamphlet gotten out by this office in 1935 relating to trial justices, reading as follows:

"7 Q. Has the trial justice the power to remit fines and suspend jail sentences in cases where he feels that the ends of justice will be met by so doing?

"A. Under the provisions of section 1922-b of the Code the trial justice is authorized to suspend jail sentences in such cases, but he is prohibited by section 2557 from remitting fines in any case. Attention is called to the distinction between remitting and suspending a fine. A remittance releases the prisoner forever from further liability to pay the fine; a suspension defers the time of payment in accordance with the terms of the suspension order. No court has power to remit a fine. Only the Governor possesses such power."

Yours very truly,
Abram P. Staples,
Attorney General.

TRIAL JUSTICES—Traffic Cases—Process.
Id.—Collection of Fines.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 18, 1937.

Honorable W. Francis Binford, Sec'y-Treas.,
Association of Trial Justices,
Prince George, Va., Virginia.

Dear Mr. Binford:
This is in reply to your letter of August 18, 1937, requesting my opinion upon certain questions therein set out. These questions I will answer seriatim:

"1. When a defendant has been summoned to court for a violation of the traffic code and has duly signed the summons as provided by law and the defendant fails to appear in court, does the Trial Justice have a right to try the defendant in his absence and issue a capias pro fine for the collection of the fine and cost so imposed?"

I very much doubt the right to try a person arrested for a traffic violation, who has been released by the arresting officer, upon his written obligation to appear at the time and place specified by the officer, and I advise against the trial
where the person arrested does not appear. I advise that a summons or a warrant for the arrest of the offender be sworn out before an official authorized to issue warrants, and that upon service of such process the offender be then tried.

Not only may the offender be tried for the traffic violation, but section 120, paragraph (a), at page 76, of the Motor Vehicle Act of 1936, makes the willful violation of a promise to appear a misdemeanor and he may be proceeded against by summons or warrant of arrest for that offense, and punished therefor in addition to the disposition of the case against him for the violation of the traffic regulation.

"2. Where a defendant has been tried by the court and a fine and costs imposed, and the defendant placed on probation and ordered to pay the fine and cost in stated installments to the court and the defendant fails and refuses to pay the fine, does the court have a right to issue a capias pro fine for the collection of the fine and cost so imposed?"

In my letter to you of August 12, in which I enclosed a pamphlet containing opinions of this office relating to trial justices and justices of the peace, I referred you to the answer to question No. 6, on page 6. That answer in my opinion covers the inquiry propounded in the second question of your letter. In that answer, I say in part:

"... If the fine is suspended and the prisoner placed on probation, and fails to pay the fine in accordance with his probation, the Trial Justice may revoke the suspension, issue a capias pro fine or enter an order for the arrest of the prisoner"—(and upon his arrest order his confinement in jail or that he serve the term provided by law on the convict road force)—"Code, section 1922-b. He should then report to the clerk the unpaid balance of the fine, costs, etc."

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

TRIAL JUSTICES—When Substitute May Act.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 8, 1938.

Mr. W. G. MOOKLAR,
Substitute Trial Justice,
Mangohick, Virginia.

My Dear Mr. MOOKLAR:
I am in receipt of your letter of June 7. The effect of your letter is to inquire when and under what circumstances you may act as trial justice.

Section 4987b of the Code (Michie, 1936) deals with the appointment of substitute trial justices and their duties. The second sentence of the section provides in part as follows:

"In the event of the inability of the trial justice to perform the duties of his office, by reason of sickness, absence, vacation, interest, proceedings or parties before his court, or otherwise, such substitute trial justice shall perform the duties of the office during such inability ***."

The last sentence of the first paragraph of the section is:

"The trial justice or the substitute trial justice, while acting as trial justice, may perform all acts, with reference to the proceedings, acts and judgments of the other, in the same manner and with the same force and effect as if such proceedings, acts and judgments were his own."
You state in effect that your principal was necessarily absent from his office and his county on Friday and Saturday, June 3 and 4.

In my opinion, under the provisions of the statute from which I have quoted, you could act as trial justice during those days for the transaction of such business as would ordinarily come before the trial justice court on those days. If the trial justice was in his office and able to transact his regular duties on the following Monday, June 6, I am of opinion that you had no authority to act in his stead on that day, and that anything to be done on that day which may have been commenced by you prior thereto should be done by the trial justice himself. It seems to me that section 4987b is reasonably plain and that its provisions are in accordance with what I have written above.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

WITNESSES-Allowances-A. B. C. Inspectors.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 16, 1938.

MR. JOHN J. MORRIS,
Trial Justice of Green County,
Stanardsville, Virginia.

MY DEAR MR. MORRIS:

I am in receipt of your letter of May 13, in which you ask if investigators of the Alcoholic Beverage Control Board who are summoned as witnesses in cases involving violations of the laws relating to intoxicating liquors should be allowed mileage as provided by law for witnesses summoned in criminal cases.

I find nothing in the Alcoholic Beverage Control law prohibiting the allowance of mileage to these witnesses under the circumstances stated, and I am, therefore, of opinion that the regular mileage should be allowed.

For your information, I will say that I have conferred with an official of the Alcoholic Beverage Control Board and am informed that the Board has instructed its investigators that, where this mileage is allowed, it should be turned over to the Board and not retained by the investigators, the reason for this being that these investigators are employed by the Board on a salary and their expenses while on duty are paid by the Board. However, the fact that the officers themselves are not allowed by their employer to retain this mileage has no bearing on the legal question as to whether or not the mileage should be allowed under the law.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

WITNESSES-Allowances-Time Within Which Claims Must be Presented.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 16, 1938.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

Attention: Mr. Geo. W. Settle, Jr.

DEAR COLONEL HODGES:

This is in reply to your letter of May 12, in which you request my opinion whether or not a claim presented by the Director of Finance for Henrico County
for reimbursement of the sum of $3.30 paid to a juror would come within the limitation provided by section 3531 of the Code. This section provides as follows:

"No payment out of the treasury shall be made to witnesses unless their claims are presented within two years from the time of rendering the service."

Since the claim to which you refer is for jury service and not for service as a witness, I do not think that section 3531 would be applicable.

Section 2179 of the Code provides that no claim shall be allowed after ten years from the time when it might by law have been presented for payment, while section 2180 contains this provision:

"No allowance made by order of any circuit or corporation court shall be paid out of the treasury, unless presented to the Auditor of Public Accounts for payment within two years from the date of such allowance."

It is not clear to me that there was ever any court order entered in 1932 or at any other time, except the order entered on April 11, 1938. From the papers before me, it appears that the clerk of the court issued a certificate on August 2, 1932, certifying that Harry Allen, Jr., was entitled to $3.30 for attendance and mileage as a juror in the circuit court of Henrico county, but there is no indication that the court order was entered at that time allowing the said payment.

If these be the correct facts, it is my opinion that the two-year limitation would begin to run from the time of the entry of the court order on April 11, 1938, and not from the date of the signing of the certificate by the clerk, and that, therefore, it is proper for the Comptroller to pay the claim of the Director of Finance as reimbursement for the amount paid to the juror.

I am returning herewith the copy of the court order, and also the certificate of the clerk.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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