OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA

From July 1, 1938, to June 30, 1939

RICHMOND:
DIVISION OF PURCHASE AND PRINTING
1939
COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 24, 1939.

Honorable James H. Price,
Governor of Virginia,
Richmond, Virginia.

My Dear Governor Price:

In accordance with the provisions of section 374a of the Code of Virginia, I herewith transmit to you my annual report.

Pursuant to the statute, I have included in my report such official opinions rendered by me as would seem to be of general interest, or helpful in promoting uniformity in the construction of the laws of the State, together with the required statement of cases now pending and cases disposed of since the time of my last report.

Respectfully submitted,

Abram P. Staples,
Attorney General.
### Personnel of the Office

(Postoffice address Richmond)

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<tr>
<th>Name</th>
<th>County</th>
<th>Official Title</th>
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<tr>
<td>Abram P. Staples</td>
<td>Roanoke city</td>
<td>Attorney General</td>
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<tr>
<td>Edwin P. 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>D. Gardiner Tyler, Jr.</td>
<td>Charles City</td>
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<td>G. Stanley Clarke</td>
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<td>Kenneth C. Patty</td>
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<td>A. B. Carney</td>
<td>Norfolk</td>
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<td>Jos. L. Kelly, Jr.</td>
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<td>Walter E. Rogers</td>
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<td>Nerhea S. Evans</td>
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<tr>
<td>Eva E. Kibler</td>
<td>Augusta</td>
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<td>Marie Low</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>Robert Brooke</td>
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<td>James Robertson</td>
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<td>Sidney S. Baxter</td>
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<td>Willis P. Bocock</td>
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<td>John Randolph Tucker</td>
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<td>Thomas Russell Bowden</td>
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<td>Charles Whittlesey (military appointee)</td>
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<td>Samuel W. Williams</td>
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<td>John Garland Pollard</td>
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<td><em>J. D. Hanks, Jr.</em></td>
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<td>John R. Saunders</td>
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<td>Abram P. Staples</td>
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<td>Abram P. Staples</td>
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*Hon. J. D. Hanks, 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

2. Commonwealth of Virginia v. Blair B. Stringfellow. From Hustings Court of City of Richmond. State tax on intangible personal property.

Cases Decided in the Supreme Court of the United States


Cases Decided in United States District Courts


Cases Pending in United States District Courts


Cases Decided by the United States Board of Tax Appeals


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

2. Board of Supervisors Elizabeth City County v. State Highway Commission. Suit to force Commission to open a portion of Route 169. Circuit Court Elizabeth City County. Decree for complainant.


27. General Outdoor Advertising Company v. State Highway Commissioner and Board of Supervisors of Arlington County. Circuit Court of the City of Richmond. Appeal from action of Highway Commissioner in refusing to grant license for outdoor advertising.


Judgment for Commonwealth as to income tax; for taxpayer as to license tax.
40. Scott, Fred W., Jr. v. Commonwealth. Hustings Court City of Richmond. State tax on intangible personal property.
43. Special Pictures Corporation v. Division of Motion Picture Censorship. Circuit Court of the City of Richmond. Appeal from ruling of the Division of Motion Picture Censorship. Judgment for plaintiff.
47. Steiner, Keeve C. v. Commonwealth. Circuit Court City of Richmond. License tax.
52. Walters, John W., et al. v. State Highway Commission and Board of Supervisors. Circuit Court of Gloucester County. Suit to have public road closed.
53. Waters, L. R. v. Alcoholic Beverage Control Board of Virginia; Brooks Transfer & Storage Company; and Carter Brothers, Incorporated. Circuit Court of the City of Richmond. Mandamus to compel acceptance of bid.
AGRICULTURE—Crop Pest Control—Nursery Stock—Regulating Shipments Into State—Requiring Inspection Certificates of State of Origin.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, Va., December 28, 1938.

Mr. G. T. French, State Entomologist,
Department of Agriculture and Immigration,
1112 State Office Building,
Richmond, Virginia.

My Dear Mr. French:

I am in receipt of your letter of December 19, in which you call my attention to sections 870 to 905 of the Code, and particularly to sections 874 and 879, relating to the inspection of nursery stock sold or delivered in Virginia.

You desire to know whether it is clear that in the case of nursery stock shipped into the State from another State a duplicate inspection certificate issued by the proper officer of the State of origin may be required to be attached to each lot of nursery stock and each container by the out-of-State shipper.

Section 879 of the Code provides that the Board of Crop Pest Commissioners "shall provide by regulation for the acceptance of proper certificates (of inspection) from other States, and when so accepted shall issue an official tag designating the fact and nursery stock carrying the same may be reshipped under the certificate above provided for."

It is my opinion, construing the quoted language and other pertinent portions of the State crop pest law, that it is perfectly plain that the Board of Crop Pest Commissioners may require each out-of-State shipper to attach to each lot of nursery stock and each container a valid inspection certificate issued by the proper officer of the State of origin.

I am further of the opinion that it is plain from the statutes in question that the Board may also require that the official tag furnished by Virginia shall be attached to each such shipment of nursery stock.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AGRICULTURE—Crop Pest Control—Nursery Stock—License for Shipment, Sales, etc.—Shipments into State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, Va., December 10, 1938.

Mr. G. T. French, State Entomologist,
Department of Agriculture and Immigration,
Richmond, Virginia.

My Dear Mr. French:

I am in receipt of your letter of December 5, in which you ask the following question:
“Will you please advise whether or not in your opinion Chapter 30, sections 870 to 905 of the Code as amended require citizens of other States who ship nursery stock into Virginia to pay a registration fee of $10 or dealers’ fee of $10 or an agent’s fee of $1.”

This question is directed to the registration fees provided for under section 882 of the Code. I assume, of course, that you are referring to a case where neither the out-of-State shipper nor their agents come into the State, but simply cause nursery stock to be shipped into the State in interstate commerce.

I direct your attention to the first sentence of the section, which reads in part as follows:

“It shall be unlawful for any person, firm or corporation, either for himself or as agent for another, to offer for sale, sell, deliver, or give away within the bounds of this State, any plants, or parts of plants, commonly known as nursery stock, unless such person, firm or corporation shall have first procured from the State entomologist a certificate of registration, * * *.”

It is my view that the quoted language and especially that portion which I have underscored contemplates the securing of a certificate of registration by those dealers in nursery stock who actually or through their agents other than a common carrier deliver such nursery stock within the territorial limits of Virginia. This construction of the section is further supported by the last sentence thereof. Considering the statute as a whole, I am of opinion that out-of-State dealers who do not come into the State personally or through their agents to make sales and deliveries of nursery stock are not required to secure the certificates of registration prescribed by the section. It is unnecessary to state that this interpretation of section 882 does not mean that nursery stock shipped into the State shall not be subject to inspection and the other requirements of Chapter 30 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Confiscation of Vehicles—Procedure.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 29, 1939.

HON. WM. M. SMITH,
Commonwealth’s Attorney,
Cumberland, Virginia.

My Dear Mr. Smith:

I have your letter of March 27, requesting my opinion as to whether, under certain circumstances described by you, it would be proper to institute proceedings under section 38 of the Alcoholic Beverage Control Act, rather than under section 38-a, for confiscation of a motor truck which has been seized by inspectors of the Alcoholic Beverage Control Board.

Section 38 of the Act prescribes the manner in which “articles declared contraband and forfeited to the Commonwealth” shall be proceeded against. Section 36 expressly declares that certain articles enumerated “shall be deemed contraband and shall be forfeited to the Commonwealth.”

Upon a close scrutiny of section 36, I believe you will agree that it does not include motor vehicles among the articles declared contraband. The articles specified are stills, beverages (and their containers), materials used in manufacturing stills or beverages, and weapons. The only reference made to vehicles is in connection with the provision as to forfeiture of weapons, where it is pro-
provided that such weapons may be seized either if found upon the person of one who is violating the Act, or if found in a vehicle which he is using to aid in such violation.

I find no other provision of the Act under which a motor truck may be said to be "declared contraband and forfeited." Section 38-a, dealing expressly with vehicles, provides that under certain specified circumstances they may be seized and "confiscated," but specifically prescribes the procedure by which such seizure and confiscation shall be accomplished.

It is my opinion, therefore, that the truck to which you refer may be proceeded against only according to the terms of section 38-a of the Alcoholic Beverage Control Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Contributions by Wholesale Licensees to Campaign Fund for "Sunday Beer" Referendum.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 25, 1939.

HONORABLE HUNTER MILLER, Chairman,
Alcoholic Beverage Control Board,
Richmond, Virginia.

My Dear Mr. Miller:

This is in reply to your letter of May 23, requesting my opinion upon the question of whether or not contributions by persons having wholesale beer licenses to a fund to be used in opposition to the passing of an ordinance by the board of supervisors prohibiting the sale of beer on Sunday would be in violation of section 53 of the alcoholic beverage control act.

While, of course, the question presented is largely one of fact, it seems to me that the general purpose of the act is to prevent contributions by wholesalers to individual retail licensees. Where money of this kind is contributed to a campaign fund, it does not seem to me it can be said to be contributed to any particular retail licensee.

However, the answer to the question is, in its final analysis, dependent upon the facts in each case and the uses to which the money itself is applied.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Cooperation of Board with Boards of Other States in Obtaining Fair Prices—Entering Contracts with Such Other Boards.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1938.

HONORABLE R. MCC. BULLINGTON,
Member of Alcoholic Beverage Control Board,
Richmond, Virginia.

Dear Mr. Bullington:

This is in reply to your letter of October 20, in which you ask my opinion upon certain matters relating to activities of the National Alcoholic Beverage Control Association.
Without repeating the details in relation to the Association and the action heretofore taken, it is sufficient to say that the questions you raise relate to the efforts on the part of the members of the Association, which consists of representatives from the Liquor Control Boards and Commissions of the thirteen States you set out in your letter, to avoid the payment by the various State Boards of a greater price for distilled liquors than is charged by the stores or distributors in sales of like liquors made to other States, or to licensed dealers or distributors in other States, which you refer to as "open" States.

It appears that no definite agreements have been made so far in reference to the cooperative action between the States, but that the Association's action has been confined solely to recommendations which it has made to its various members, the final recommendation taking the form that the several States refuse to purchase from the stores which engage in the practice of price cutting below the prices charged the several States or any of them.

It is my opinion that the action so far taken by the Association and its members, and the participation therein by the Virginia Alcoholic Beverage Control Board and its members do not constitute any violation of any laws, State or Federal, by either the Association, the State Board, or the members of the State Board.

Your next question, upon which you request my opinion, involves the right of the Virginia Alcoholic Beverage Control Board to enter into an agreement with the Liquor Control Boards or Commissions of the other thirteen States comprising the membership of the Association, the effect of which agreement will be to obligate each and all of the several Boards to strike from their respective lists all merchandise sold, or to be sold, by said Boards, and each of them which is produced by any offending distiller or company affiliated therewith. By the term "offending distiller", your letter indicates that you mean a distiller who engages in the practice of, either permanently or at times of peculiar competitive conditions, cutting or reducing the price of any of its merchandise to dealers in "open" States, or to the Board of any State which is a part of the Association.

The Virginia Alcoholic Beverage Control Board is, by the statute creating it, made one of the departments of the State government. Any contract made by the Board would, in legal contemplation, be a contract on the part of the State itself. The legal effect of the proposed contract, as I view the matter, would constitute an agreement or compact between the several States parties thereto, obligating each State to carry the provisions of the agreement.

In my opinion, an agreement or compact of this kind between the several States would be in violation of Article 1, Section 10, Clause 3, of the Constitution of the United States, which provides as follows:

"No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign Power * * *:"

It is a well settled principle of law that only the General Assembly has power, on behalf of the State, to enter into an agreement or compact with another State, or to authorize same to be done. I find no provision in the Alcoholic Beverage Control Act, or in any other statute, which would confer power or authority upon your Board to enter into an agreement or compact of this kind with any other State or States, even were same permitted by an Act of Congress.

It follows from the foregoing that I am of the opinion that the Virginia Alcoholic Beverage Control Board may not lawfully enter into an agreement of the kind referred to in your letter. This conclusion renders it unnecessary for me to consider or comment upon the question whether such an agreement, if made, would be in violation of the Federal statutes-prohibiting monopolies or contracts restraining trade competition.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 19, 1938.

HONORABLE R. PAGE MORTON,
Attorney for the Commonwealth,
Charlotte C. H., Virginia.

My Dear Mr. Morton:

This is in reply to your letter of November 17, in which you ask my opinion as to whether, under the provisions of the alcoholic beverage control law, it is necessary that a person operate a restaurant in order to be eligible to be granted a retail on-premises beer license.

Under the provisions of section 18(g) Fifth, the Board is authorized to grant such license to "Persons who in the opinion of the Board, are suitable to be so licensed, which licenses shall authorize the licensees to sell, for on-premises consumption only, beer in such places as the Board shall deem suitable for such purpose".

The Act as originally drawn limited the authority of the Board to grant such license to the places in which meals were served, but it has been amended so as to incorporate therein the provision above quoted.

It is my opinion that, under the statute as so amended, it is not necessary that the licensee operate a restaurant or procure a restaurant license unless he in fact operates a restaurant business.

On the other hand, if the licensee does operate a restaurant in fact, of course, it is necessary for him to obtain a restaurant license, as the license granted by the Alcoholic Beverage Control Board does not confer the privilege of operating a restaurant.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Possession—"Illegal Whiskey".

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

HONORABLE R. P. BRUCE,
Trial Justice,
Wise, Virginia.

Dear Judge Bruce:

I acknowledge your letter of December 13, requesting my opinion upon a question which has arisen under section 50 of the Alcoholic Beverage Control Act, i. e., whether a person convicted of possessing one pint of illegal whiskey is subject to a minimum fine of $50 as provided in said section.

This section was designed to cover the possession and transportation of two different types of alcoholic beverages. The second paragraph of this section states that spirits in the possession of any person, and in containers not bearing the required government stamps or seals, shall be deemed for the purposes of this Act to have been illegally acquired. This you refer to as "illegal whiskey".

This portion of section 50 was intended to cover what is commonly known as "moonshine" whiskey, or any whiskey which did not bear evidence that the Internal Revenue tax had been paid, and the possession of any amount of this
whiskey subjects a person possessing the same to the minimum penalty specified in the last paragraph of this section.

The third paragraph of section 50 deals with tax paid alcoholic beverages in the possession of persons in amounts in excess of one gallon, etc. This section was intended to cover the possession of alcoholic beverages brought into the State from other states, where the same had been lawfully obtained.

You will notice in section 58, subsection (d), that a person is permitted to bring into the State lawfully acquired alcoholic beverages in amounts not to exceed one gallon. The practice had grown up among the bootleggers throughout the State of accumulating such liquors which bore the Internal Revenue stamps, and sometimes the stamps of adjoining states, and from this stock to engage in peddling the same. This practice was doubtless the cause of the enactment of the amendment making it unlawful to possess such beverages in quantities exceeding one gallon in the absence of evidence that same was lawfully acquired in Virginia from some person authorized to sell same. A person can lawfully transport only one gallon of such alcoholic beverages and the statute permits the lawful possession of only that amount.

It is my opinion that, if the whiskey is possessed in any amount in a container which does not have thereon government revenue stamps or seals, the person so possessing same is punishable as provided by this section for the possession of said "illegal whiskey", the minimum punishment being a fine of $50.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—"Sunday Ordinances"—Validity of, Where Adopted After Issuance of Licenses.

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

HON. EMORY L. CARLTON,
Attorney for the Commonwealth,
Tappahannock, Virginia:

MY DEAR MR. CARLTON:

I am in receipt of your letter of December 22, in which you state that the Board of Supervisors of Essex County has passed an ordinance pursuant to the authority contained in chapter 129 of the Acts of 1938, prohibiting the sale of beer and wine on Sunday, the ordinance to become effective December 25, 1938. You desire to know whether the Board of Supervisors has authority to pass this ordinance since the licensees have received from the Alcoholic Beverage Control Board their licenses for a year expiring July 1, 1939.

I am of opinion that the Board of Supervisors plainly has this authority. The effect of the ordinance, adopted, of course, as a police measure, is by authority of the General Assembly to restrict the licenses granted by the Alcoholic Beverage Control Board to the extent specified in the ordinance. The licensee still has his license, but the General Assembly has authorized the local authorities to prohibit him from using his license on Sunday, and I do not think there can be any question but that this is a proper and valid exercise of the police power. When he procured his license he knew, or should have known that its use on Sunday was subject to this contingency.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ABC LAW—"Sunday Beer" Ordinance—Procedure in Adopting.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 25, 1939.

Hon. A. D. Johnson,
Attorney for the Commonwealth,
Windsor, Virginia.

My dear Mr. Johnson:
I am in receipt of your letter of April 24, relative to the procedure to be followed where a county adopts an ordinance regulating or prohibiting the sale of wine and beer on Sunday, pursuant to the authority contained in the Acts of 1938, at page 194.

In my opinion, and I have heretofore so held, in adopting such an ordinance, the provisions of the last paragraph of section 2743 of the Code are applicable. There is nothing in the statute authorizing the adoption of an ordinance which does away with these requirements contained in section 2743.

I do not think the provisions of section 2743-b are applicable, because the ordinance is not adopted under the authority of that section.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ABC LAW—"Sunday Beer" Ordinances—Effective Date of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 24, 1938.

Honorable Bernard Mahon,
Attorney for the Commonwealth,
Bowling Green, Virginia.

My dear Mr. Mahon:
This is in reply to your letter of October 21, in which you request my opinion upon the question whether or not an ordinance passed by the county board of supervisors pursuant to the Acts of 1938, page 194, (section 4675(83b) of Michie’s 1938 Supplement to the Code) becomes effective immediately upon compliance with the necessary action to be taken by the board of supervisors, or whether the effective date of same is deferred until the beginning of the new annual license period for the issuance of wine and beer licenses by the Alcoholic Beverage Control Board.

You state that it has been suggested that the provision contained in the Act requiring the clerk of the board of supervisors to certify to the Alcoholic Beverage Control Board a copy of the ordinance, and the provisions requiring the Board to insert in licenses issued thereafter a provision limiting the privileges under the license to conform to the ordinance, would operate to defer the effective date of the ordinance.

I concur in your view that the provision referred to does not have this effect, and that the ordinance becomes effective just as though said provision were not contained in the Acts. In my opinion, the purpose of requiring the Board to insert the limitation in the license is, first, to advise the licensee of the existence and terms of the ordinance, and, second, to bring it within the power of the Board to revoke the license for violation of terms contained therein.

Sincerely yours,

Abram P. Staples,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

ABC LAW—“Sunday Beer” Ordinance—Validity of Act Authorizing.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1938.

Hon. R. I. Overbey,
Substitute Trial Justice,
Juvenile and Domestic Relations Court,
Rustburg, Virginia.

My Dear Judge Overbey:

I have your letter of October 20, in which you request my opinion as to the constitutionality of the statute carried into Michie’s 1938 Supplement as section 4675(83b), empowering the Board of Supervisors in each county to prohibit the sale of beer and wine on Sunday.

The precise point raised in your letter is that the new act does not expressly amend the prior act empowering the Board to prescribe a time in which beer and wine should be sold, and that the Board, having granted a license on July 1, 1938, to one of its licensees without restricting the time of sale, might possibly be considered as having assumed this power and authorized a sale entirely free from any restrictions as to time.

In my opinion, this question should be resolved in favor of the validity of the last mentioned act. It is well settled that a license does not confer a right but merely a privilege, and I think the license issued July 1, 1938, should be merely construed as conferring a privilege to sell, provided such sale is not in conflict with any other law.

It is further my opinion that the powers of the Board to prescribe the time in which beer and wine may be sold are, by implication, repealed to the extent necessary to conform same to the Sunday restrictions which may be enacted by local Boards of Supervisors.

From the standpoint of equity, I believe that a licensee who obtained a license on July 1, and paid the charges therefor, must be considered to have known that the Sunday privileges would or might be controlled by future ordinances of the Board of Supervisors, and that this possibility constituted an implied condition or restriction in the unlimited exercise of his license.

For these reasons, I do not believe the statute can be said to be unconstitutional.

Cordially yours,

Abram P. Staples,
Attorney General.

ABC LAW—“Sunday Beer” Ordinances—Publishing Notice of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 11, 1938.

Hon. Valentine W. Southall,
Commonwealth’s Attorney,
Amelia Court House, Virginia.

My Dear Mr. Southall:

I am in receipt of your letter of August 10, following our correspondence relating to the notice to be given by the Board of Supervisors of a county of a proposed ordinance forbidding the sale of wine and beer from Saturday midnight until Monday, 6 a. m.
You now ask my opinion as to the construction of section 2743 relative to the publication of the notice. You state:

"Now, the local Board has asked me to give such notice as provided in section 2743 of the Code, preparatory to the adoption of an ordinance as outlined above. That section says that such notice 'shall have been published for two successive weeks prior to its passage'. To my mind that calls for a publishing every day for two weeks, that is, fourteen separate publishings. The Board apparently thinks otherwise, that is, that it calls for a publishing of once a week for two successive weeks."

The last paragraph of section 2743 reads as follows:

"No such ordinance or by-laws shall be passed until after notice of an intention to propose the same for passage shall have been published for two successive weeks prior to its passage in some newspaper published in the county, or if there be none such, in some newspaper published in an adjoining county or nearby city and having a general circulation in the county of said board, and no such ordinance or by-laws shall become effective until after it shall have been published in full for two successive weeks in a like newspaper."

You will particularly observe that the publication shall be "for two successive weeks prior to its passage in some newspaper published in the county." The paragraph then goes on to provide what shall be done if there is no newspaper published in the county. I presume that there is a newspaper published in the county, and my opinion, therefore, is that the notice shall be published for two successive weeks in that newspaper. If the newspaper is published only once a week, then the notice will only be printed twice. If the newspaper is published twice a week, the notice, of course, will be published four times.

With much deference to your view. I must differ to the extent I have indicated above. As I interpret your opinion, if the newspaper is published only once a week, then it would be impossible to comply with the statute in its mandatory provision that it shall be published in a newspaper "published in the county". In other words, my view is that the expression "for two successive weeks" means that it shall be published each time that the county paper is published for two successive weeks.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

ABC LAW—Unlawful Possession and Transportation—Penalties.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., SEPTEMBER 7, 1938.

HONORABLE M. B. COMPTON,
Trial Justice,
Gate City, Virginia.

DEAR MR. COMPTON:

In your letter of August 19, you request the opinion of this office on Section 50, Chapter 234, Acts of Assembly 1938, page 374, relative to punishment for possessing, keeping, carrying, transporting or shipping alcoholic beverages illegally acquired. You ask if under this Act a person charged with possessing one pint of illegally acquired whiskey may be fined less than $50.

I have not received any communication from the attorney you mention who
represents several defendants charged with possessing small quantities of illegal whiskey. You state, however, that he seems to think the General Assembly in passing this Act did not intend to fine one person $50 for possessing a small quantity of illegal whiskey and to fine another person $10 or less for transporting the same amount.

The Act provides that "if any person, other than a common carrier, shall have, possess, keep, carry, ship or transport alcoholic beverages which have been illegally acquired", he shall be guilty of a misdemeanor, and that "the minimum punishment for any violation of the provisions of this section, except violation of the provisions thereof the carrying or transporting alcoholic beverages, shall be a fine of not less than Fifty Dollars * * * ."

In view of the express language of the statute fixing a minimum fine of $50 for violations of the provisions thereof, except those dealing with carrying or transporting liquor, it is my opinion that the minimum punishment for the offense of possessing illegal whiskey, since this is not one of the two enumerated exceptions, is $50.

It would seem that a person carrying a small quantity of illegal whiskey could be charged either with possessing the same or with carrying the same. In the first case, the minimum fine would be $50, and in the second case the minimum fine could be less. This Act, as originally drawn as Senate Bill 156, did not contain the exception dealing with transportation. This amendment was offered from the floor and inserted in the Act as finally passed. If the Act, as passed, causes unjust results, it is a matter to be corrected by the Legislature. The express wording of the statute does not appear to be open to construction.

I am unable to tell you how other trial justices are disposing of such cases as I have had no correspondence with them on this question.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ABC LAW—Warrants Used in Payment for Beverages—Form of Certain Warranties, etc.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., November 14, 1938.

HONORABLE R. MCC. BULLINGTON,
Alcoholic Beverage Control Board,
Richmond, Virginia.

MY DEAR COLONEL BULLINGTON:
I have your letter of November 9, in which you request my opinion upon the question whether or not there is any objection from a legal standpoint to the Board adopting a practice of incorporating the following warranty into checks or vouchers used in paying vendors of alcoholic beverages for beverages bought by the Alcoholic Beverage Control Board:

"1. It is hereby warranted in consideration of this order that the above case price represents the lowest price f. o. b. distillery, or point of final shipment, offered any state or other class of purchases for this same merchandise. Provided, however, the vendor shall be deemed to have complied with this warranty notwithstanding any differences in net realized prices on merchandise sold to different states, when such differences are due to State law or Administrative Requirement pertaining to freight, handling or delivery charges, bailment, or total cash discounts not exceeding 2%.

"2. No claim on this warranty shall be enforceable 180 days after the date of this invoice."
I beg to advise that, in my opinion, there is no legal objection to this warranty being incorporated in the checks or vouchers.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 11, 1938.

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

DEAR GOVERNOR PRICE:

By chapter 405 of the Acts of the General Assembly of 1938, there was created a State Library Building Commission, and authority conferred upon said Commission to cause to be erected upon the Ford Lot in the city of Richmond, said lot being bounded by Eleventh, Twelfth, Capitol and Broad Streets, a suitable building to house the State Library, the State Law Library, and to include appropriate rooms and facilities for the Supreme Court of Appeals, its members and its clerk, and the necessary offices for the Attorney General. The Commission is given very broad powers with respect to the construction of said building and the making of contracts therefor.

While said Act does not itself make an appropriation, there was appropriated the sum of $150,000 to the State Library Commission for the year ending June 30, 1939, as appears on page 936 of the Acts of 1938, and the further sum of $300,000 for the year ending June 30, 1940, as appears at page 946 of said Acts.

Section 51 of the Appropriation Act (Acts 1938, page 958) provides that, in the event of an emergency declared by the Governor and with the consent and approval of the Governor in writing first obtained, a State agency receiving an appropriation may exceed the amount of its appropriation.

Application has been made by the State Library Building Commission to the United States Public Works Administration for a grant of approximately $800,000 to be utilized in connection with the construction of said proposed library building. In order to obtain this grant it is necessary that there shall be available to the said Library Commission sufficient funds to complete the construction of said building, such additional funds to be used in connection with and in addition to the amounts received under said grant.

You request my opinion whether or not these facts and circumstances constitute such an emergency as would empower the Governor, under said section 51 of said Appropriation Act, to authorize the said Library Building Commission to exceed the appropriations made to it as above set out to the extent necessary to complete the said building.

Since it appears it is necessary, in order to obtain the said grant, that this power should be exercised by the Governor, and since it further appears that unless these funds are available the proposed grant will be lost to the Commonwealth of Virginia, it is my opinion that this is such an emergency as justifies and empowers the Governor to authorize the said State Library Building Commission to exceed its appropriation in the manner contemplated by said section 51 of the Appropriation Act.

Sincerely yours,

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

APPROPRIATIONS—Commission of Fisheries—Federal Laboratory at Yorktown.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1938.

Honorable LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

Referring to your letter of August 6, 1938, in which you request my opinion as to your authority as Comptroller to authorize the payment of $5,000 appropriated to the Commission of Fisheries for the operation of a laboratory by the Federal Government at Yorktown, I beg to advise that after considerable correspondence with the Commissioner of Fisheries, Honorable G. Walter Mapp, and with Honorable Charles E. Jackson, Acting Commissioner of the Bureau of Fisheries at Washington, D.C., which correspondence is herewith handed to you, I am of opinion that it has been established that the Federal Government has made available the sum of $7,000 for the operation of said laboratory, and that it is proper for you to authorize the payment of said sum to the United States Bureau of Fisheries as soon as proper requisition is made therefor by the Virginia Commissioner of Fisheries.

It is my opinion that this payment does not constitute a lump sum transfer within the meaning of the prohibition against such transfers contained in the Reorganization Act. I believe that the latter refers only to lump sum transfers between the Departments of the State government.

I am further of opinion that, even if this payment were in violation of the provisions of the Reorganization Act, it is authorized by a subsequent act of the General Assembly contained in the 1938 Appropriation Act, and to that extent same would operate as a partial repeal or amendment of the Reorganization Act. The provisions of the Reorganization Act are not controlling where same come in conflict with any more recent statutory enactment.

Sincerely yours,

Abram P. Staples,
Attorney General.

APPROPRIATIONS—"Discretionary Fund"—Covering Deficit in County School Funds—Authority of Governor.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 15, 1938.

Honorable J. H. Bradford, Director,
Division of the Budget,
Richmond, Virginia.

My Dear Mr. Bradford:

I have your letter of July 15, in which you enclose a letter dated June 22 from Dr. Sidney B. Hall, Superintendent of Public Instruction, to Governor Price.

Dr. Hall's letter requests the Governor to authorize the payment of the sum of $1,000 to York County, $1,000 to Elizabeth City County, and $1,221.60 to King George County out of the discretionary fund. The reason for this request is that these counties, prior to a ruling of this office that they have no authority so to
do, had furnished aid to schools conducted by post exchanges on government reservations, and had, by reason of such payments, incurred a deficit in their school funds.

You request my opinion as to whether or not there is any legal obstacle in the way of the Governor's authorizing the payment of these funds to these counties.

It is my opinion that the Governor is not concerned legally with the cause for the depleted condition of the school funds of these counties, and is not required to inquire into same. The fact that the condition exists, and that this discretionary fund is to provide relief from such condition, is in my opinion, ample authority for the payments if in the opinion of the Governor it is proper to do so.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—For Education of World War Orphans—Construction of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1938.

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

My Dear Doctor Hall:

This will acknowledge your letter of recent date, requesting an opinion of this office construing a portion of the 1938 Appropriation Act.

The appropriation to which you refer is for the education of the children of certain World War Veterans, and the provision with which you are concerned reads as follows:

"* * * for the use and benefit of the children not under sixteen and not over twenty-one years of age of those who were killed in action or died from other cause or who are totally and permanently disabled as a result of service in the World War, from April 6, 1917, to July 2, 1921, while serving in the army, navy or marine corps of the United States * * *.

Prior to 1938, this appropriation was provided in each Appropriation Act in these same terms, except that the words "or who are totally and permanently disabled as a result of service" were not included in the former Acts.

The language of this Act is very confusing and ambiguous. However, I am advised that the former Acts were uniformly construed to apply to the children of persons who were killed or actually died during the official duration of the war, and it is my opinion that this settled construction of so ambiguous a statute should be accepted as correct.

I am further of the opinion that the 1938 amendment must be taken simply to extend the benefits of this appropriation to the children of veterans who are at present permanently and totally disabled as the result of services in the war.

Very truly yours,

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

APPROPRIATIONS—For Maintenance of Medical College Hospital—Disbursement Through Health Department Under Federal Social Security Plan.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 26, 1938.

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

Dear Dr. Sanger:

I have your letter of July 26, requesting my opinion as to whether you may legally use a portion of the special revenues from the Hospital Division, which have been reappropriated for maintenance and operation of the hospital, to participate in the State plan for crippled children's services adopted by the State Health Department pursuant to the Federal Social Security Act.

More specifically, you state that you propose to use a sum in the amount of $5,600.00 in the following manner:

"In order to meet certain requirements imposed under the Federal Social Security Act, and thus secure Federal funds to match funds expended in our Hospital for the free hospitalization and care of crippled children, it is necessary that all such State funds should be made immediately available to the State Board of Health and disbursed by that Board in the form of per diem allotments based on the services actually rendered to crippled children.

"It is inevitable that we shall spend, out of the appropriation in question, vastly more than the amount just mentioned for the free treatment of crippled children. In order to secure the funds available under the Federal Social Security Act, we propose, instead of spending this portion of our appropriation directly, to transfer the same to the State Board of Health to be disbursed by it in payment for the treatment of crippled children in our Hospital.

"I should like to emphasize that under such an arrangement, these funds will be used in our Hospital for precisely the same purposes for which this portion of our reappropriated revenues would have been spent had there been no such transfer."

In my opinion, the disposition which you propose to make of these funds amounts to spending such funds for the purpose for which they have been appropriated. It is the opinion of this office, therefore, that your proposal may lawfully be carried out.

Very truly yours,

Abram P. Staples,
Attorney General.
COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., SEPTEMBER 23, 1938.

HONORABLE H. G. SHIRLEY, COMMISSIONER,
DEPARTMENT OF HIGHWAYS,
RICHMOND, VIRGINIA.

DEAR MR. SHIRLEY:

This is in reply to your letter of September 12, which is as follows:

"For the biennium 1937-1938 there was set up in the general fund for the year 1937 $178,465.00 and the year 1938 $178,465.00 for the maintenance of secondary convict camps. This was taken from the general fund, or set up to the Departments from the general fund. But on page 972 of the Acts of 1936, Section 36 provides the following:

"'In order to reimburse the general fund of the State Treasury for expenditures herein authorized to be paid out of said general fund on account of the State Highway Department . . . ., there shall be transferred from the proceeds of the motor vehicle fuel tax to the general fund, etc.'

"We find that the total amount appropriated from the general fund, being the amounts above given, namely $178,465.00 and $178,465.00, was not used during the biennium by $64,984.36, but the Comptroller's Office has charged the State Highway Department with the full $178,465.00 for the two years, making a diversion of road funds of $64,984.00, which we believe is illegal.

"Will you please give me your opinion as to this transaction and why should the Highway Department have to pay more than was required to reimburse the general fund?"

The Appropriation Act of 1936 appropriates for the fiscal year July 1, 1936, to June 30, 1937, (Acts 1936, page 871) the sum of $182,465 for payment of the per diem allowance authorized by law to prisoners transferred to the State convict road force in accordance with the provisions of chapter 145 of the Acts of Assembly of 1932. A like appropriation is made for the fiscal year 1937-1938 (Acts 1936, page 942). On page 964 of said Acts, the Appropriation Act further provides that there shall be a deduction for each of said years of the sum of $4,000, in the event that the Governor should decide that such deduction is necessary in order to prevent a deficit.

You quote the provision on page 972 of the Acts, which provides for the transfer from the proceeds of the motor vehicle fuel tax to the general fund on January 1, 1937, and on January 1, 1938, the sum of $178,465 in each year. You will observe that this is $4,000 less in each year than the amount appropriated to the Highway Department for the convict road force out of the general fund of the treasury.

You quote the provision on page 972 of the Acts, which provides for the transfer from the proceeds of the motor vehicle fuel tax to the general fund on January 1, 1937, and on January 1, 1938, the sum of $178,465 in each year. You will observe that this is $4,000 less in each year than the amount appropriated to the Highway Department for the convict road force out of the general fund of the treasury.

I am advised by the Comptroller's office that the deduction of $4,000 was made for the fiscal year ending June 30, 1937, but was not made for the following year, which accounts for an apparent balance in said appropriation of $4,000 more than was actually intended to be expended. I have a letter from the Comptroller, signed by Mr. S. C. Day, Jr., his assistant, in which he states that during the biennium which ended June 30, 1938, the sum of $356,930 was transferred from the proceeds of the motor vehicle fuel tax to the general fund of the treasury, and that during said time there was expended out of the convict road force appropriations above referred to the sum of $295,945.64, leaving a balance of $60,984.36.

The legal question presented is whether or not the balance remaining in the general fund at the expiration of the last biennium shall revert to and become a
REPORT OF THE ATTORNEY GENERAL

part of the general fund of the State Treasury for the next biennium, or whether the same shall be transferred back as a credit to the account of the motor vehicle fuel tax fund.

Section 48 of the Appropriation Act of 1936, page 977, provides that all appropriations made out of the general fund unexpended on the books of the Division of Accounts and Control at the close of business on June 30, 1938, shall, except as therein otherwise expressly provided, revert to and become a part of the general fund of the State Treasury. On the other hand, the language quoted in your letter providing for the transfer to the general fund from the motor vehicle fuel tax fund expressly states that the purpose of the transfer is "in order to reimburse the general fund of the State Treasury".

Upon the facts as above set forth, it appears that after said reimbursement has been completed there still remains out of the funds transferred the sum of $60,984.36 in the general fund, which has not been utilized for the purpose for which the transfer was made.

I am of opinion that, within the meaning of the provisions of section 48 of the Appropriation Act above referred to, this balance which was not used for the purpose for which it was transferred should not be deemed to thereafter remain in the general fund unconditionally, and therefore would not come within the scope of said section 48, which requires a reversion of all appropriations unexpended at the end of the biennium.

I am further of the opinion that the money thus transferred was impressed by the General Assembly with a specific purpose, and was in the general fund as a fund in the nature of a trust fund for that purpose. After the purpose of this trust has been completely fulfilled and the object of the transfer accomplished, the balance on hand should be transferred back to the credit of the motor vehicle fuel tax account and available for expenditure by the Highway Department in the same manner that other funds in said account are available.

I am sending a copy of this letter to Colonel LeRoy Hodges, State Comptroller.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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APPROPRIATIONS—Special Accounts for Special Revenues of Administrative Agencies—Department of Agriculture and Immigration.

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

COLONEL LEROY HODGES,
State Comptroller,
Richmond, Virginia.

DEAR COLONEL HODGES:
I have before me your letter of July 7, which is as follows:

"Section 13, Chap. 428, Acts 1938, page 951, provides as follows:

"'All monies, fees, taxes and other charges hereafter collected by or on behalf or on account of the Department of Agriculture and Immigration, in pursuance of law, from whatever source, or on account of the laws administered by the said department, or any division or section thereof, shall be paid promptly and directly into the general fund of the State treasury * * *.'"

"On pages 838 and 908 of the Acts of 1938, an appropriation is made to the Division of Markets for each year of the biennium for auditing cooperative
associations, to be paid out of the fees collected by the Division of Markets for auditing said cooperative associations, and paid into the State treasury.

"The Dairy and Food Division of the Department of Agriculture, under the provisions of Chapter 390, page 711, Acts 1938, is charged with the duty of enforcing the provisions of the Act with respect to shipments of sweet cream or ice cream mix into the State of Virginia, and the funds collected under the provisions of that Act are appropriated for such enforcement.

"Also the Dairy and Food Division of the Department of Agriculture, under the provisions of Chap. 382, page 672, Acts 1938, is charged with the duty of enforcing the provisions of that Act with respect to 'Vitamin D. Milk', and the funds collected under the provisions of that Act are appropriated for payment of the cost of assays.

"We will thank you to advise whether or not, in your opinion, the Comptroller should set up on the books of the Division of Accounts and Control the special funds mentioned above and credit thereto the monies collected from the sources mentioned, in view of the provisions of Section 13 of the Appropriation Act requiring that all such monies shall be paid into the General Fund of the State treasury."

The revenue derived by the Department of Agriculture pursuant to its administrative and supervisory duties under the four several Acts referred to in your letter disclose the legislative intent of imposing upon the respective associations, corporations, and persons subject thereto, compensatory fees or charges to cover the cost of the State supervision, inspection and regulation contemplated by the said Acts.

In the recent case of Great Northern Railroad Company v. Washington, 300 U. S. 154, 81 L. Ed. 573, the Supreme Court of the United States sustained the validity of a fee or charge of this nature, provided same is not unreasonable or disproportionate of the cost of rendering the service for which the charge is compensatory. The Court further held in that case, where the funds derived from such compensatory charges are commingled with funds expended for other purposes, the State is under the burden in a proceeding to collect such charges to prove that the amount of same is not in excess of the cost of rendering said service.

It will be noted that in section 7 of chapter 382, page 672, of the Acts of 1938, it is provided that all moneys collected from the fees charged for assays of Vitamin D milk embraced in the said Act "shall be placed in the General Fund to the credit of an account to be known as the 'Vitamin D Milk Account', and such amount as may be necessary hereby is appropriated out of such Vitamin D Milk Account for the payment of the cost of assays of Vitamin D Milk as provided in this act".

The decision of the Supreme Court referred to above proceeds from an assumption that in the event the revenue from the compensatory charges should exceed the cost of rendering same, the General Assembly will, as to future operations, reduce the amount of the fees or charges to conform to the actual cost thereof.

In view of the burden under which the Department labors in collecting these charges, it is my opinion that the general policy provided for in section 7 of said chapter 382, above quoted, should be followed with respect to receipts from all of the four several Acts referred to in your letter, and that special accounts within the general fund should be set up earmarking the receipts and disbursements with respect to each of said four statutes.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ARCHITECTS, ENGINEERS, ETC.—Non-Residents Exempted from Qualifying to Practice.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 29, 1939.

HONORABLE WILLIAM T. SPENCER, JR.,
Commonwealth's Attorney,
Lynchburg, Virginia.

My DEAR MR. SPENCER:
I have your letter of May 27, in which you set out the facts with reference to the employment of a professional engineer, a resident of New York State and qualified to practice in that State, to undertake the construction of a building in the city of Lynchburg costing something like $185,000, which will take approximately six months to build.

You request my opinion as to whether or not such person will come within the exemption of section 3145h of chapter 125A of the Code, as amended by Acts 1938, which exempts such a person "when his practice in responsible charge of work does not aggregate more than fifteen days in any calendar year."

In my opinion, the answer to your question is dependent upon the facts and the nature of the duties undertaken by the engineer, and the extent of supervision which he is required to give the project during the course of its construction. If he is required to check up on the progress of the work from time to time and supervise same, in my opinion the "duration of his practice" would be determined not by the number of days he is present in the State, but by the number of days during which the work is in progress, and the entire six months' period would be regarded as the time of his practice in Virginia. However, as above stated, the question is largely one of fact, depending upon the extent and continuity of the work and study required to be given the project by the engineer.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ATTORNEYS—Disbarment—Procedure.
Id.—Id.—Costs.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 29, 1939.

HONORABLE R. E. BOOKER,
Secretary-Treasurer,
Virginia State Bar,
408 Law Building,
Richmond, Virginia.

My DEAR MR. BOOKER:
I am in receipt of your letter of June 27th in which you first say:

"Under the Rules for the Integration of the Virginia State Bar, it is provided that the several District Committees shall investigate complaints made against attorneys. If, after investigation, the Committee decides that a charge of disbarment, suspension or other disciplinary action is merited, it shall make such report of proceedings as the Committee may deem advisable and file the same, with a verified complaint, in the Clerk's office of the Court
which has jurisdiction in the premises. 'Thereupon, further proceedings on the said complaint and report shall be in accordance with the statutes in such cases made and provided'. It is the feeling of the Chairman of the several District Committees, as well as the members of the Council of the Virginia State Bar, with whom I have talked, that when the report and verified complaint are filed by the District Committee, the Commonwealth's Attorney takes over the handling of the case from then on, and the Committee of the Virginia State Bar has no further obligation to perform under the statute.'

In my opinion, the above procedure is plainly correct and in accordance with the rules adopted by the Supreme Court of Appeals of Virginia for the Integration of the Virginia State Bar and with section 3424 of the Code.

You then ask the following question:

"In a case recently tried upon a verified complaint made by one of the District Committees, the accused attorney was acquitted and the Court assessed the costs against the Virginia State Bar. Would you please advise whether or not in cases of this nature, the Virginia State Bar would be liable for any costs in the Clerk's office, or whether or not these costs should be charged to the Commonwealth as in a criminal case?"

I do not think that proceedings instituted against a member of the Virginia State Bar for the revocation of his license to practice law can be deemed to be in any sense a criminal case. It seems to have been definitely established by our Court of Appeals that even though proceedings are brought in the name of the Commonwealth, it cannot be deemed a criminal case unless the end and purpose of such proceedings are to punish someone for an offense. The revocation of a license is not a punishment for any specific offense but is merely the withdrawal of the privilege which the State has granted. See the case of Cherry v. Commonwealth, 78 Va. 375. It follows, therefore, that costs taxed against the Virginia State Bar may not be paid out of the appropriation made for criminal charges.

I do not think it proper for me to attempt to pass on the action of the court in assessing costs against the Virginia State Bar. This office has uniformly taken the position that it should not and will not express an opinion on the action of a court of record. I am sure you will appreciate this position and realize that this office has no power to review the decision of the court. If appropriate authorities are of the opinion that the court decision was erroneous, then it would seem that the proper way to determine this question is by appeal, or writ of error if same will lie. If not, then the decision of the lower court is conclusive.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Duties—Auditing Accounts Approved by Courts—Opinions of Attorney General as to Correctness of Same.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 25, 1939.

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

My dear Mr. Downs:
I refer to two of your letters of April 21, in which you ask a number of question relating to the proper fees of a sheriff for making arrests and allowances
to this officer for mileage, all of your questions having to do with fees and allowances in criminal cases. You state further that you are engaged in auditing the accounts of a sheriff, which means, I take it, that the fees and allowances to which your questions relate have already been paid.

While the statutes involved are not as clear as they might be, insofar as answering one or two of your questions is concerned, the answers to most of them are not difficult if all of the facts are known. In fact, some of them are covered by previous opinions of this office. However, I think it proper at the outset to direct your attention to the law relating to the payment of these fees and allowances to sheriffs in criminal cases. Generally speaking, all of your questions relate to fees and allowances paid to sheriffs pursuant to their certification by a court of record. I refer to section 4961 of the Code, which reads as follows:

“The certificate required by section thirty-five hundred and four, shall when the payment is to be to a clerk, be from the court thereof he is clerk, and when it is to be to a sheriff or other officer, from the court in which the prosecution is, or to which a justice shall certify, as hereinafter mentioned. Any other expense incident to a proceeding in a criminal case which is payable out of the treasury otherwise than under the preceding section, or under section twenty-one hundred and seventy-six, shall be certified by the court. If it be a justice exercising jurisdiction, it shall be certified by such justice to the circuit or corporation court before which he qualified, which court shall certify the same, if it appears to be correct, to the Auditor. With the certificate of allowance there shall be transmitted to the Auditor of Public Accounts the vouchers on which it is made. The court, in passing upon any account for fees or expenses required to be certified by it under this section, before certifying the said account, may, in its discretion, require proof of the correctness of any item thereof, notwithstanding the affidavit of the party in whose favor such account is. In all cases the justice of the peace shall file with his account a copy of the warrant on which his proceedings were had.”

These fees and allowances are certified to the State Comptroller by a formal court order on which it is stated that “said account, being supported by the affidavit of the party aforesaid, was duly examined by the court, and appearing to be correct and unpaid, was allowed in order to be certified to the State Comptroller for payment.” The form of order used is prepared by the State Comptroller and is described as “Official Form No. 5 (Criminal).

In view of the section of the Code to which I have referred and of the certification itself being in the form of a court order, any person questioning the correctness of any item appearing in the order is in fact questioning the court order itself. In my opinion, the only way in which this order may properly be corrected or set aside is by an order entered by the court making the original order, or by a decision of the Supreme Court of Appeals. I know of no statute which authorizes any State officer to correct or alter this court order certifying these fees and allowances of a sheriff in criminal cases.

In view of the above, it is my opinion that the court order referred to above, under which these fees and allowances were paid to the sheriff, is binding upon all State officers until it is corrected or set aside in the manner I have already indicated. This view makes it unnecessary for me to express an opinion on the questions which you raise in connection with your audit of the accounts of a sheriff. There may be facts bearing upon any particular order which do not appear in the order itself and which are not recited in your letter. Doubtless the court which entered the order or orders in the case of the sheriff whose accounts you are now auditing will be glad to enlighten you as to its reasons for allowing any items which you question.

The authority of the Attorney General to give opinions is limited by section 374a of the Virginia Code by this language: “The Attorney General shall have no authority to render an official opinion unless the question dealt with is directly related to the discharge of the duties of the official requesting same”.

You will observe from the foregoing that the duty of passing upon these
REPORT OF THE ATTORNEY GENERAL

claims is vested in the judge of the court, and his construction of the statutes is
conclusive in the absence of a reversal by the Supreme Court of Appeals. Under
these circumstances, I do not feel that it would be proper for me to express to
you an opinion as to what I consider the proper construction of the statutes re-
lation to compensation of these officers.

During the last five years matters have frequently arisen in the Comptroller’s
office which caused some doubt in the mind of the Comptroller as to the correct-
ness of the act of the judge in certifying compensation or other items of cost
for payment. I have invariably advised the Comptroller that, in my opinion, the
proper procedure for him to follow is to write to the judge who certified the claim
for payment and call his attention to the particular matter in doubt. The Com-
troller’s office has met with very cordial cooperation by the judges of the courts
in correcting mistakes in cases where mistakes have occurred.

I would suggest to you the same practice if you feel that any claim has been
paid through a mistake of fact. I have no doubt the judges of the courts will
be glad to assist you in any way to correct any errors which may have occurred.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AUDITOR OF PUBLIC ACCOUNTS—Local Audits Not Covered by Ade-
quate Appropriation—Discretion in Determining Which Shall be Made.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 3, 1939.

Hon. L. McCarthy Downs,
Auditor of Public Accounts,
Richmond, Virginia.

My Dear Mr. Downs:
I am in receipt of your letter of April 1, which I quote as follows:

"I have been requested to make an audit of the accounts and records of the
School Board of the City of Richmond. I am charged by law with making
a great many audits, the aggregate cost of which would be greatly in excess
of the amount appropriated for this work by the General Assembly. I have
not yet undertaken a program of auditing city school boards in view of the
great demand for our services by State departments and institutions.

"In view of the fact that our appropriation is insufficient to do all the
work required by law, I should like your opinion as to whether or not it is
within my power to decide just which audits I shall make and if I am within
my rights to decline to audit the School Board of the City of Richmond at
this time in view of the fact that I have other work which in my judgment
is more important."

In the situation described by you I am of the opinion that it is clearly within
your discretion to pass upon the relative importance of the various audits which
you are required to make by statute. Therefore, in my opinion, your question
must be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Honorable Edwin B. Jones, Chairman,
Board of Sinking Fund Commissioners,
Richmond, Virginia.

Dear Mr. Jones:

I have your letter of August 23, which is as follows:

"The State Board of Education finds it is necessary for it to sell some of the county school bonds held in the Literary Fund in order to raise funds with which to purchase $750,000 of bonds of the Virginia Polytechnic Institute, which will be issued under an act of the last General Assembly."

"The Board of Education proposes to sell the Board of Sinking Fund Commissioners a part of the county school bonds. Will you kindly give me your opinion as to whether or not the Board of Education can sell the county school bonds, and if the Board of Sinking Fund Commissioners has the right to buy the bonds?"

The two questions submitted in your letter will be answered in the order therein set out.

The first question is whether or not the State Board of Education possesses the authority to sell to the Board of Sinking Fund Commissioners the bonds evidencing loans heretofore made out of the literary fund by the State Board of Education to the school boards of the various counties, cities, and towns in the State for the purpose of the erection of school buildings.

Section 633 of the Code authorizes the State Board of Education to invest the capital of the literary fund in bonds of the State, or of the United States, or of railroad companies under certain restrictions; or in bonds made by one or more of the county boards of city school boards of the several counties or cities of the State.

The Act further authorizes the said Board to call in any such investment, or any heretofore made, and reinvest the same as aforesaid, when ever deemed proper, for the preservation, security or improvement of the said fund.

The provision last referred to has been construed as authorizing the State Board of Education to sell any securities to the public at any time deemed desirable, other than loans made to the said local school boards. This office has heretofore ruled that securities evidencing loans made to such local school boards may not be sold to the general public, for the reason that the entire plan on which loans are made contemplates that the ownership of the debts arising from said loans shall continue in the State and remain subject to the control of the public officers of the State.

The second paragraph of section 58 of the Appropriation Act expressly authorizes the sale by the State Board of Education of any bonds owned by the State as a part of the literary fund, and the reinvestment of the proceeds from such sale in certain certificates of indebtedness of the Virginia Agricultural and Mechanical College and the Polytechnic Institute at Blacksburg aggregating the sum of $750,000. Said section 58 further authorizes the issuance of these said certificates.

Due to the fact that the Sinking Fund Commissioners are officers of the State, and that any securities sold to said Sinking Fund Officers, so long as same are not resold, will remain within the control of one of the agencies of the State Government, it is my opinion that the State Board of Education has authority to sell said local school board bonds to the said Sinking Fund Commissioners, upon
the condition, however, that same shall not be resold to any person or corporation other than an agency of the State Government.

Your second question is whether or not the Sinking Fund Commissioners have legal authority to purchase said local school board bonds from the State Board of Education.

The provisions of the Acts of 1932, page 80, are carried into Michie's 1936 Code as section 2641(8). The following provision is found:

"* * * The moneys belonging to such sinking fund shall be invested by the commissioners of the sinking fund in safe securities at the highest rate of interest obtainable, * * *.*"

The statutes creating sinking funds for the purpose of retiring future mature obligations of the State generally contemplate the investment by the Sinking Fund Commissioners of moneys in the hands of said Commissioners in good and safe interest bearing securities. The bonds of the local school boards above referred to are secured by liens upon the school buildings constructed from the proceeds of said loans.

The statutes, in addition thereto, are very comprehensive and far-reaching in their provisions for the repayment of the loans made for the construction of such local schools out of the literary fund, and impose a direct duty and obligation upon each board of supervisors to make such levies upon property in the county as may be requisite to pay the interest and retire the principal of said literary fund loans as the same mature.

It is my opinion, therefore, that the Sinking Fund Commissioners have ample authority under the statute to purchase the local school bonds held by the State Board of Education in the literary fund, subject, however, to the following qualifications: that the Sinking Fund Commissioners are prohibited from reselling such bonds to other than State Agencies, and that the Commissioners may purchase only bonds which will mature before the time when the money to be derived from the repayment thereof will be needed to meet future payments which the Sinking Fund Commissioners will be required to make on the bonds to be retired out of the sinking fund.

Subject to these qualifications, it is my opinion that the Sinking Fund Commissioners are authorized to purchase said local school bonds in their discretion.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Parliamentary Procedure—"Majority of Those Present"—Effect of Refusal to Vote.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 28, 1939.

HONORABLE FRANK NAT WATKINS,
Commonwealth's Attorney,
FARMVILLE, VIRGINIA.

DEAR MR. WATKINS:

This is in reply to your letter of April 22, 1939, in which you state:

"In August, 1938, the Board of Supervisors of Prince Edward County passed an ordinance prohibiting the sale of beer on Sunday as provided by section 4675(83b), amendment 1938. At a regular meeting of the Board of Supervisors of Prince Edward County on April 14, 1939, there were present six members of the Board, they being all the members of the Board. A motion was made at this meeting to repeal the ordinance above referred to,
and a vote was taken on the same, which was recorded three for repeal and two against. One member who was present did not vote."

You point out that section 2717 of the Code of Virginia (Michie 1936), which deals with county Boards of Supervisors, provides in part:

"** All questions submitted to the board for decision under the proceedings of this chapter, or any law of the state, shall be determined by a viva voce vote of a majority of the supervisors present **."

You ask if the ordinance passed in August, 1938, was repealed by the action of the Board of Supervisors on April 14, 1939.

In general, if a quorum is present and there is no statute or other organic provision requiring a certain vote by which a given question must be passed by a certain body, a majority of the votes actually cast is sufficient to pass the measure, and this though they be not a majority of the whole body and though others be present but do not vote, the non-voting members being held to acquiesce in the result. Booker v. Young, 12 Gratt. (53 Va.) 303; 46 C. J. 1381; Dillon on Municipal Corporations, section 527, page 851.

However, where, by statute or otherwise, a definite vote is necessary—e.g., a majority of all the members of the body, or two-thirds of all the members elected, etc.—the vote specified by law must be obtained in order to pass the measure in question. Smiley v. Commonwealth, 116 Va. 979; McQuillin on Municipal Corporations, section 626; 46 C. J. 1381.

Practically all the cases enunciating this last rule dealt with statutes requiring a specified vote of all the members elected. The reason for the rule is quite clear. Usually the type of measure requiring a specific vote of the membership is one of vital importance, and it is evident that, in requiring such a vote, it was deemed best not to have the measure passed by a mere majority of a quorum, but rather that it should be passed only upon an affirmative vote of a designated percentage of everyone entitled to vote.

This reasoning, requiring a strict construction, does not apply when the language "the majority of the members present" is used. Here it is evident that the Legislature did not think it necessary that any definite vote of the entire body be obtained, for it recognized that some members, the number of which may vary from time to time, may be absent. So the language used, however construed, would not require any definite vote.

While two cases construing such language have been found (Commonwealth, ex rel. Swartz v. Wickersham, 66 Penn. St. Rep. 134, decided in 1870, and Livesey v. Borough of Secaucus, 97 Atl. 950 (N. J.), decided in 1916) which hold that such language must be strictly construed, the reasoning advanced in these cases is not very forceful. However, there is a further reason why these cases would not govern a construction of the Virginia statute. In neither of them, at least so far as is disclosed by the opinion, was involved a statute providing for action by a tie-breaker in case of a tie.

It is to be noted that section 2717 provides that, in case of a tie, the deciding vote shall be cast by the designated tie-breaker. It is clear that the Legislature contemplated that, where a majority of the Supervisors present did not vote in favor of a given matter, the remainder would vote against it and thus either defeat the measure or create a tie, in which case the tie-breaker would cast the deciding vote. It was not contemplated that a member, by his failure to vote, would completely defeat the action of the majority of those actually voting.

It has been steadfastly held by the courts, where a designated number of votes is not required, that when members are present at a meeting, a mere refusal to vote on the part of some of the members cannot defeat the action of the majority of those actually voting. See 2 Dillon on Municipal Corporations, page 851. This was so held in Booker v. Young, 12 Gratt. (53 Va.) 303. See opinion by Daniel, J.

While, as a general rule, words cannot be added to a statute, or the words thereof changed, whenever a word is so used in the context of a statute as to
be ambiguous, it will be so construed to carry out the evident intent of the Legislature.

Though the matter is not free from all doubt and, in the final analysis, is one that can be finally determined only by the courts, it is my opinion that the Legislature did not intend to change the general rule that the majority of those actually voting should determine the matter, and that the words "majority of those present" mean the "majority of those acting." This seems true since it is clear that the Legislature did not intend to require an affirmative vote of any definite proportion of the entire body and, in providing for action by a tie-breaker, indicated that it did not intend that any member, by refusing to vote, should completely defeat the action of those actually voting.

It is, therefore, my opinion that the ordinance referred to in your letter was repealed by the action of the Board of Supervisors of Prince Edward County on April 14, 1939.

With respect to your second question concerning the necessity of all Supervisors present to vote, I beg to advise that this is a matter which may depend upon facts not before me and is, therefore, a question upon which I am expressing no opinion.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Publication of Financial Statement—"Newspapers of the County".

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 5, 1939.

Hon. G. M. Weems,
Treasurer of Hanover County,
Ashland, Virginia.

My Dear Mr. Weems:

I am in receipt of your letter of March 30, in which you ask the following question:

"I would appreciate your advising me if in your opinion section 2577m (3) means that such statement may be published in any newspaper having a general circulation in the locality affected. This County has one paper published in the County. My purpose in writing is to find whether or not publication of the statement of receipts and disbursements may be made in the Richmond papers which have circulation in this County in event satisfactory arrangements cannot be made in the local paper."

Section 2577m (3) of the Code, (Michie. 1936) 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."

Construing the last clause of this section, it is my opinion that it is within the discretion of the Board of Supervisors to direct that the statement of receipts and disbursements be printed either in a newspaper published in the county or in a newspaper published in an adjoining county or city where both papers have a
general circulation in the county whose receipts and disbursements are to be published.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CAPITOL SQUARE—Management and Control of.

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

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

Dear Governor:

I have before me a letter addressed to you by Mr. Rowland Egger, Director of the Bureau of Public Administration at Charlottesville, Virginia, concerning which you request that I give an opinion upon the matters therein set out.

Mr. Egger inquires as to the jurisdiction and powers of the Governor over the public grounds and buildings located in Capitol Square.

Section 410 of the Code confers upon the Director of the Division of Grounds and Buildings the power of the control of the Capitol Square, and all buildings and offices thereon situated with the exception of the executive chambers, the offices of the Secretary of the Commonwealth, Division of Purchase and Printing, the old and new Senate chambers, the old and new halls of the House of Delegates, the offices of the clerks of the Senate and House of Delegates, the committee rooms, the enrolling office, the general library, and the offices and court room of the Court of Appeals. This section also provides this power of the said Director is to be exercised "under the direction and control of the Governor".

It is my opinion that this power, therefore, is vested in the said Director, and that he should exercise same in accordance with his own judgment unless direction is given to him by the Governor. However, if the Governor desires to do so, it is my opinion that the ultimate authority and jurisdiction with respect to the control of said grounds and buildings is vested in the Governor.

As to the offices excepted from the jurisdiction of the said Director, it is my opinion that these offices are under the control of the heads of the respective departments occupying same, and that, where same are not occupied by any specific department, the Governor would have jurisdiction with respect thereto.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CCC CAMPS—Thefts of Government Property by Enrollees—Trial for, in State Courts.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 17, 1939.

HON. PIERCE KEGLEY,
Trial Justice,
Bland, Virginia.

My Dear Mr. Kegley:

I am in receipt of your letter of April 11, from which I quote as follows:
REPORT OF THE ATTORNEY GENERAL

"I would like to ask your opinion in regard to jurisdiction of a Trial Justice court over CCC enrollees.

"In this particular case, two boys who had not been discharged at the time, left the camp and went home. They took with them such articles of clothing, bedding, etc., as had been issued to them for their use in camp. All these articles are stamped and tagged as being property of the U. S. Government.

"The camp authorities had the boys arrested, charging them with theft, and have communicated with me regarding their trial. I have been unable to find anything pertaining to such a case, and frankly I do not know whether I should try these boys on a misdemeanor charge or leave it up to the CCC authorities to mete out their own punishment."

As I understand it, the land on which these CCC camps are located is not within the exclusive jurisdiction of the Federal Government. As a matter of fact, my information is that the land for these camps at times is leased from private individuals. Nor am I advised as to any Federal statute which has the effect of ousting or attempting to oust the State of its jurisdiction over offenses committed on these lands, nor of any statute that makes the theft of property of the United States Government an offense against the laws of the United States only.

I am of the opinion, therefore, that under a proper warrant your jurisdiction is not affected by the fact that the offense may have been committed on land occupied by a CCC camp or by the further fact that the property alleged to have been stolen was property belonging to the United States Government.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

Id.—Id.—Commonwealth’s Attorney—Duties With Respect to.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 7, 1938.

Hon. J. J. Temple,
Attorney for the Commonwealth,
Prince George, Virginia.

My Dear Mr. Temple:
Please pardon my delay in replying to your letter of November 18, which has been due to an unusual amount of recent litigation in the courts which has demanded my attention.

You state that a judgment in favor of the Commonwealth was obtained in 1927 in the Circuit Court of Prince George County against three persons in the sum of $750 for a forfeited recognizance, together with the costs, and the judgment was duly docketed. You further state that one of the persons against whom the judgment was obtained owned some real estate, has subsequently died, and that his widow has vacated the premises.

You desire my opinion on whether this judgment should be collected under the provisions of chapter 101 of the Code, or whether an ordinary suit in equity should be brought for the enforcement of the judgment lien.

I think that the procedure provided for in chapter 101 of the Code might be followed, but in many respects in a case of this kind it would be an unsatisfactory remedy to pursue, since a purchaser of the real estate might secure a rather doubtful title.
I know of no reason why an ordinary suit in equity should not be brought in the Circuit Court of Prince George County at the direction of the State Comptroller. It seems to me that this method would be infinitely more satisfactory, and I know of nothing which makes the procedure prescribed in chapter 101 exclusive. Indeed the case of Commonwealth v. Ford, 29 Grat. 683, seems to be authority for the bringing of a suit in equity. The suit, of course, should be brought in the name of the Commonwealth at the direction of the State Comptroller, and I suggest that the matter be referred to that office.

You also inquire whether or not it would be the duty of the attorney for the Commonwealth to attempt to collect the money due the Commonwealth without additional compensation, stating that you were not attorney for the Commonwealth at the time the judgment was obtained.

From such examination of the statute as I have been able to make, I do not find that it is the duty of the attorney for the Commonwealth, by virtue of his office, to enforce the collection of this debt, without compensation. As I have indicated above, it seems to me that the matter should be brought to the attention of the State Comptroller, and he can, if he so desires, refer the matter to this office for such action as this office deems proper for the enforcement of the claim.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

CLERKS—Admitting to Bail.

COMMONWEALTH OF VIRGINIA,  
Office of the Attorney General,  
Richmond, Va., June 27, 1939.

HONORABLE S. L. FARRAR, JR.,  
Clerk, Circuit Court, Amelia County,  

DEAR MR. FARRAR:

I am in receipt of your letter of June 22nd in which you ask the following questions:

"In the absence of the Trial Justice, or if a Justice of the Peace or the Bail Commissioner is not available I have been requested to take a bail bond for a person who is to be bonded to appear before the Trial Justice Court. I should like to know if I have a general right to take these bonds, or if not, under what conditions, if any, I can take them."

You further state that you are somewhat confused by the following provision of Section 4835 of the Code:

"* * * and provided, further, that the clerk shall not exercise any of the powers of the bail commissioner except where the latter is unable for any reason to act as such bail commissioner."

You state that "the Bail Commissioner is not available". Under these circumstances, I am of opinion that you clearly have the right to admit to bail. However, if the bail commissioner is readily available and can perform the duties of his office, I am of opinion that the quoted language from Section 4835 of the Code prohibits you from admitting to bail in such a case.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.
CLERKS—Fees—Recording Veteran’s Certificate of Discharge.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 28, 1939.

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

My dear Mr. Lacy:
I am in receipt of your letter of April 25, in which you refer to sections 5214-d and 5214-f of the Code (Michie, 1936), and inquire if the clerk of a court of record may charge a fee for the recordation of the discharge certificate of a veteran of the World War.

Section 5214-d, which provides a fee for recording these discharges, is merely a codification of a part of an Act of the General Assembly of 1924, at page 471. Later, in 1934, the General Assembly passed an Act (Acts 1934, page 99) which provides that clerks of courts of record “shall upon presentation record free of charge the discharge certificate of any veteran of any war in which the United States has been engaged.” This Act is codified as section 5214-f of the Code.

While the latter Act does not in terms repeal any provision of the Act of 1924, I am of opinion that, insofar as the payment of a fee for the recordation of the discharge certificate is concerned, the two Acts are entirely inconsistent, and that, therefore, the later Act, providing that no fee may be charged, controls.

In my opinion, therefore, a veteran of the World War may have his discharge certificate recorded without the payment of any fee.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMERCIAL AND TRADE—“Unfair Sales Act”—Interstate Commerce.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 26, 1938.

HONORABLE JAMES P. REARDON,
Attorney for the Commonwealth,
Winchester, Virginia.

Dear Mr. Reardon:
This will acknowledge your letter of August 23.
As I understand your letter your question is, does the Unfair Sales Act, chapter 441, Acts of Assembly, 1938, page 992, which prohibits wholesalers from selling for less profit than that stipulated by the Act, apply either to nonresident wholesalers selling directly to residents of this State, or to Virginia wholesalers selling directly to nonresidents.
The Unfair Sales Act defines the term wholesalers as “every person, partnership, corporation or association engaged in the business of making sales at wholesale within this State.”

It is my opinion that this Act is only applicable to intrastate sales. If applied to interstate sales, it would impose an unconstitutional burden upon that commerce. In the case of Missouri v. Kansas Natural Gas Co., 265 U. S., 298, 308, 68 L., ed., 1027, 1030, which held that the commerce clause of the Federal Constitution precludes a state from prescribing rates or prices to be charged, local
distributing companies for natural gas purchased by them from an interstate pipe line company, the Court said:

"* * * But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. * * *"

The converse of this was held in *Public Utilities Commission v. Attleboro Steam-and E. Co.*, 273 U. S. 83, 71 L. ed. 549, the decision of the Court being that a state cannot regulate the rates charged by a local electrical corporation for current sold to a foreign corporation. See also *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 81 L. ed. 835.

I am assuming for the purposes of this letter that when you speak of "Drop Shipments", you are speaking of sales directly involving interstate commerce, and I am expressing no opinion as to whether a particular type of sale is interstate commerce as that is a question which depends upon the particular facts involved in each case.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSION FOR THE BLIND—Donations to—Disposition of Funds—
Payment into Treasury.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 17, 1939.

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

My Dear Governor Price:
I am in receipt of your letter of January 3, in which you quote from a report of an audit of the Virginia Commission for the Blind made by the Auditor of Public Accounts as follows:

"We call attention to the fund entitled 'Donation Fund' in the statements. This fund is used to reflect donations made by individuals interested in the work of the Virginia Commission for the Blind. These donations, we were informed, were made with the distinct understanding that they would be set apart and used exclusively for work in connection with the blind. At the present time the amounts of such donations are deposited in the State-Planters Bank and Trust Company, Richmond, in the name of the Virginia Commission for the blind by L. L. Watts, Executive Secretary, and disbursements of these funds are made by checks drawn against the account in the name of the commission and signed by the executive secretary. In discussing this matter with the secretary we were advised that the fund has been regarded as one with which the State has no concern and for that reason the moneys received have not been deposited with the State Treasurer. Since the fund stands in the name of the commission and is administered by the secretary in his official capacity and since the secretary advises that the money is donated with the distinct understanding that it is to be used for the work of this State agency, it appears to us that the money should be handled through the State treasurer and be reflected through the records of the State comptroller in accordance with the provisions of the last paragraph of sub-
section (c) of section 10, chapter 79 of the Reorganization Act as amended by Acts of Assembly, 1928."

You desire my opinion as to whether the donations referred to should be paid into the State treasury.

Subsection (c) of section 10 of the Reorganization Act (Acts 1928, p. 342) provides generally that all State departments, divisions, officers, boards, commissions, institutions and agencies collecting or receiving public funds from any source whatever shall pay the same into the treasury of the State. However, it is provided that this section shall not apply "to the endowment funds or gifts to institutions owned or controlled by the State."

The last Act dealing with the Virginia Commission for the Blind may be found in the Acts of 1926 at page 860. This Act goes into some detail as to the duties and powers of the Commission. Among other things, it is to assist the blind in finding employment and to teach them industries. It also may establish, equip and maintain schools for industrial training and work shops for the employment of blind persons. I am informed that the Commission maintains a training center here in Richmond and a work shop for the blind at Charlottesville, and it maintains a training center in Lynchburg and training centers for the colored blind in Newport News, Hampton and Norfolk; that it carries on an educational as well as medical campaign for the conservation of vision and the prevention of blindness. The Auditor's report states that these donations were made with the distinct understanding that they be set apart and used exclusively for work in connection with the blind.

Considering the activities of the Commission as a whole, I am inclined to be of the opinion that it is very similar to our institutions for the care and treatment of the afflicted, such as tubercular, insane, feeble-minded, deaf, etc. While the question is not free from doubt, I think the better view is that the Virginia Commission for the Blind should be considered as an institution and come within the exception specified in subsection (c) of section 10 of the Reorganization Act, to which I have referred.

I am strengthened in my conclusion by subsection 6 of the Act dealing with the Virginia Commission for the Blind. This subsection reads as follows:

"That the commission is authorized to receive and use for the purposes enumerated in this act, or any of them, donations and bequests, and is authorized to expend such donations and bequests in such manner as it may deem proper within the limitations imposed by the donors thereof."

It seems to me that the quoted provision is inconsistent with some of the provisions of section 10 of the Reorganization Act relating to the receipt and distribution of public funds. My conclusion is on the whole that the Virginia Commission for the Blind is not required by law to pay these donations into the State treasury. I am not expressing any opinion on the merits of the policy of paying these funds into the treasury if any provision in the Appropriation Act can be found which reappropirates them for the use of the Commission for the Blind to be spent as provided in section 6 of the Act creating the Commission.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COMMISSION OF FISHERIES—Property Acquired by—In What Name Held.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 29, 1939.

Honorable G. Walter Mapp, Commissioner,
Commission of Fisheries,
Accomac, Virginia.

My dear Senator Mapp:

I have your letter of May 27, requesting my advice upon the question whether it would be preferable to have title to the new cruiser yacht boat “Siren” transferred to the Commonwealth of Virginia—Commission of Fisheries, or whether it should be merely to the Commission of Fisheries of the Commonwealth of Virginia.

The Commission of Fisheries is a State agency and it has always been my view in matters of this kind, particularly with reference to real estate, that the title should be taken in the name of the Commonwealth of Virginia followed by the name of the particular agency to whose use the property is to be dedicated. I believe, therefore, it would be preferable to have the bill of sale made to the Commonwealth of Virginia—Commission of Fisheries.

Sincerely yours,

Abram P. Staples,
Attorney General.

COMMISSION OF FISHERIES—Removal of Seines Unlawfully Used—Procedure.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 10, 1938.

Honorable G. Walter Mapp, Commissioner,
Commission of Fisheries,
Accomac, Virginia.

Dear Senator Mapp:

This is in reply to your letter of September 8, in which you ask if, when the Commission of Fisheries has determined that a haul seine is being used in such a manner as to violate section 3165 of the Code of Virginia, “the Commission has authority to enforce its resolution and decision by physically removing the haul seine in question” without first securing a warrant from the trial justice. I am assuming, without expressing an opinion thereon, that the facts are such as to constitute the use of the seine a violation of section 3165. This section provides:

“It shall be unlawful to set or fish any net or nets across any river, bay, estuary, creek or inlet at the point where such net is located for a greater distance across such river, bay, estuary, creek or inlet from either shore than one-fourth the width of such river, bay, estuary, creek or inlet; and the Commission of Fisheries, where a question arises as to such distance, or as to any net set too far from shore, or set so as to vitally interfere with any net already set, or to vitally impede the run of fish, or to seriously interfere with navigation in the waters allowed by law, shall be empowered to determine the matter, and have such net or nets removed if the Commission deems best.”
You state that on September 3, the Commission, acting upon the ex parte statement of an inspector of the Commission, determined that the seine in question vitally interfered with nets already set. I do not think that the Commission should proceed under section 3165, when it has made its finding, without having given the alleged offender an opportunity to be heard.

However, when the Commission, either in an ex parte proceeding or otherwise, has determined that the seine has been used in such a manner as to constitute a violation of section 3165, it is my opinion that they may proceed under section 3150 of the Code, which provides:

"The Commissioner or any member of the Commission of Fisheries, all inspectors and deputy inspectors, police captains of boats, and other employees designated by the Commissioner in the service, shall have the power, with or without warrant, to arrest any person or persons found violating any of the fish or shellfish laws, and to seize any vessel, boat, craft, motor vehicle conveyance or other thing used in violating any of said laws, together with the cargo of such vessel, boat, craft, motor vehicle conveyance, or other thing, and they shall have the same authority as constables have to summon the posse comitatus to aid them in making such arrest and seizure. Any person so arrested may be carried before a trial justice for trial, and any vessel, boat, craft, motor vehicle conveyance, or other thing so seized when not liable to forfeiture to the Commonwealth in proper proceedings may be held by the inspector or other official who made the seizure, or in whose district the same was seized, until the accused has paid the penalty of his offense if upon trial he is found guilty, or has settled the amount agreed upon without trial, or has upon trial been acquitted, as the case may be."

Under this section, the alleged offender may be arrested and the seine seized without first securing a warrant. Upon the trial before the trial justice, the merits of the case would be determined and the seine disposed of in accordance with the provisions of section 3150.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSION OF GAME AND INLAND FISHERIES—Terms of Members.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., July 11, 1938.

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

DEAR GOVERNOR PRICE:

This is in response to your request for my opinion as to the length of the terms to which two members of the Commission of Game and Inland Fisheries should be appointed to fill the vacancies caused by the expiration on June 30, 1938, of the terms of Messrs. Sinclair Brown and Samuel P. Goodloe. The statutory provisions relating to the appointment of members of the Commission are contained in Acts 1930, p. 634, carried as section 3305 (2) in Michie's 1936 Code, which provisions, so far as here pertinent, are as follows:

"* * * The members of the commission, who may be in office when this section takes effect, shall continue therein until their respective terms expire, unless sooner terminated. One of the members shall be designated by the
Governor as chairman, and all members shall be appointed hereafter for terms of one, two, three, four, five, six and seven years.

The Commission was originally created by chapter 295 of the Acts of 1926, p. 511, and the Act contained this provision:

"* * * Said commission shall consist of five members, to be appointed by the governor, subject to confirmation by the senate, and who may be removable from office during their respective terms by the governor. Appointments under this act shall be made to take effect on the first day of July, nineteen hundred and twenty-six, and shall be for terms as follows: One of the members shall be appointed for a term of four years and designated by the governor as chairman; the other members shall be appointed for one, two, three and five years. Subsequent appointment shall be for terms of five years. * * *"

The effect of the former Act was that after the expiration of one year, a new appointment was made each year, for a term of five years. While the language in the 1930 Act is very unsatisfactorily expressed, it is my opinion that it was designed to continue the same plan of having one term expire each year. The report of the Secretary of the Commonwealth for the year 1937 indicates that considerable confusion has arisen as to the terms and expirations thereof. Two terms expire in 1938, two in 1939, one in 1940, none in 1941, one in 1942, none in 1943 and one in 1944. The chairman, Mr. Nolting, appears to have been appointed in 1937 for a seven year term. There now remains, however; only six years of this term, so that there is a vacancy in a term of seven years beginning July 1, 1938. It is my opinion, therefore, that one of the appointments to be made this year may be for a term of seven years. There is also a vacancy in the term of five years from July 1, 1938, and ending June 30, 1943. I am of opinion that one of these appointments may be made for a term of five years. There is also a vacancy in the term of three years from July 1, 1938, and ending June 30, 1941. I am of opinion that one of the new appointments may be made for three years.

It follows from the foregoing, that, if the expiration of the terms of the members of this Commission is correctly set forth in the said report of the Secretary of the Commonwealth, the Governor may make appointments for any two of the three terms of three years, five years and seven years from July 1, 1938.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONERS OF THE REVENUE—Building Permits—Discretion.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 11, 1938.

HONORABLE W. E. RAMSEY,
Commissioner of the Revenue,
Chatham, Virginia.

DEAR MR. RAMSEY:

I have before me your letter of July 8, in which you request my opinion as to whether or not, under the provisions of section 262 of the Tax Code, as amended by chapter 4, page 5 of the Acts of 1938, the Commissioner of the Revenue has any authority or discretion to refuse to issue building permits where same are applied for by persons desiring to construct, repair or improve any building or structure permanently annexed to the freehold.

This section is contained in the Tax Code along with various other sections
relating to assessment of real estate and improvements by the Commissioner of
the Revenue. The obvious purpose of requiring the permit is to provide the Com-
mmissioner of the Revenue with information of the addition of improvements to
lands so that he may intelligently assess such additional improvements on the land
books. It is not intended to vest the Commissioner of Revenue with powers to
determine what sort of buildings may be erected and, in my opinion, the duty on
his part to issue the permit is a ministerial one and he has no discretion in the
matter of granting or refusing same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONERS OF THE REVENUE—Compensation of in Certain
Cities—Validity of 1938 Act with Reference to.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1938.

Colonel LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

This is in reply to your inquiry concerning the constitutionality of chapter
440, Acts of Assembly, 1938, relating to division of the salaries and expenses of
Commissioners of the Revenue between cities and the Commonwealth.

The 1934 Act (Acts of Assembly, 1934, section 13, pages 733, 740) provided
that the salaries and expenses of Commissioners of the Revenue were to be paid
in the proportion of two-thirds by the cities and one-third by the Common-
wealth.

In 1936, section 13 of the Acts of Assembly, 1934, page 733, was amended,
and the following provision was inserted:

"* * * provided, however, the salaries and expenses of commissioners
of the revenue in cities containing more than one hundred and seventy-five
thousand inhabitants according to the last preceding United States census which have appointed a permanent board for the annual assessment of real
estate shall be paid in the proportion of one-half by the respective cities and
one-half by the Commonwealth; provided the Commonwealth shall not be
required to pay more than it does at present and * * *" (Acts of Assembly,
1936, p. 363.)

The title to the 1936 Act, after stating that it was an Act to amend section
13 of an Act entitled (then followed in full the title of the 1934 Act), approved
March 29, 1934, stated specifically that said Act was amended "in relation to the
salaries and expenses of commissioners of the revenue in cities containing more
than 175,000 inhabitants."

In 1938, section 13 was again amended, the above quoted proviso being
changed to read:

"* * * provided, however, the salaries and expenses of commissioners of
the revenue in cities containing more than one hundred and twenty-nine thou-
sand inhabitants according to the last preceding United States census which have provided a board for the annual assessment of real estate separate and
apart from the commissioner of the revenue shall be paid in the proportion
of one-half by the respective cities and one-half by the Commonwealth * * *" (Acts of Assembly, 1938, p. 990.)
The title to the 1938 Act, after stating that it was an Act to amend section 13 of an Act entitled (then followed in full the title of the 1934 Act), approved March 29, 1934, also specifically stated that said Act was amended "in relation to the salaries and expenses of commissioners of the revenue in cities containing more than 175,000 inhabitants."

The body of the Act made the Act apply to cities having more than one hundred and twenty-nine thousand inhabitants while the title indicated the Act was only in relation to cities having over one hundred and seventy-five thousand inhabitants. The body of the Act is, therefore, broader and more comprehensive than the title of the Act, for it affects a city other than the class of cities to which application is stated in the title to be limited. It is, therefore, a violation of section 52 of the Constitution of Virginia and void. See Wooding v. Leigh, 163 Va. 785, and Irvine v. Commonwealth, 124 Va. 817.

It is my opinion that the 1938 Act is void, not only in so far as it is applicable to the city of Norfolk, but also as to the city of Richmond. Normally, a statute will not be held unconstitutional in toto if the invalid portions may be separated from the valid portion, or when the statute may be construed as applying to a legitimate field of legislation. But here there is no valid provision to be separated from the invalid provisions. Nor can the body of the Act be construed to apply only to cities having over one hundred and seventy-five thousand inhabitants, for it cannot be said that the Legislature would have passed this Act if it applied only to the city of Richmond. When an Act contains a single provision which is broader than its title, a court cannot narrow and change the ordinary meaning of the words employed in the Act so as to sustain it as to cases falling within the title. See Ft. Worth and D. C. Ry. Co. v. Loyd, 63 Tex. Civ. App. 47, 132 S. W. 899; Willoughby on the Constitution of the United States, section 23; 11 Am. Jur., p. 735.

This opinion is in accord with the opinion of Honorable Horace H. Edwards, City Attorney of the city of Richmond, as expressed in an opinion to Mr. John C. Goode, Commissioner of the Revenue of the city of Richmond, on August 20, 1938.

It has been suggested that, since the 1938 Act is an amendatory Act, the general rule that, if the title of the original Act is sufficiently broad to cover the provisions of the amendatory Act, the fact that the title to the amendatory Act is itself insufficient is unimportant should apply in this case. However, this general rule is subject to the equally well established rule that if the title of the amendatory Act specifies the particulars in which the prior legislation is to be amended, the body of the Act may not contain any other matters. Lewis' Sutherland, Statutory Construction, section 140; 58 C. J. 819, "Statutes", section 400.

It is my opinion, therefore, that since the title to the 1938 Act specifically states that the prior Act is to be amended in relation to cities having over one hundred and seventy-five thousand inhabitants, the provision in the body of the Act, attempting to make the Act applicable to cities having over one hundred and twenty-nine thousand inhabitants, violates section 52 of the Constitution of Virginia and is void.

The salaries and expenses of Commissioners of the Revenue should be paid in accordance with the provisions of the 1936 Act.

Sincerely yours,

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

COMMISSIONERS OF THE REVENUE—Compensation—Salary and Office Expenses.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 22, 1938.

Honorable J. W. Townes,
Commissioner of Revenue,
Martinsville, Virginia.

My dear Mr. Townes:

This is in reply to your letter of September 21, 1938, in which you request my opinion upon the question whether or not the salaries fixed by statute for the commissioners of revenue in cities are in addition to the expenses of the office, or whether such officers are required to pay their office expenses out of their salaries.

The salaries of these officers are provided for by chapter 364, page 733, etc., of the Acts of 1934, generally known as the Compensation Act. Section 11 of the Act imposes upon the Compensation Board the duty to fix the salary of each commissioner of the revenue, and other officers embraced within the Act, and also his office expenses. After these salaries have been fixed, the Board is required to notify the city council so that objection may be made if desired. The annual salaries of city treasurers and city commissioners of the revenue must be fixed within the limitation provided by section 5 of the Act, and both the maximum and minimum salaries are controlled by the population and the aggregate levies within the respective cities.

The Act is very clear in its provisions that the salary is entirely separate from the expenses of the office. Under the practice adopted by the Board, each officer is required to file with the Board prior to the fixing of his salary and expense allowances such information as the Board desires, which includes an itemized statement of his estimated expenses of operating the office. This usually includes salaries of deputies, if any, telephone, stationery, and clerical assistance. In the allowance made by the Board, it is customary to provide for the amount of the officer's salary, as well as the allowances for office expenses, each being treated separately in the findings of the Compensation Board.

I am advised that the Compensation Board is now engaged in the consideration of salaries and expense allowances for the year 1939 and, if you have not already done so, you should get in touch with the chairman of the Board, and file such request for salary and allowances with the Board, and such other information as the Board requires.

I might suggest that it is a good practice to discuss these matters with the city council prior to presenting your request to the Board, since under the provisions of section 13 of the Act referred to the cities are required to pay two-thirds of the salary and expenses of the commissioners of the revenue.

If there is any further information you desire, please let me know.

Sincerely yours,

Abram P. Staples,
Attorney General.
REPORT OF THE ATTORNEY GENERAL


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 21, 1939.

Hon. O. B. Watson,
Treasurer of Orange County,
Orange, Virginia.

My Dear Mr. Watson:

I am in receipt of your letter of February 20, in which you inquire as to the authority of a commissioner of the revenue to assess real estate in cases where, at the time of the general re-assessment of real estate, buildings were only partially completed and since then have been entirely completed.

To the extent that the completion of the buildings may be considered as new buildings or additions within the meaning of sections 259 to 261 of the Tax Code, I am of opinion that the commissioner of the revenue clearly has authority to increase the assessments on account of the finished structures. Where the buildings were completed at the time of the re-assessment and were assessed by the Board, I do not think the commissioner of the revenue has authority to change the valuations fixed by the Board.

Very sincerely yours,

Abram P. Staples,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Compensation for Extra Services.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 21, 1939.

Hon. B. D. Peachy,
Attorney for the Commonwealth,
Williamsburg, Virginia.

My Dear Mr. Peachy:

I am in receipt of your letter of February 20, in which you state that the Board of Supervisors of James City County is contemplating instituting a large number of chancery suits under section 403 of the Tax Code, for the purpose of subjecting real estate to the payment of delinquent taxes. You inquire as to whether the Board can pay you a fee for instituting and conducting these suits.

Section 403 of the Tax Code, as amended in 1938 (Acts 1938, page 557) provides that these proceedings shall be instituted and conducted "by such attorney or attorneys as the Board of Supervisors may employ for the purpose."

I am of opinion that, in view of this provision, the Board clearly has the authority to employ the Commonwealth's Attorney of the County to institute and conduct these suits and to pay him a fee therefor.

Very sincerely yours,

Abram P. Staples,
Attorney General.
COMMONWEALTH'S ATTORNEYS—Compensation for Extra Duties—Collecting Local Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 3, 1938.

Hon. John A. Blakemore,
Attorney for the Commonwealth,
Abingdon, Virginia.

My Dear Mr. Blakemore:

I am in receipt of your letter of December 1, in which you state that at the request of the Board of Supervisors of Washington County you brought a suit for the collection of certain local taxes and succeeded in collecting such taxes. You desire to know whether the Board of Supervisors may compensate you for this service.

I call your attention to section 403 of the Tax Code of Virginia, as amended in 1938 (Acts 1938, p. 157), which provides additional remedies for the collection of taxes and so far as pertinent reads as follows:

"Such proceedings shall be instituted and conducted in the name of the Commonwealth of Virginia, or 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 the 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."*

It seems to me that the above language is authority for the Board of Supervisors to employ and pay you to bring such action as you describe.

Very sincerely yours,

Abram P. Staples,
Attorney General.

COMMONWEALTH'S ATTORNEYS—Compensation for Extra Duties—Representing County Before Corporation Commission in Tax Matter.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 6, 1939.

Hon. Fred B. Greear,
Attorney for the Commonwealth,
Wise, Virginia.

My Dear Mr. Greear:

I am in receipt of your letter of December 30, in which you ask if the Board of Supervisors may pay you a fee, other than your regular salary, for representing the County of Wise before the State Corporation Commission in connection with the request by the County for a revision of the Commission's assessment against the property of the Interstate Railroad Company.

The answer to your question, of course, depends upon whether or not it was your duty as Commonwealth's Attorney to represent the County in this matter. From an examination of the statutes, I am unable to say that any statute which I have found fixes this duty upon you by virtue of your office. I am, therefore, of opinion that the Board of Supervisors had authority to employ an attorney to represent the County and to pay him a fee therefor. If the Board decided to em-
ploy you independent of your position as Attorney for the Commonwealth, then I am of opinion that it has authority to pay you a fee if it so desires.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH'S ATTORNEYS—County Employing Counsel to Assist in Prosecutions.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 6, 1938.

HON. JULIAN K. HICKMAN,
Attorney for the Commonwealth,
Warm Springs, Virginia.

My Dear Mr. Hickman:

I am in receipt of your letter of September 2, in which you ask if the Board of Supervisors has authority to employ an attorney to assist you in the prosecution of a criminal case.

From my examination of the statutes, I can find none which can be reasonably construed to authorize this action on the part of the Board of Supervisors. Of course, you are familiar with section 4970 of the Code, dealing with cases in which it is impossible or improper for the Commonwealth's Attorney to act.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

COMMONWEALTH'S ATTORNEYS—Duties—Services for School Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 11, 1938.

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

My Dear Mr. Whitehead:

I have before me your letter of July 6, from which I quote as follows:

"I have been called upon by the County School Board of Nelson County from time to time to perform certain legal services, consisting, among other things, of the following:

1. Preparation of options for the purchase of school sites; and deeds therefor;
2. The examination of the titles of certain school sites made pursuant to the designation by the Court;
3. The execution of certain certificates for loans from the literary fund; and
4. The institution and conduct of proceedings for the acquisition of a school site; and
5. Advice to the Board from time to time as to its legal powers and duties."
“I am Commonwealth’s Attorney for Nelson County and I realize, of course, that whatever duties the law requires me as Commonwealth’s Attorney to perform for the school board are comprehended in the compensation paid me as a public official, and for which I am entitled to no other compensation. I have made a survey of the school laws and do not find them in a very satisfactory shape so far as defining the duties of a commonwealth’s attorney to the school board of his county.

“I shall appreciate an expression from you of your views as to which, if any, of the services above mentioned, are not required of me by law as Commonwealth’s Attorney.”

It is my opinion that none of the matters set out in your letter come within the scope of the official duties of attorneys for the Commonwealth except No. 5 above quoted. It has been the opinion of this office for many years that it is the duty of the attorney for the Commonwealth to give legal advice and opinions to all public officials and boards of his county.

This office has frequently expressed the opinion that the school board may engage the services of any attorney it desires for the performance of the first four duties set out in your letter. Should the school board select the attorney for the Commonwealth, he, being a private practitioner of the law except insofar as his official duties are concerned, is entitled to be compensated therefor just as any other attorney who might be employed would be.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

COMMONWEALTH’S ATTORNEYS—Duties—Advising Grand Jury, Drawing Indictment, etc.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 8, 1939.

HONORABLE M. B. BOOKER,  
Commonwealth’s Attorney,  
Halifax, Virginia.

MY DEAR MR. BOOKER:  
This is in reply to your request for my opinion upon the question whether or not it is the duty of the Commonwealth’s Attorney, who has knowledge of the commission of a felony in his county, to call the attention of the grand jury to the commission of such crime and prepare for the grand jury and deliver to it an indictment, together with a list of the witnesses who may testify to the commission of such crime.

In my opinion it is the duty of the Commonwealth’s Attorney to act in accordance with the foregoing.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.
COMPTROLLER—Collection of Delinquent Taxes—Reimbursing Special Agent for Bad Check of Taxpayer.

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

Colonel LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

I have your letter of October 20, referring to me certain correspondence between your office and Mr. Geddes H. Winston relative to the latter's request for a refund of $59.76 as a balance in his favor arising out of his account rendered to the State when Mr. Winston was serving in the capacity of a special agent to collect taxes.

Mr. Winston states that in 1929, pursuant to his employment as special collector, he collected from the Gospel Spreading Tabernacle Association a check for $59.35 to cover the Association's taxes; that this check was subsequently returned on account of insufficient funds, and that his account with the State was charged with a like amount when settlement was made in 1936.

Mr. Winston further states that the Association has gone out of existence, and that it would have been impossible at any time to collect the tax in question. He requests reimbursement for this amount.

You request the opinion of this office as to your authority to make such reimbursement, and ask me to suggest what evidence you ought to require in support of Mr. Winston's claim.

Under the terms of Virginia Code (Michie 1936) section 2534, under which Mr. Winston was employed, it appears that such special agents are simply employees of the Comptroller, and responsible solely to your office. It is my opinion that you have authority to make any settlement with such employees which to you seems just and proper, acting upon any evidence which you might reasonably consider sufficient to establish the facts.

In the instant case, as you suggest, it would seem entirely proper for you to require Mr. Winston to make affidavit, simply stating the facts set forth in his letter. If, on the strength of such affidavit and any other evidence available to you, you are satisfied that the claim is just, it would be proper for you to reimburse Mr. Winston out of the appropriation provided for the employment of such special agents.

Cordially yours,

Abram P. Staples,
Attorney General.

CONSERVATION COMMISSION—Division of Water Resources—Accepting Private Funds to Perform Special Services.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 19, 1939.

Honorable James H. Price,
Governor of Virginia,
Richmond, Virginia.

Dear Governor Price:

I have your letter of April 11, 1939, to which you attach certain correspondence between the office of the Division of the Budget and Honorable N. Clarence Smith,
Chairman of the Virginia Conversation Commission, relating to the acceptance of the sum of $1,469.20 which has been tendered by the Appalachian Electric Power Company, apparently in payment for services rendered to the Company by the Division of Water Resources and Power which is an arm of the Conservation Commission.

It is my opinion that, unless expressly authorized by statute, no department or agency of the State Government has authority to contract or do work for compensation, such compensation to be paid by the beneficiary of the work. This is a well established public policy in Virginia and is obviously well founded, for the reason that Virginia has never permitted its governmental agencies to cope with private industries in the rendition of engineering or other technical services. There is also the further objection that a governmental agency is possessed of legal powers which enable it to perform acts which a private person would not be permitted to do, the net result of which would be the purchase of governmental favoritisms. For these and other obvious reasons, I am of opinion that no State agency should make a contract with the general public for any special services or favors to be paid for by the beneficiary.

I remind you however of the provision contained in the appropriation bill empowering the Governor to permit various agencies to accept donations and spend the same in the exercise of their usual governmental functions. I do not have before me sufficient facts as to the nature of the work done, or the circumstances under which the services were rendered, to enable me to form an opinion whether this payment could be regarded by the Governor as a donation.

It would seem from the letter addressed to you on March 10, 1939, by the chairman of the Conservation Commission, in which he states that “The Division of Water Resources and Power, which operates under the administration of this Commission, has received a check for $1,469.20 as part payment for special services rendered the Appalachian Electric Power Company”, that there will be considerable difficulty in construing this as anything other than part payment for services rendered pursuant to an agreement. However, this is a question of fact and the actual circumstances might justify or require the application of a different conclusion of law than that reached by Mr. Smith as to whether or not the money tendered is a donation, or whether same is a payment.

If I can be of any further service in connection with this matter, please do not hesitate to call upon me.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

GENERAL C. E. KILBOURNE, Superintendent,
Virginia Military Institute,
Lexington, Virginia.

DEAR GENERAL KILBOURNE:

I have your letter of September 17, 1938, in which you request my opinion upon various questions relating to the reciprocal rights and obligations existing between the State of Virginia and the State Cadets of the Virginia Military Institute, appointed pursuant to the provisions of section 845 of the Code, as a result of the apparent repeal of section 849 of the Code by chapter 471 of the Acts of the General Assembly of 1938. Section 849 imposes upon State Cadets obliga-
tions either to render certain services as teachers in some private or public school of the State, or as employees of the Highway Commission, or as members of the national guard; or in lieu thereof to pay certain charges to the Virginia Military Institute in later years after their graduation.

I do not find it necessary to answer the various questions you ask, for the reason that, in my opinion, the provision contained in the said 1928 Act for the repeal of section 849 of the Code is inoperative and invalid because said provision is in no way germane or pertinent to the main purposes of the Act as set forth in the title thereto and in the provisions in the body of the Act.

The cardinal purposes of the Act, and (with the exception of the repeal of section 849) all of its voluminous provisions, are confined to a revision and codification of the laws of Virginia relating to the public free school system of the State, and to the State Board of Education in its relation to said system. It has never been the policy of the General Assembly of Virginia to treat legislation with respect to the institutions of higher learning as in any way connected with that governing the public free school system, consisting of the elementary and high schools. The two subjects are, from a legislative standpoint, in my opinion, essentially distinct and different. To inject into this one Act (covering as it does the broad, general and comprehensive field of education in these public schools) a provision affecting solely the obligation to the State of the State Cadets at the Virginia Military Institute would be to clearly violate the provisions of section 52 of the Constitution of Virginia, which provides that "No law shall embrace more than one object. * * *." In my opinion these State Cadets have no relation to the public free school system, and the provision concerning them is not germane to the object and purpose of the Act.

For this reason, it is my opinion that section 849 of the Code has not been legally repealed, but is still in full force and effect.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 4, 1939.

COLONEL LEROY HODGES,
State Comptroller,
Richmond, Virginia.

MY DEAR COLONEL HODGES:

I have before me your letters of February 21 and February 28, in which you request my opinion upon the question of the constitutionality of section 128 of the Tax Code, which requires every person to pay certain State capitation taxes before he can obtain any State or local license, permit or authorization except a marriage license. You also request my opinion upon certain questions relating to the construction of this statute. The section referred to provides as follows:

“No officer authorized to issue any license, permit or authorization required by the laws of this State, or by any political subdivision thereof, shall issue any license, permit or authorization to any person, unless and until such person shall file with such officer his or her certificate in writing, setting forth that the State capitation tax, assessed or assessable against such person for the tax year immediately preceding the last preceding tax year to the tax year to which the license, permit or authorization relates, has been paid, unless the records of the officer applied to for the license, permit or authorization show such tax has been paid. The requirements of this section shall not be applicable to any person who, under the laws of this State, was not legally
assessable with a State capitation tax for the tax year to which the certificate
required by this section to be filed relates, nor shall this section apply to
soldiers, sailors and marines who were in the Confederate service or their
wives or widows.

"Any person falsely certifying to any fact hereinbefore required to be
certified to, shall be guilty of a misdemeanor, and any person otherwise-violating
this section shall be likewise guilty of a misdemeanor. This section shall
not apply to marriage licenses."

You say that "In view of the importance of the whole question, I have thought
it wise to raise this question of constitutionality with The Attorney General before
launching forth on an effort of State-wide enforcement of the capitation tax."

As you point out in your letter, section 22 of the Constitution of Virginia
contains this provision:

"** The collection of the State poll tax assessed against anyone shall
not be enforced by legal process until the same has become three years past
due."

If the statute above quoted is in violation of this provision of the Constitu-
tion, then, of course, the statute is unconstitutional and void, and no officer would
have the authority to withhold the issuance of any license, permit or authorization
because of the applicant's failure to pay the required poll tax.

No one can read the debates of the Virginia Constitutional Convention of
1902, and the views expressed by the proponents of the above quoted provision
in section 22, and entertain any doubt that the purpose or intention of the framers
of the Constitution was to leave it wholly optional with the taxpayer whether he
would pay his capitation or poll tax for any year until the same has become three
years past due. The language employed in the Constitution to accomplish this
purpose is that before such three year delinquency the tax "shall not be enforced
by legal process".

The foregoing, therefore, brings us to the clear cut question whether the
effect of section 128 of the Tax Code is to "enforce" such payment "by legal pro-
cess". I am of opinion that it unquestionably does have this effect. A simple
illustration will suffice, I think, to demonstrate the correctness of this conclusion.
Assume a case in which a merchant, lawyer, dentist, real estate agent, an automo-
bile owner or driver, an oyster tonger, a hunter or fisherman, or any other person,
applies for a permit or license and tenders payment of the permit fee or license
tax. The applicant, however, has not paid his capitation or poll tax and for that
reason is refused the license or permit. He has done every act the law requires
to be done to entitle him to the license or permit, except the payment of the poll tax.
The applicant, however, has not paid his capitation or poll tax and for that
reason is refused the license or permit. He has done every act the law requires
to be done to entitle him to the license or permit, as a matter of right, except the
payment of the poll tax. He is arrested under the criminal process of the court,
and charged with failure to obtain the license. Were it not for section 128 of the
Tax Code, proof of his tender of payment of the license tax, and of his compliance
with all other legal requirements, would entitle him to be acquitted of the charge.
The only thing he has failed to do is to pay the required poll tax, but because of
that he may be convicted and fined. If he could prove the poll tax was not prop-
erly assessable against him he would be acquitted; if it was so assessable he would
be convicted. The payment or nonpayment of the poll tax is obviously the sole
and only issue involved, and, if he is fined, he is punished solely because the poll
tax was properly assessable against him and he has not paid it. Looking behind
the form and at the substance of the crime charged, it is very clear and obvious
that the act, and the only act, this person has been punished for is his failure to
pay the poll tax. It would be difficult to imagine a clearer case of "enforcing" the
payment of the poll tax "by legal process" than that provided by section 128 of
the Tax Code.

It might be argued that the effect of the statute is to make the poll tax a
part of the license tax itself. But this would be equally objectionable as denying
equal protection of the laws because discriminatory in favor of corporations and
nonresidents not assessable with a poll tax. They would pay a smaller tax to do
business than a citizen of Virginia would be required to pay.

Another fatal objection to this method of enforcing the payment of the poll
tax is that one class of citizens, such as merchants, lawyers, oyster tongers, real estate agents, dentists, and others who earn their livelihood through occupations upon which the State imposes a license tax are required also to pay the poll tax as a condition to pursuing their occupations, while another class of persons engaged in occupations not requiring a license, such as individual manufacturers, farmers, and many others, do not have this condition imposed upon their right to work and do not have to pay the poll tax at that time. It can hardly be contended that payment or nonpayment of the poll tax has any relation whatever to the qualifications of either class to engage in his work or business, or to the occupations involved; or that the nature of their respective lines of endeavor is so different as to justify compelling one class to pay the poll tax at the required time while the other is exempted from so doing. This arbitrary discrimination against persons engaged in licensed occupations, in my opinion, operates to deny to them the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

For the reasons stated, I see no escape from the conclusion that section 128 of the Tax Code is in clear violation not only of the spirit and purpose of section 22 of the Virginia Constitution, but of the letter thereof as well, and also denies equal protection of the laws. It is my opinion, therefore, that said section 128 of the Tax Code is unconstitutional and void.

This conclusion renders it unnecessary for me to reply to your other questions relating to the proper construction of the statute, since I am of opinion that none of its provisions can be held valid.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONTRACTORS—Registration—Fixing Time Limit for Applications.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 20, 1939.

CHARLES P. BIGGER, ESQ.,
Executive Secretary,
State Registration Board for Contractors,
108 Exchange Building,
Richmond, Virginia.

DEAR MR. BIGGER:

I have your letter of February 16, requesting my opinion on a question arising under chapter 431 of the Acts of 1938 [Virginia Code (Michie 1936) sections 4359(103)-4359(110)].

Section 14 of this Act [Code section 4359(116)] provides in effect that resident contractors who engaged in the general contracting business before July 1, 1938, shall be entitled to certificates of registration on payment of the proper fees, without submitting to examination.

You wish to know whether there is any time limit required by law, or which may be required by the Board, within which such contractors must apply for registration under this section.

Upon a careful examination of the Act, I am unable to find any provision affecting the time within which such application may be made, or authorizing the Board to fix such a limit. If there is any portion of the Act which your Board thinks might have this effect, I should be glad to have you bring it to my attention and I will give the matter further consideration.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1939.

Mr. Charles P. Bigger,
Executive Secretary,
State Registration Board for Contractors,
108 Exchange Building,
Richmond, Virginia.

Dear Mr. Bigger:

I have your letter of February 1, requesting my opinion as to the propriety of certain procedure which your Board proposes to follow in the registration, under chapter 431 of the Acts of 1938, of resident general contractors who were engaged in that business prior to July 1, 1938.

Section 14 of the Act provides that any person, firm, etc., which was engaged in such business prior to July 1, 1938, is entitled as a matter of right to be registered upon payment of the required fees. However, no provision is made as to how the factual question of whether an applicant is eligible under this section shall be determined.

The statute would seem, therefore, to require of the Board that it make this determination of fact in such reasonable manner as the Board may deem proper, having due regard for the constitutional rights of the applicant, principal of which is the right to a fair hearing after reasonable notice, where such hearing is desired.

It is my opinion that in dealing with applications under section 14 of the Act, the Board might properly authorize its Secretary to issue or refuse registration according to whether the applicant produces such evidence as the Board deems reasonable and adequate to show that he was, in fact, engaged in the business of a general contractor as defined in the Act, so long as provision is made for affording a fair hearing before the whole Board at the request of any applicant who is refused registration.

Trusting that this will adequately answer your question, I am,

Very truly yours,

Abram P. Staples,
Attorney General.

CORONERS—Compensation—Mileage—Power of Board of Supervisors to Provide.
SHERIFFS—Deputies—Compensation—Additional Allowances for Keeping Jail.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 28, 1939.

Honorable Benjamin Haden, Judge,
Fincastle, Virginia.

My Dear Judge Haden:

I am sorry that I was not able to reply sooner to your letter of February 13, due to the fact that I have just returned to the office after having been sick at home for a few days, and thereafter continuously engaged in the taking of depositions in a State insurance case.
I do not know that I can point you to any other statutes than the ones mentioned in your letter which throw any light on the question of whether or not a coroner is entitled to mileage from his home to the place where he views a dead body. I entirely concur in your view that there is no statutory requirement for the allowance of this mileage and, therefore, it would seem that it cannot be claimed by the coroner as a matter of right.

However, the question whether, under the conditions prevailing in a county, the board of supervisors would have the power to allow the coroner his traveling expenses, properly incurred in the performance of his duties, is not so easily disposed of. It is not entirely improbable that the statutory compensation might be considered by competent physicians to be so inadequate if they must pay their own travelling expenses that they would be unwilling to serve, and as a result the county might be deprived of such services. Under the provisions of the Code the board of supervisors is empowered to provide for the general welfare of the county, and I suggest for your consideration the thought that, if the board deems it necessary to pay these expenses in order to secure the desired services of a competent coroner, it might have authority to pay same. Certainly there is no provision contained in the statutes, so far as I know, which would prohibit such payment.

The question that you have before you relative to the power of the board of supervisors to pay a separate salary to a jailor, who is a deputy sheriff, over and above the allowance of the sheriff's office fixed by the board of supervisors under the provisions of section 2726 and 2726-a to 2726-1 of the Code is also a difficult one.

Section 3516 of the Code provides in part as follows:

"* * * All reports filed with the Auditor of Public Accounts under this section shall be referred by him to the State Fee Commission, and the said Commission shall determine how many deputies and assistants, if any, are necessary to the efficient performance of the duties of the said office, and what should be the compensation of such deputies and assistants; what allowance, if any, should be made for office expenses and premiums on official bonds and the manner in which said compensation should be paid or such allowance made. * * *"

As you know, the duties of the State Fee Commission are now performed by the State Compensation Board. It is plain, in my opinion, from the language I have quoted and other provisions of the section that it is contemplated that the State Compensation Board shall determine what allowances shall be made for the expenses of the sheriff's office, and that this Board shall determine the compensation of the deputies. If, therefore, the maximum allowance has been made to the sheriff under section 2726 of the Code and the compensation of the deputies has been fixed by the Compensation Board, I know of no authority for the payment of any additional salary by the board of supervisors to the sheriff or his deputies for services which they are required by the statutes to perform. There is this angle to the question, however, which you may or may not have considered. As you state, section 2868 provides that the sheriff of the county shall be the keeper of the jail thereof. This office has uniformly construed section 3510 of the Code as prescribing the fees and allowances for keeping State prisoners in jail. See Richmond v. Epps, 98 Va. 233. That is to say, section 3510 does not necessarily fix the allowance of the sheriff for keeping and supporting city, county or town prisoners in jail. In my opinion, the board of supervisors of a county or the proper authorities of a city or town may agree with the sheriff as to what his compensation shall be for keeping and supporting prisoners convicted of violating local ordinances. Obviously the board of supervisors could agree with the sheriff that he shall receive the same fees as are prescribed by section 3510. On the other hand, it seems that the board of supervisors could agree with the sheriff for different allowances than those provided in section 3510 for keeping and supporting county prisoners in jail. The effect of this is that the sheriff and the Board could agree on a basis of compensation different from that provided for in sec-
tination 3510. Obviously, as you suggest, the sheriff, if he designates a deputy as jailer, can make such agreement as he sees fit with his deputy.

In the light of the above, it is my opinion that, if any salary is paid to a deputy sheriff for his services in acting as jailer, it would have to take the form of an agreement between the board of supervisors and the sheriff and be considered as a part of the sheriff's compensation for the board and keep of county prisoners.

If I am correct in the foregoing, it follows that, where the sheriff has designated one of his deputies to perform the duties of jailer, the sheriff and the board could agree that the specified compensation for keeping and supporting local prisoners in jail shall be paid either to the sheriff or to the deputy who is actually acting as jailer.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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COSTS—Arrest Fees—Motor Vehicle Officers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 3, 1938.

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

My Dear Mr. McNeil:

This is in reply to your letter of November 1, in which you request my opinion upon the question whether, under the provisions of subsection (b) of section 2154(53) of Michie's 1936 Code (Acts 1932, page 617, as amended by Acts 1934, page 277), a trial justice should tax, as a part of the costs in a conviction for violation of the provisions of the motor vehicle code, arrest fees and witness fees of police officers appointed by the Director of the Divisions of Motor Vehicles. The statute referred to is section 6 of the motor vehicle code.

You will probably recall that under date of August 28, 1936, you requested my opinion as to whether, under the provisions of section 8 of the motor vehicle code, Acts 1932, page 618, the fees for the arresting officers should be taxed. In my reply of September 10, 1936, I expressed the opinion that the taxing of such fees was not prohibited by the provisions of said section 8, provided same were paid not to the officer but into the State Treasury.

At that time my attention had not been called, nor was I aware of the provisions of subsection (b) of section 6 of the motor vehicle code, to which you refer in your letter. This latter named provision is to the effect that 'no trial justice or other court 'shall in any case; in which a fine is assessed for the violation of any laws of this State, or any subdivision thereof, assess, as a part of the cost of such case any fee for arrest, or as a witness, for the benefit of any police officer of the division; nor shall any such police officer receive any such fee'.

Upon giving this matter very thorough consideration, I have reached the conclusion that it was the purpose of the prohibition against assessment of fees for the benefit of the officer, which prohibition is contained in the quoted provisions from section 6 of the motor vehicle code, to prevent the taxing of such fees altogether. I am therefore further of opinion that no arrest fee should be taxed in any criminal case, whether for violation of the motor vehicle code or for any other offense, where the arrest is made by a State motor vehicle officer, or any witness fee on account of such officer being a witness in the case.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
COSTS—Confiscation of Automobiles Under ABC Law.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 3, 1938.

Colonel LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

This is in reply to your letter of August 29, requesting the opinion of this office as to whether or not court costs might properly be taxed against the Commonwealth in proceedings for the confiscation of automobiles, under the Alcoholic Beverage Control Law, in cases where it is adjudged that the automobile has been stolen from the owner.

Virginia Code (Michie 1936) section 4675(38a), paragraph (h), expressly provides that in such cases “the costs of the proceedings shall be paid by the Commonwealth as now provided by law.” It seems clear that the legislative purpose and intent here was to make some provision insuring the payment of court costs in these cases, and yet to exonerate the innocent owner of the automobile from all expense incident to the attempted confiscation of an automobile which is found to have been stolen from him.

It is my opinion that the statutory provision just quoted should be construed to authorize taxing against the Commonwealth, in such cases, the usual court costs “as now provided by law.”

Very cordially yours,

Abram P. Staples,
Attorney General.

COSTS—Criminal Cases—Professional Services of Physicians—Superintendent of State Hospital.

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

Honorable Daniel Weymouth,
Attorney for the Commonwealth,
Heathsville, Virginia.

My Dear Mr. Weymouth:

I am in receipt of your letter of December 8. Without repeating all of the facts set out by you, I may say that I agree with your conclusion that the three doctors appointed by the Court on the 13th of October are entitled to $15 pay for their services on that day and mileage, pursuant to the provisions of section 4909 of the Code.

I do not think, however, that section 4909 applies in the case of the doctors who were summoned to testify as expert witnesses for the Commonwealth at the trial on December 1 and 2. Section 4909 relates to service rendered by the physicians in the actual examination of the defendant before his trial. I do not think that the section relates to expert testimony of physicians in the actual trial of a criminal case.

As to the compensation of the doctors summoned as expert witnesses, I refer you to section 4960 of the Code, which provides in effect that the court may allow compensation in certain cases where no specific compensation is provided by statute.

Whether or not Dr. Brown, Superintendent of the Eastern State Hospital,
is entitled to a special per diem for attendance as an expert witness is a question which I think should be decided by the court under section 4960, supra, and should probably be dependent upon the nature of Dr. Brown's employment by the State, and whether same is such as to render his salary full compensation for his services as an expert witness.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

COSTS—Criminal Cases—Professional Services of Physicians.

COMMONWEALTH OF VIRGINIA,  
Office of the Attorney General,  
Richmond, Va., December 6, 1938.

COLONEL LEROY HODGES,  
State Comptroller,  
Richmond, Virginia.

DEAR COLONEL HODGES:

This is in reply to your letter of December 5, 1938, in which you request my opinion upon your authority, as Comptroller, to issue a warrant in payment of two claims for professional medical services rendered in connection with the trial of a felony case in Roanoke County. You enclose with your letter a letter from the Commonwealth's Attorney, Honorable Edw. H. Richardson, in which he sets forth in full the nature of the services rendered by these two physicians, and that same were necessary in the trial of the case.

You also enclose with your letter a copy of the accounts made out in due form in favor of these respective physicians, Dr. Homer Bartley and Dr. Charles M. Irvin, from which it appears that the accounts have been fully examined and inquired into by the judge of the Circuit Court of Roanoke County and have been allowed for payment.

There is no special provision contained in the statute fixing the amount of compensation for a service of this nature. However, section 4960 of the Code contains the following provision:

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

It is my opinion that these two accounts should be paid under the authority contained in the provision quoted, and that the certificate of the court allowing same is in compliance with the statute.

Sincerely yours,

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

COSTS—Criminal Cases—Swearing Jury—Sheriffs—Clerks.

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

HONORABLE CHARLES C. CURTIS, Secretary,
Virginia State Sheriffs' Association,
Hampton, Virginia.

MY DEAR MR. CURTIS:

I am in receipt of your letter of October 26, in which you request my opinion upon the question whether or not there should be taxed as a part of the cost in criminal cases which are tried before a jury a sheriff's fee of $1.50, under paragraph 12 of section 3487 of the Code as amended by Acts 1938, page 781.

The provision referred to entitles the sheriffs to a fee "When a petit jury is sworn in court, for swearing and impaneling each such jury, one dollar and fifty cents."

It is my opinion that every jury before which a case is tried, whether civil or criminal, is a petit jury, and the term "petit jury" is usually employed to distinguish a trial jury from a grand jury.

I am of opinion, therefore, that, whenever a petit jury is sworn and impaneled by the sheriff, there should be taxed as a part of the cost in the case a fee for the sheriff of one dollar and fifty cents.

It does not necessarily follow from the foregoing, however, that the sheriff is entitled to this fee in every case in which the jury is impaneled, by reason of the fact that paragraph 26 of section 3484 of the Code, as amended by Acts 1938, page 554, contains this provision as to fees for the clerk of the court:

"Where a jury is impaneled, if witnesses be examined by the court, for swearing such jury and witnesses, seventy-five cents."

In view of these provisions which provide for the fees to both the sheriff and the clerk for swearing a jury, I am of the opinion that the question of which officer is entitled to the fee depends upon which officer swears and impanels the jury. This might depend to a large extent upon the practice followed by the different courts of the State. After all, it is a question for the judge of each court to decide which officer shall perform this duty, or whether same shall be divided between the respective officers.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Criminal—Hospitalization of Prisoner in Private Hospital.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 8, 1939.

MR. R. E. GARLAND, President,
Southside Community Hospital,
Farmville, Virginia.

MY DEAR MR. GARLAND:

I have your letter of January 30, in which you state that Judge Hutcheson would like to have my views with reference to the payment by the State of the hospital expenses of a prisoner who was taken to the Southside Community Hospital on October 15, 1938, for emergency treatment. You further state that on
October 9, the sheriff of Prince Edward County applied to the superintendent of the penitentiary for admission of the prisoner to the hospital ward of the penitentiary or State Farm, but admission was refused for lack of facilities. You also state that the prisoner is still a patient in the hospital and has not yet been able to stand trial.

Generally speaking, the facts above outlined would seem to me to come within the purview of expenses which the judge of the court is authorized to certify to the Comptroller for payment under section 4960 of the Code. I have talked this matter over with Mr. Sidney C. Day, Deputy Comptroller, and he concurs in this view.

The only questionable fact in the matter is whether or not additional application should have been made to the penitentiary for admission of the patient to that hospital. I doubt very much if the denial of one application for admission would justify retaining a patient in a private hospital indefinitely. This, however, presents a question of fact as to the reasonableness of the action of the sheriff and hospital authorities, and is purely a question for the court to determine.

If, under all of the circumstances, the judge of the court is of opinion that the bill for the care and treatment of this patient during the entire time should be paid and will so certify to the Comptroller, I am advised that same will be paid in accordance with the certificate and order of Judge Hutcheson. It appears from your letter that there is no other source from which the hospital may expect payment of this bill. Of course, this would be a material factor as the bill should be paid from the patient's own estate, if she has any.

Sincerely yours,

ABRAM P. STAPLES
Attorney General.

COSTS—Fees of Commonwealth's Attorney—Appealed Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 22, 1938.

Honorable John Henry Powell,
Clerk of the Circuit Court,
Nansemond County,
Suffolk, Virginia.

My Dear Mr. Powell:

I regret that press of business in the office has prevented my sooner giving attention to your letter of November 16, in which you request my opinion upon the question whether there should be taxed as part of the costs separate fees for the Commonwealth's Attorney, in cases where separate judgments are entered on three separate warrants for separate offenses, the judgments being entered by the circuit court, the same judgment being rendered, as was rendered by the trial justice from whose judgment of conviction the accused appealed.

Under the law of Virginia, where a case is appealed from a justice of the peace, the hearing in the circuit court is a hearing de novo and the circuit court does not enter a technical judgment of "affirmance" but enters a new judgment of its own. This being true, I am inclined to the view that there should be separate costs taxed in each case. However, it may be that the nature of the offense is such as to require the application of a definite ruling.

If you desire my further opinion on these particular cases and will write me the nature of the offenses charged in each warrant, I shall be very glad indeed to give the matter further consideration and study and write you again.

Sincerely yours,

ABRAM P. STAPLES
Attorney General.
COSTS—Fee of Commonwealth's Attorney for Prosecuting Ordinance Case.

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

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of March 14, in which you quote the following resolution adopted by the Council of the Town of Floyd, Virginia:

"At a regular meeting of the Town Council for the Town of Floyd, Virginia, held on the 4th day of January 1938.

"On motion made and seconded the Council ordered that the Town employ J. H. Poff Commonwealth's Attorney to prosecute cases arising under town ordinances and that the $5.00 fee heretofore collected and paid one half to the State and the other half to the County of Floyd be paid direct to J. H. Poff except in cases where the fines and costs are served in jail then there are no fees paid.

"R. E. LEE, Mayor,
DELLA AGNEW, Clerk."

You then ask whether or not the attorney for the Commonwealth may personally retain these fees or whether they should be paid in the regular manner into the State and local treasury.

Section 3505 of the Code provides for a fee of $5 payable to the attorney for the Commonwealth where he prosecutes a misdemeanor case before a justice of his county "which he is required by law to prosecute". However, there is no statute which requires the Commonwealth's attorney to prosecute before a trial justice in cases involving violations of town ordinances, and there is, therefore, no fee for such a prosecution fixed by State law. Unless the charter of the Town of Floyd plainly gives to such town the authority to require the Commonwealth's attorney to prosecute violations of town ordinances, I am of opinion that the Council may not impose this duty upon him, and it follows that the Council could not provide that this fee shall be taxed as part of the costs.

If the Town of Floyd desires to employ the attorney for the Commonwealth in his individual capacity as a lawyer to prosecute these offences and pay him a fee therefor, the Commonwealth's attorney is not receiving this fee by virtue of his office as such and, therefore, may retain the fee. However, as I have indicated above, I know of no authority, unless it be plainly given by the town charter, for the Council to provide that this fee shall be taxed as a part of the costs in such cases.

In this connection I enclose a copy of an opinion given to Honorable Watkins M. Abbit, Attorney for the Commonwealth of Appomattox County, under date of September 26, 1934, which deals with this question.

I will add, however, that if fees have been collected from convicted persons, though not authorized in my opinion, nevertheless the Commonwealth of Virginia would have no claim or right to the fees. The disposition of same is a matter with which the State treasury is not concerned.

ABRAM P. STAPLES,
Attorney General.
COSTS—Ordinance Cases—How Paid.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 15, 1939.

HON. J. SOL WRENN, Clerk,
Circuit Court of Greensville County,
Emporia, Virginia.

MY DEAR MR. WRENN:
I am in receipt of your letter of April 12, in which you request an official opinion on the following questions:

"The defendant was convicted in the Mayor's Court for driving while under the influence of intoxicants. He appealed his case to the Circuit Court of Greensville County. The verdict of the lower court was sustained. He was assessed with a fine of $100.00 and the costs of court and he was given thirty days in jail. He could not pay the fine and costs and was put to work on the streets of the town of Emporia, to work out said fine and costs. It seems to me that the fine and costs should be paid into the Circuit Court for proper distribution. Of course, the fine would be paid back to the town, less the usual commission due the clerk, and the pay of the witnesses and other court officials would be paid out of this fund by the clerk of the court. It is contended that I should, as clerk, pay the witnesses out of the State Treasury. I contend that I have no authority for such payments, since the town gets the full benefit of the fine, if collected, and also gets the benefit of it, if not collected, by working the defendant on its streets."

I assume for purposes of reply that the defendant was convicted of violating a town ordinance. Upon this assumption, I am of opinion that your conclusions on the questions are correct. In other words, the taxed costs should be deducted and the fees of officers entitled thereto should be paid to such officers. Certainly there is no statute providing that witnesses' fees or commissions allowed you by the town should be paid out of the State treasury in a case such as this where a violation of a town ordinance is involved.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Witness Fees—Same Witnesses in Different Cases on Same Day—Apportionment.

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

HON. JOHN M. WHALEN, Clerk,
Circuit Court of Fairfax County,
Fairfax, Virginia.

MY DEAR MR. WHALEN:
I am in receipt of your letter of October 6, enclosing copy of your letter of October 5 to Hon. L. McCarthy Downs, Auditor of Public Accounts.
In view of the fact that fees for a witness can only be taxed where a summons is actually issued, it seems to me that the most practical solution to your problem is to have each of the investigators of the Alcoholic Beverage Control Board summoned in each case in which he is expected to testify. The witness is only entitled to one fee for each day's attendance. Section 4957 of the Code. I think that this section of the Code may also be construed so as to allow mileage
REPORT OF THE ATTORNEY GENERAL

only once where but one trip is made for the purpose of testifying. My Assistant, Mr. G. Stanley Clarke, attached to the Alcoholic Beverage Control Board, advises me that this practice is followed in most of the jurisdictions of the State.

If the above procedure is followed and several cases are tried on the same day, the same investigator or investigators testifying in each, while I know of no specific statute authorizing him so to do, it seems to me that the power is inherent in the court to apportion these costs among the several defendants so that they will bear equally on all. If this apportionment is not made, certainly an injustice will be done to a particular defendant or defendants. It seems to be the better practice, however, to actually have a summons issued for each investigator in each case in which he is expected to testify.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Borrowing Funds—Referendum.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 15; 1938.

Hon. Junius W. Pulley,
Attorney for the Commonwealth,
Courtland, Virginia.

My Dear Mr. Pulley:

I am in receipt of your letter of August 11, from which I quote as follows:

"The County of Southampton is contemplating erecting an office building at a cost not to exceed $40,000.00. They desire to obtain through the PWA a Federal grant of 45 per cent and a loan for the remaining 55 per cent.

"The question is whether or not the Board of Supervisors can incur this indebtedness without a special election. The building is to be erected on the property now owned by the county."

It is clear from your letter that the county intends to borrow the remaining 55 per cent. In view of this fact and of the provisions of section 115-a of the Constitution, I am of opinion that it is necessary that this loan be approved by the qualified voters of the county in an election to be held for the purpose.

In the letter of this office under date of June 7, 1937, to Hon. W. R. Broaddus, Jr., Attorney for the Commonwealth of Henry County, the only question presented or passed upon was whether or not the county office building came within the scope of the language "court house, clerk's office or jail, or poor houses" as this language appears in section 2738 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COUNTIES—Budgets—Appropriations in Excess of.

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

HONORABLE PHILIP KOHEN,
Commonwealth’s Attorney for Botetourt County,
Buchanan, Virginia.

My Dear Mr. Kohen:

I am in receipt of your letter of September 5, in which you ask if the Board of Supervisors has authority to make an additional appropriation in excess of the amount provided for by the county budget, the situation being that the County Welfare Department during the fiscal year ending June 30, 1938, contracted obligations $800 in excess of the budget provided for that Department. You now desire to know if your Board may make an appropriation to take care of this deficit during the preceding fiscal year.

After considering the matter, I know of nothing which would prohibit the Board from making this appropriation if the funds are available. I do not think that section 2724-a would apply in this case, inasmuch as that section is primarily a limitation on the issuance of warrants in any year.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Construction of County Buildings—Accepting WPA Grant—Spending Unappropriated Revenues.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 1, 1938.

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

My Dear Mr. Simpkins:

This is in reply to your letter of July 26, in which you request my opinion as to several questions arising out of a proposed construction of a building by the board of supervisors of Hanover County to be used primarily as an office for the clerk of the court, but to include additional space for other offices for the Health Department, Board of Public Welfare, Home Demonstration Agent, and other related county offices.

Your first inquiry is directed to the question whether or not the board of supervisors has authority to accept a grant from the Federal Public Works Administration to aid in the cost of the construction of said building.

It is not contemplated that a loan will be applied for in connection with this grant, and, in my opinion, there is no question about the authority of the board of supervisors to apply for and accept such a grant where the balance of the funds required for the construction of such building is available out of unappropriated moneys in the county treasury in addition to budget requirements.

It is my opinion that section 2723 of the Code confers upon the board of supervisors such broad general powers relating to the acquisition of real estate,
and the construction of buildings thereon for county purposes, as to embrace the power to apply for and accept this grant for the purposes set forth above.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Contracts—Interest of Supervisor in.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 1, 1938.

HONORABLE VALENTINE W. SOUTHALL,
Attorney for the Commonwealth,
Amelia Court House, Virginia.

DEAR MR. SOUTHALL:
This is in reply to your letter of July 30, from which I quote as follows:

"I would like for you to advise me if it is proper for a member of the board of supervisors to contract with the school board of the same county for the construction of a school building, the supervisor being employed, more or less, to buy materials and to superintend the construction work and to be paid either a fixed sum or on a commission basis."

Section 2707 of the Code prohibits any supervisor from making a contract of any kind with any "officer, agent, commissioner, or person acting on behalf of the supervisors * * *." The same section also prohibits any supervisor from becoming 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."

It seems very clear to me that the contract to which you refer violates the obvious spirit and purpose of the first paragraph of section 2707, and that also it is an express violation of the second paragraph prohibiting a member of the board of supervisors from becoming interested in any claim against the county. The compensation arising from the performance of the service contracted for would, when same becomes due, thereupon become a claim against the county in violation of the provisions above quoted.

Furthermore, in addition to the provisions of the statute itself, our Supreme Court of Appeals has held in the case of Bristol v. Dominion National Bank, 153 Va. 71, that similar provisions as to a city council is but a restatement of the common law principle. The Court in that case quotes with approval the following from a New York case:

"'It is said in the case before us that the supervisor who was employed did not vote on the question of his own employment or upon the audit of his bill; that does not cure the evil; the influence upon his fellow members is the same; his constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act; he cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust at will, and as best subserves his private interests. He is a part of the board of supervisors; its act is his act, and he cannot, as a supervisor, make a contract with himself as a private citizen.' * * *" (at page 79).
I concur in the view you express that the law does not permit a member of the board of supervisors of a county to enter into a contract of the nature you refer to.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—District Debt Funds—Transfer of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 21, 1939.

HON. A. STUART ROBERTSON,
Attorney for the Commonwealth,
Orange, Virginia.

My dear Mr. Robertson:
I am in receipt of your letter of February 13, from which I quote as follows:

"In the report of the audit of the accounts of Orange County made by T. Coleman Andrews & Company, after commenting on the fact that there are four district school debt funds and two district road debt funds carried on the treasurer’s books, the following comment appears:

"The district school debt funds were formerly used also for the financing of capital outlays. However, recent legislation has prohibited the use of district school funds for this purpose. Since there is no longer any indebtedness outstanding in the Gordon District school debt fund, the Taylor District road debt fund and the Taylor District school fund, we suggest that these funds be closed and their balances transferred to other appropriate funds. If there is any doubt as to which funds these balances should be closed to, we suggest that the Attorney General be requested for an opinion in this matter."

"Gordon District owes a large road debt, but has paid off its school debt. The board of supervisors should like to know whether the balance in the Gordon District school debt fund could be transferred to the Gordon District road debt fund. This would give the people of Gordon District the benefit of the school debt fund which was raised in that district.

"They should also like to know whether the balance in the Taylor District road debt fund could be applied on the Gordon District road debt or whether these balances should be passed to the general county fund. The opinion of the Supreme Court in the case of Godwin v. Board of Supervisors, 161 Va. 494, seems to indicate that the Taylor District road debt fund might be applied to the Gordon District road debt."

It seems to me reasonably plain that the balance in the Gordon District school debt fund may be transferred to the Gordon District road debt fund; inasmuch as this balance came, I presume, from taxes levied in Gordon District, I can think of no objection to giving the citizens of the District the benefit of these funds which they have raised by reducing the district road debt.

The question as to whether or not the balance in the Taylor District road fund can be applied on the Gordon District road debt is more difficult. Assuming that Taylor District has no existing indebtedness whatsoever, I think that the case of Godwin v. Board of Supervisors, 161 Va. 494, is persuasive authority for this transfer. However, if the surplus in the Taylor District road fund is passed into the general county fund, as suggested in Godwin v. Board of Supervisors, supra, could not the board of supervisors then appropriate this surplus for the purpose
of reducing the Gordon District road debt? It seems to me that the board would clearly have authority to do this.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Expenditures—Compensating Widow of Constable Killed on Duty.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 6, 1939.

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

Dear Mr. Whitehead:
In reply to your letter of June 5, I am unable to find anything in the law which would give the board of supervisors authority to make an appropriation for the benefit or relief of the widow of a constable who has been killed in the course of duty.

Virginia Code (Michie 1936) section 2743e, relating to such appropriations, includes the dependents of sheriffs and deputy sheriffs only and I find no analogous provision relating to constables.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Expenditures—“Relief” Appropriation for Person Injured on County Property.

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

HON. JOHN D. WHITE,
Attorney for the Commonwealth,
Staunton, Virginia.

My Dear Mr. White:
I am in receipt of your letter of December 7, in which you enclose a petition to the Board of Supervisors of Augusta County of Miss Annie Critzer, in which she asks for compensation for medical and other expenses attributable to a fall which she sustained in the court house of the county while attending court in the capacity of a witness.

As you state, there appears to be no legal liability on the county, which enjoys the same immunity from a suit in case of tort that the State does. Assuming that there is no legal obligation on the part of the county to compensate Miss Critzer, I must advise that I know of no authority given to the Board of Supervisors to make any payment to this lady in these circumstances. The case seems a hard one if the facts stated in the petition to the Board can be substantiated,
but apparently it is just one of those cases in which no relief may be had under the law.

I note that the opinion I am expressing herein coincides with yours.

The petition is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Expenditures—Use of Surplus Funds for Constructing County Office Building.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 31, 1938.

HONORABLE W. EMORY ELMORE, Clerk,
Circuit Court of Brunswick County,
Lawrenceville, Virginia.

MY DEAR MR. ELMORE:

I have your letter of August 30, with which you enclose a letter from Honorable A. S. Harrison, Jr., Commonwealth's Attorney of your county to the Treasurer of the county, relating to the authority of the board of supervisors to expend surplus funds in the county treasury, which have not been appropriated for or dedicated to any other purpose, for the purpose of the construction and erection of a county office building. You request my opinion upon the authority of the said board to utilize such surplus funds.

The general authority of the board of supervisors with respect to county real estate and the construction, erection, and repair of county buildings may be found in sections 2723 and 2725 of the Code. These powers are very broad, and in my opinion there is no question as to the authority of the board of supervisors to expend any available and unappropriated money in the county treasury for the purpose contemplated in your letter.

While section 2738 of the Code empowers the board of supervisors, upon compliance with the provisions of said section, to borrow money for the erection of a court house and incidental buildings, in my opinion it is obvious that the supervisors should resort to borrowing only where no other funds are available for that purpose.

I do not think that it is necessary to have the approval either of the judge of the circuit court or of the people, as expressed in a referendum, in order to expend surplus funds for the erection of such buildings as you describe.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Ordinances—Publication of Notice—Sunday Beer.

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

HONORABLE VALENTINE W. SOUTHALL,
Attorney for the Commonwealth,
Amelia Court House, Virginia.

MY DEAR MR. SOUTHALL:

This is in reply to the letter of Honorable S. L. Farrar, Jr., requesting in your behalf my opinion on the question hereinafter set out.
Chapter 129 of the Acts of 1938, page 194, empowers the board of supervisors of counties to enact ordinances prohibiting the sale of wine and beer, or either, between the hours of midnight Saturday night and 6:00 a.m. Monday morning, or fixing hours within said period during which same may be sold, and prescribing fees and other penalties for violation of the ordinance.

Your inquiry is directed to the question whether or not the board of supervisors, in order to legally enact such an ordinance, shall comply with the provisions of section 2743 of the Code, which requires that no ordinance shall be passed until after notice of an intention to propose the same for passage shall have been published for two successive weeks prior to its passage in one of the newspapers designated in the said Act.

The 1938 Act does not contain any provision dispensing with the compliance with this formality by the board of supervisors, and it is my opinion that an ordinance authorized by said 1938 Act must be enacted in the same manner and after the same publication as other ordinances are required to be published by section 2743 of the Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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

HON. A. N. WELLFORD,
Attorney for the Commonwealth,
Warsaw, Virginia.

MY DEAR MR. WELLFORD:

I am in receipt of your letter of June 20, in which you advise that the Board of Supervisors of Richmond County adopted an ordinance prohibiting the sale of wine and beer on Sundays, pursuant to the authority contained in Chapter 129 of the Acts of 1938 (Acts 1938, page 194). You further state that the ordinance fixes a penalty for the violation thereof of a fine not exceeding $500 or confinement in jail not exceeding twelve months, or both, as provided in section 4782 of the Code fixing the punishment for the commission of misdemeanors generally. You desire my opinion on the validity of this ordinance in view of the fact that section 2743 of the Code, which is the section conferring powers of a local nature on boards of supervisors, provides that in cases of ordinances enacted by such boards the fine "shall in no case exceed fifty dollars, and if imprisonment in the county jail be prescribed in any case, such imprisonment shall not exceed thirty days."

In my opinion, section 2743 of the Code fixes the limit of the punishment that may be prescribed for violation of county ordinances generally, and this section should be considered together with Chapter 129 of the Acts of 1938. For example, Chapter 129 of the Acts of 1938 does not provide for the publication of the proposed ordinance in newspapers nor for its publication after its adoption, and yet such publication of ordinances of this kind has uniformly been made pursuant to the requirement contained in section 2743. It should also be borne in mind that section 4782 deals primarily with the punishment of misdemeanors which are violations of State statutes, while section 2743 is the general statute prescribing the punishment for misdemeanors which are in violation of county ordinances.

It follows from the above that I am of opinion that the ordinance adopted by your board of supervisors, which provides for punishment in excess of that provided in section 2743, is invalid as being contrary to the provisions of that section.

It might be argued with considerable force that the defect may be cured by amendment of the ordinance so as to comply with section 2743, especially in view
of the fact that the publication of the notice of intention to propose the ordinance did not set out the penalty, notwithstanding the fact that the ordinance as published after its enactment did set out such penalty. However that may be, I think there is real doubt as to whether the defect can be cured by an amendment, and in a criminal statute of this character it seems to me that it would be the far better policy to remove all doubt as to its validity. My view is, therefore, that the only way the matter can be handled so as to place beyond all doubt the validity of the ordinance prohibiting the sale of wine and beer on Sundays is to enact an entirely new ordinance complying with all of the pertinent provisions of Chapter 129 of the Acts of 1938 and of section 2743 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Releasing Penalties, Interest and Costs on Taxes—State Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1938.

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

My DEAR MR. RANDALL:

This is in reply to your letter of July 19, in which you request my opinion as to whether or not the provisions of chapter 94, page 159, of the Acts of 1938, are sufficiently broad to vest in the board of supervisors of a county the power to release penalties, interest, and costs accrued on State taxes on real estate for the year 1937, and all previous years.

The language used in the Act restricts the power to release said penalties, interest, and costs to "taxes upon real estate due such county or any district of such county."

While the General Assembly in 1934 appropriated out of the State Treasury for the benefit of the counties all delinquent real estate taxes, nevertheless, under our Constitution these taxes are required to be paid by the county treasury into the State treasury, and I am of the opinion that such taxes cannot be construed as due to the county, or to any district thereof, and therefore do not come within the terms of the enabling act above referred to.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Set-off of Debts Due—Choosing Debt to be Credited.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 29, 1939.

HONORABLE R. PAGE MORTON,
Commonwealth's Attorney,
Charlotte C. H., Virginia.

DEAR MR. MORTON:

I am in receipt of your letter of June 26th from which I quote as follows:
"The County of Charlotte has a deed of trust against a tract of land of a certain party, and the deed of trust is for considerably more than the value of the land. This same party has another tract of land in said County on which the taxes have not been paid for several years, but the land is well worth the taxes and more.

The question is this, the County of Charlotte owes this same party a sum of money which we wish to apply to the note secured by the deed of trust and not to the taxes, because we can collect these taxes at any time and we will never be able to collect the full face of the note. I want to know whether we are compelled to apply this warrant to the taxes now due, or can we use it as an off-set on the note. We are withholding application of the warrant until I can hear from you."

Section 356 of the Tax Code provides in part as follows:

"* * * He (the treasurer) shall receive in payment of the county levy any county warrant drawn in favor of any taxpayer, whether such warrant has been entered in the treasurer's book or not, but if the warrant has been transferred, it shall be subject to any county levy owing by the taxpayer in whose favor the same was issued. When the warrant is for a larger sum than the county levy due from the payee or transferee of the warrant, the treasurer shall endorse on the warrant a credit for the amount of the county levy so due, and such payee or transferee shall execute to the treasurer a receipt for the said amount, specifying the number and date of the warrant on which it was credited; and the residue of the warrant shall be paid according to the order of its entry in the treasurer's book."

While the quoted provision authorizes the treasurer to apply the proceeds of any county warrant against county levies owing by the taxpayer in whose favor the warrant is drawn, I do not interpret the section to be mandatory where the taxpayer may be indebted to the county in another way. I am, therefore, of the opinion that in the case you put, the treasurer may apply the warrant owing by the county to the taxpayer, to the deed of trust debt, if the latter is due. I do not think that the question is altogether free from doubt, but in my opinion the county may adopt the suggested procedure.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Street Lighting.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 14, 1939.

HONORABLE ROBERT RANDOLPH JONES,
Commonwealth's Attorney,
Powhatan, Virginia.

MY DEAR MR. JONES:

This will acknowledge your letter of June 8, in which you enclose a blank form of agreement and request my opinion as to the authority of your Board of Supervisors to enter into such an agreement with the Virginia Electric and Power Company.

The proposed agreement is for the establishment and maintenance of street and highway lighting service within the county, and the purchase of electric current therefor, for a period of ten years. The first question which presents itself in this connection is that of the effect of section 115-a of the Constitution, which provides in substance that no county shall contract any debt except to meet
casual deficits in the revenue, or in anticipation of the collection of revenues for the current year, or to redeem a previous liability, except subject to a referendum.

In the case of American-LaFrance, Etc., Inc. v. Arlington County, 164 Va. 1, 178 S. E. 783, it was held that this constitutional provision applies not only to the actual borrowing of money, but to the contraction of other debts payable in the future, as in the case of a contract for the purchase of equipment where the purchase price is payable in installments extending beyond the current year.

It is possible to argue that a bilateral contract such as the one here involved, requiring future payments only upon delivery of future services, does not create a "debt" within the meaning of section 115-a of the Constitution. However, in my opinion, the authority of the county to enter into such a contract is doubtful in view of this constitutional provision.

Again, further doubt as to the Board's authority in this connection is presented by the provisions of Virginia Code (Michie 1936) section 2742b. This section expressly authorizes the Boards of Supervisors of counties "adjoining and abutting a city with a population of twenty-five thousand, or more, inhabitants" to install and maintain street and highway lighting systems in the villages and built-up portions of such counties. In the absence of such a statute as this, it would seem that authority to provide such a lighting system might be predicated upon the "general welfare" clause of Code section 2743. Since, however, the Legislature has expressly dealt with the subject in section 2742b, and in doing so has confined the grant of such authority to counties adjoining or abutting large cities, it is my opinion that the authority of the Board of Supervisors of Powhatan county to enter into such a contract is extremely doubtful for this additional reason.

I cannot, therefore, advise you affirmatively that your Board of Supervisors has authority to execute the proposed contract. The possible want of such authority, however, is a matter of concern primarily to the Power Company and, if the company is satisfied as to the authority of the Board and wishes to enter into such an agreement, I do not think it would be your duty to make objection, provided the contract is amended for the protection of the Board members themselves by the insertion of a provision to the effect that no individual officer executing or authorizing the execution of the contract shall be in any event held personally liable on account of such authorization or execution.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.


COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., August 25, 1938.

HONORABLE T. C. BEDINGER,
Commonwealth's Attorney,
Boydton, Virginia.

MY DEAR MR. BEDINGER:

I am in receipt of your letter of August 23, in which you ask if the Board of Supervisors of Mecklenburg County may pay to a member of the Board an additional salary of about $150 per year for services rendered by him in supervising certain county buildings. I note that you have found no authority for this action on the part of the Board.

After consideration, I must agree with the conclusion that you have reached; in fact, I am of opinion that such an agreement would be in conflict with section 2707 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COUNTIES—Taxes—Release of Interest, Penalties and Accrued Costs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 5, 1938.

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

My Dear Mr. Randall:
I have your letter of July 2, in which you request my opinion as to whether the provisions of chapter 94, page 159 of the Acts of 1938, restrict the authority of the boards of supervisors to release interest, penalties and accrued costs on unpaid county and district taxes upon real estate for the year 1937, and all previous years, to cases in which the taxes not only for 1937, but for all previous years, are paid. As you state in your letter, the Act provides as follows:

"* * * Such release shall be made upon the condition that all such taxes due for the year nineteen hundred and thirty-seven and all previous years shall be paid on or before the fifth day of December, nineteen hundred and thirty-eight."

I do not see any escape from the conclusion that the payment of all past due taxes upon the particular parcel of real estate involved on or before December 5, 1938, is made a condition upon which the interest, penalties and costs may be released.

Chapter 98, page 164, of the Acts of 1938, empowers councils or other governing bodies of cities and towns to make similar releases for any year or years prior to and including the year 1937, provided such taxes are paid on or before December 5, 1938. Two separate acts were introduced, presumably for the reason that the General Assembly desired to apply different rules in the counties from those to be applied in the cities, and the language is essentially different.

I note you suggest that the clerk would be unable to ascertain what taxes are delinquent on property where the same has changed hands.

If the records in the office of the clerk, such as the land books and deed books, do not supply this information and the clerk is unable to locate the taxes assessed against prior landowners, it is my opinion that the clerk should accept such taxes as he has been able to find and, this will be a substantial compliance with the provisions of the statute.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Zoning Ordinances—Area Surrounding School.

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

Hon. P. W. Ackiss,
Attorney for the Commonwealth,
Virginia Beach, Virginia.

My Dear Mr. Ackiss:
I am in receipt of your letter of October 25, from which I quote as follows:

"According to the Acts of Assembly 1938, page 777, Chapter 415, the Board of Supervisors of a county are permitted to establish and regulate by
ordinance certain areas which may be used as places of residence, or in which agriculture, forestry, trade, industry or other specific uses may be conducted, etc., and the School Board of Princess Anne County is desirous of zoning an area a distance of 500 yards around a large high school building which is now being erected and desires to zone for the purpose of prohibiting the establishment or erection of any store building within 500 yards of said school.

"My question is whether or not the wording of the Act is comprehensive enough to permit the Board of Supervisors to establish such a district around the new school building; however, I do not feel that the Legislature intended such a small district to be established."

I have examined the Act to which you refer, and it seems to me that it contemplates the adoption of a zoning plan for all of the unincorporated territory of a county. The procedure for the adoption of the plan as outlined by the statute is rather elaborate and includes the adoption of the recommendation of the County Planning Commission created by Chapter 427 of the Acts of 1936 (Acts 1936, p. 1018). In fact, before the Board of Supervisors can act, it seems that it must have had the recommendations of the County Planning Commission. The Act of 1936 providing for the creation of the County Planning Commission seems to me to clearly contemplate a zoning plan for the entire unincorporated territory of a county.

Without going into any further detailed discussion, I must say that I agree with you that the Act does not contemplate the creation of an isolated restricted area by the Board of Supervisors around any particular building.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
funds) shall be signed by the clerk and countersigned by the chairman of the board of supervisors. In the absence of any specific machinery for the disbursement of library funds, I am of opinion that these funds should be disbursed as provided in sections 2724 and 2724-a of the Code.

The reply to your first question makes unnecessary a reply to your second question.

"3. Is it necessary for the trustees to submit a proposed budget for the approval of the supervisors, and do the supervisors have the right to approve or disapprove any items as submitted? Or do they only have the right to say how much they will appropriate for library purposes in a total sum?"

I am of opinion that the appropriation for the county library system should be included in the county budget, and that it would be proper for the trustees to submit to the board of supervisors a proposed budget. Certainly there is nothing in the statute that I can find that places the appropriation for the county library system on a different basis in this respect than other appropriations. I am further of the opinion that the board of supervisors have the authority to examine the budget submitted by the trustees and to make such appropriation as the board may deem proper and that, of course, the board has authority to approve or disapprove any particular item. Once the appropriation has been made, in view of the provisions of section 365 to which I have already referred, I am of opinion that the trustees of the library system have authority to expend the money in the manner stipulated in the budget and approved by the board of supervisors.

"4. The Board of Supervisors in setting up their budget for the fiscal year ending June, 1940, included estimates for salaries and other expenses for the operation of the library. They expected the trustees to contract expenses not to exceed the items approved in the budget for the year, each month the trustees were to approve the invoices incurred and submit same to the Board of Supervisors for payment. The payment to be made by the Board by the same procedure as other county obligations."

It appears to me that the procedure you have outlined above is in accordance with the intent of the pertinent statutes and, in my opinion, it is the procedure generally that should be followed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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CRAIG COUNTY—Special Law as to Seining—Repeal of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 7, 1939.

HONORABLE JOHN C. CALDWELL,
Trial Justice,
New Castle, Virginia.

DEAR JUDGE CALDWELL:

I have your letter of April 4, requesting my opinion as to whether the 1928 Act to prohibit seining in Craig county has been repealed by subsequent legislation. The Act in question is chapter 77 of the Acts of the General Assembly for 1928. I have been unable to find any subsequent Act repealing this statute. Chapter 247 of the Acts of 1930, in which the General Assembly undertook to revise and consolidate into a single "Game, Inland Fish and Dog Code" the general statutes of Virginia on this subject, does not contain a general repealing clause, but on
the contrary specifically enumerates the statutes which are repealed thereby. Like-
wise, the Legislature enacted at this same session chapter 292, expressly repealing
certain earlier game and fish laws enumerated therein. Neither of these statutes
of 1930 includes, among the Acts expressly repealed, the 1928 statute to which
you refer.

I do not think it could be seriously contended that the 1928 Act is repealed
by implication of the Game, Inland Fish and Dog Code, it being axiomatic that
a general law will never be construed to repeal a prior special Act except where
the repeal is express and unambiguous.

It is my opinion, therefore, that the 1928 statute is still in effect.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CROP PEST CONTROL LAW—Prosecutions Under—Venue.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 12, 1939.

Mr. G. T. French, State Entomologist,
Department of Agriculture and Immigration,
1112 State Office Building,
Richmond, Virginia.

My Dear Mr. French:

I am in receipt of your letter of January 7, in which you ask in what courts
should prosecutions be instituted against persons selling nursery stock in Vir-
ginia who are not registered as required by chapter 39 of the Code.

Section 871 of the Code, which is in Chapter 39, provides that all prosecu-
tions under this chapter shall be on indictment, presentment or information in the
circuit court of the county or corporation court of the city in which the person,
firm or corporation proceeded against is then resident.

In view of the above mentioned provision, I am of opinion that the prosecu-
tion may be instituted in the circuit court of the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DAIRY AND FOOD LAWS—Trade Names for Commercial Feeds—Al-
leged Conflict with Name Registered Under Federal Law—Duties of
Dairy and Food Division.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 25, 1938.

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

My Dear Mr. Lapsley:

I am in receipt of your letter of October 24, enclosing one from T. W. Wood
& Sons, of this City.

It seems that this corporation made to the Dairy and Food Division of the
Department of Agriculture and Immigration the reports required by chapter 52
of the Code in connection with the manufacture and sale by it of a certain commercial feeding stuff, at the same time reporting the trade-name under which this commercial feeding stuff would be sold, which trade-name was registered in the office of the Dairy and Food Division. Apparently another manufacturer of commercial feeding stuff in Tennessee has registered with the United States Patent Office a trade-mark in connection with a feeding stuff manufactured and sold by it, and it is claimed by this Tennessee manufacturer that the trade-name under which the commercial feeding stuff of T. W. Wood & Sons is sold in Virginia constitutes an infringement of the trade-mark registered in the United States Patent Office by the Tennessee manufacturer.

I take it from your letter that you desire to know what action your Department can take for the protection of T. W. Wood & Sons in connection with the infringement alleged by the Tennessee manufacturer.

I know of no duty imposed upon your Department in connection with this matter, nor of any action that you can take. We may assume that T. W. Wood & Sons has complied with all of the requirements of Virginia law in connection with the sale in Virginia of its commercial feeding stuff, and so long as this compliance is continued T. W. Wood & Sons has committed no offense under any Virginia statute.

As to whether T. W. Wood & Sons has infringed upon the trade-mark registered by the Tennessee manufacturer, this is a Federal question and one entirely between T. W. Wood & Sons and the Tennessee manufacturer and thus a question with which your Department has no concern and over which it has no jurisdiction. The question being purely one, as I have indicated, between the two manufacturers, I imagine that T. W. Wood & Sons, of course, will confer with its own counsel.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., July 12, 1938.

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

I have your letter of July 5, enclosing one from Mrs. Irma T. Moseley, librarian of the William Byrd High School at Vinton, Virginia. You request the opinion of this office as to whether you should grant Mrs. Moseley's request for three copies of the bound Acts of the Assembly and Senate and House Journals.

Under sections 390 and 392 of the Virginia Code, as amended by chapter 168 of the Acts of 1938 you are required to supply one copy of each of these publications "to each educational institution in this State which maintains a library."

I concur in the view expressed in your letter that there is room for considerable doubt as to whether a high school is an "educational institution" within the meaning of the statutes. It is true, nevertheless, that the literal import of the statutory language is broad enough to include high schools and, in view of the fact that there probably will be only a limited number of schools involved, it is my opinion that the doubt should be resolved in favor of the schools which feel the need of these books and make requests therefor.

I am returning herewith your copy of Mrs. Moseley's letter.

Yours very truly,

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


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

HONORABLE P. E. KETRON, DIRECTOR,
DIVISION OF PURCHASE AND PRINTING,
RICHMOND, VIRGINIA.

DEAR MR. KETRON:
This will acknowledge your letter of July 5, enclosing one from Honorable John M. Whalen, Clerk of the Circuit Court of Fairfax County, under date of June 23. You ask my opinion as to whether you should grant Mr. Whalen's request for a copy of the bound Acts of the General Assembly to be used by the Substitute Trial Justice.

Mr. Whalen correctly states that in 1936 this office ruled that substitute trial justices are entitled to receive free copies of the Acts. This opinion was based on section 388 of the Code, as amended by chapter 376 of the Acts of 1936, which section provided that a copy should be sent to each "justice having trial jurisdiction".

At the last session of the General Assembly this section was amended and reenacted as section 390, and the provision as to justices was omitted from the new Act. There being nothing else in the statute which would seem to apply to substitute trial justices, it is the opinion of this office that Mr. Whalen's request should not be granted.

Yours very truly,

ABRAM P. STAPLES,
ATTORNEY GENERAL.

DIVISION OF PURCHASE AND PRINTING—Distribution of Legislative Journals—Back Numbers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., APRIL 7, 1939.

HONORABLE P. E. KETRON, DIRECTOR,
DIVISION OF PURCHASE AND PRINTING,
RICHMOND, VIRGINIA.

DEAR MR. KETRON:
I have your letter of April 7, requesting my opinion as to whether you may provide the Norfolk Public Library, free of charge, with copies of the House and Senate Journals for certain years past.

The controlling statutes are Virginia Code (Michie 1936) sections 392 and 401. Under section 392, you are required to have the Journals printed in a quantity at least sufficient to make the distribution specified in that section. Under Code section 401, you are required to preserve at least twenty-five copies of each book, and "authorized to sell, or distribute, or to sell and distribute, the books, documents and maps not required to be distributed or preserved."

Section 392 requires that one copy of the Journals shall be sent "to each public library." However, I think that this requirement applies only to the distribution of the books as published, and does not relate to the disposition of back numbers which have not been disposed of.

On the other hand, if you have on hand such back numbers in excess of the
quantity required by law to be distributed and preserved, the portion of section 401 quoted above would seem to confer on you the necessary authority for complying with the request of the Norfolk Public Library.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF PURCHASE AND PRINTING—Franked Envelopes—Purchase of Directly.

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

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

This will acknowledge your letters of July 1 and 6, requesting the opinion of this office as to whether you may procure from the United States Department of Agriculture Extension Division certain orders, in a total amount of less than $1,000, of franked envelopes for the use of the Extension Division at V. P. I.

It is the opinion of this office that the procurement of these envelopes is governed by sections 401-b-401-q of the Code, dealing with the purchase of materials, equipment and supplies, rather than by sections 382-401-a, relating to public printing. This being true, under the express provisions of section 401-b, it is clearly within your discretionary powers to purchase this order directly if that course seems to be advantageous and economical.

Very truly yours,

*ABRAM P. STAPLES,
Attorney General.*

DIVISION OF PURCHASE AND PRINTING—Furnishing Free Copies of Acts, etc.—Certain Educational Institutions.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., August 10, 1938.

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

This will acknowledge your letter of August 1, referring to this office certain correspondence between yourself and Mr. William Emerson Chace of Hampton Institute, and requesting the opinion of this office as to whether, under the law, you should grant Mr. Chace's request for a copy of the Acts of the Assembly, 1938.

Under section 390 of the Code, as amended by Acts 1938, chapter 168, you are directed to furnish, free of charge, one copy of the bound Acts to "the library of each educational institution in this State that maintains a library."

Under this statute, it would seem that the question whether you should grant Mr. Chace's request would depend upon the factual question of whether or not his institution maintains a library. This is a question which it would seem neces-
sary for you to determine according to your own best judgment, upon such evi-
dence as you can obtain.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF PURCHASE AND PRINTING—Official Automobiles for Sheriffs.

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

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

I have your letter of November 10, enclosing certain correspondence between
yourself and Mr. Charles C. Curtis, Secretary of the Virginia State Sheriffs' As-
sociation, and requesting my opinion on the question raised by Mr. Curtis' letters.

Mr. Curtis wishes to know whether sheriffs may purchase, through the Di-
vision of Purchase and Printing, automobiles for official use only. The letters
emphasize the fact that the automobiles are to be purchased out of the sheriffs'
official accounts, and used only for the performance of official duties.

Section 401-f of the Virginia Code (Michie 1936) authorizes certain local
officers and agents, including "the officers of counties, cities and towns who are
empowered to purchase material, equipment and supplies of any and all kinds
for local public use," to make such purchases through the Division of Purchase
and Printing.

A second paragraph of this section makes it the duty of the Director of the
Division of Purchase and Printing to encourage the use of the facilities of his
office and the making of purchases through him.

Since the automobiles in question are to be employed exclusively in a public
use, it is my opinion that the first paragraph of Code Section 401-f authorizes their
purchase through the Division of Purchase and Printing. This construction of
the statute is supported by the express declaration of policy set forth in the second
paragraph of the section.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF PURCHASE AND PRINTING—Purchase of Automobile for Deputy Sheriff.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., MARCH 27, 1939.

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

MY DEAR MR. KETRON:

I have your letter of March 23, requesting opinion of this office as to whether
you are authorized by law to grant a certain request which you have received
from a deputy sheriff in Prince George County. You state that this officer wishes to purchase, through your Department, an automobile which is to be used by him both for official business and for personal and family purposes. Such automobile would be paid for out of the officer's own funds.

I can find nothing in the statutes which would authorize you, as Director of the Division of Purchase and Printing, to make a purchase of this kind merely because the automobile in question is to be used partly in the performance of a public officer's official duty.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DOG LAWS—Licenses—Where Issued—Non-Resident Keeping Dog Here Temporarily.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., May 16, 1939.

HONORABLE W. M. MINTER,
Commonwealth's Attorney,
Mathews, Virginia.

DEAR MR. MINTER:

I have your letter of May 12, requesting my opinion as to the proper construction of the Virginia statutes imposing a license tax on dogs. Your immediate problem arises out of the case of a nonresident who spends a substantial part of the year in Virginia, keeping a dog here during such time, but is domiciled in another state.

The application of the statute to such a case is not clear, and I regret to say that there seems to be no court decision and no former opinion of this office bearing upon the question.

Code section 3305(62) simply provides that "it shall be unlawful for any person to own a dog four months old or over in this State unless said dog is licensed * * *," while section 3305(64) provides that such license may be issued only by the treasurer of the city or county in which the owner or custodian of the dog resides.

In my opinion, from the context of the entire Dog Code, it is obvious that the term "resident" as used in these statutes is not intended and cannot be construed to import technical legal domicile. On the contrary, it seems clear that this term must be taken to include temporary residence.

It is my opinion, therefore, that any person sojourning within the State who maintains anything which could reasonably be called a residence, even though it be a temporary one, should obtain from the county or city in which such temporary residence is located a license for any dog which he keeps, such license to be obtained from the treasurer of the county or city in which the custodian has his residence.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Absent Voters—Proportionate Number of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 14, 1939.

MR. THOS. W. BLACKSTONE,
Secretary of Electoral Board,
Accomac, Virginia.

My Dear Mr. Blackstone:

I am in receipt of your letter of January 12, in which you ask:

"Is there any restriction on the number of ballots for absent voters in proportion to the number of qualified voters for any precinct?"

I know of no such restriction. If the voter regularly applies for his ballot and complies with the provisions of the absent voters' law, he is entitled to the ballot.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent Voters—Return of Improperly Marked Ballot.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,

HON. JOHN H. POWELL,
Clerk of the Circuit Court,
Nansemond County,
Suffolk, Virginia.

Dear Mr. Powell:

In your letter of July 25, you ask if a person who has voted by mail, but who through ignorance or mistake voted differently from the way he had intended to vote, can go to the polls on election day and request that the mail ballot not be used and then vote in person.

The law governing voting by mail does not provide relief for a person who has received, marked and returned an absent voter's ballot to the registrar of his precinct, though he afterwards arrives at the conclusion that his ballot was improperly marked.

Section 208 of the Code provides that a person who has applied for and received an absentee ballot may, if he decides not to vote the same, return it and then vote in person, but such ballot must be returned unopened in the sealed envelope in which it was received to the registrar at least three days before the election. Once the ballot has been marked and mailed it is the duty of the registrar to place the same in a sealed box to be kept and turned over to the judges of the election on election day.

It is my opinion that a person who has marked an absent voter's ballot and has mailed the same cannot secure its return. This is in accord with an opinion rendered by my predecessor, Honorable John R. Saunders, to Mr. B. I. Grigg, Registrar, on November 3, 1928.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Ballots—Including Names of Proposed Deputies.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., May 19, 1939.

Mr. Thomas W. Blackstone,
Secretary of Electoral Board,
Accomac, Virginia.

My Dear Mr. Blackstone:

I am in receipt of your letter of May 18, in which you ask if it is proper for a ballot to be used in the forthcoming primary to carry the name of the candidate for an office together with the names of the deputies he proposes to appoint. You ask if this could not be done, the three names being arranged in a bracket, so to speak, so that they could be treated as one.

I must advise that I know of no authority for a ballot being printed in this way. The law contemplates that the ballot shall contain only the names of the candidates for office, and, of course, the deputies that a candidate for office proposes to appoint are not candidates. I do not see how any of the statutes regulating the holding of primary elections could be construed in the way you suggest.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Candidates—Petitions—When to be Filed.

Id.—Id.—Id.—Personally Soliciting Signatures.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., May 4, 1939.

Mr. Thomas W. Blackstone,
Secretary of Electoral Board,
Accomac, Virginia.

My Dear Mr. Blackstone:

I am in receipt of your letter of May 3, in which you ask if a candidate for office may personally ask people to sign the petition to accompany his declaration of candidacy.

The statute is silent on this subject and, while I believe that the practice is for the petition to be carried around by one of the candidate's friends, yet I know of nothing to prohibit the prospective candidate from personally asking people to sign his petition.

Section 229 of the Code provides that candidates for office, except candidates for an office to be filled by election by the qualified voters of the State at large, shall file their declarations of candidacy sixty days' before the primary. The primary this year falls on August 1 and I am, therefore, of opinion that the declaration of candidacy should be filed on or before Friday, June 2.

Very sincerely yours,

Abram P. Staples,
Attorney General.
ELECTIONS — Candidates — Primary Fees — Computation — Members of General Assembly.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 8, 1939.

HON. L. F. HIGGINS, Treasurer,
Clifton Forge, Virginia.

MY DEAR MR. HIGGINS:
I am in receipt of your letter of May 6, in which you ask the amount of the primary fee to be paid by candidates for the Senate and for the House of Delegates.

Section 249 of the Code, which was in effect amended by chapter 40 of the Acts of 1918 (Acts 1918, page 96), provide that the candidate shall “pay a fee equal to two per centum of one year’s salary attached to the office for which he is candidate.”

Section 3454 of the Code provides that, each member of the General Assembly shall receive “the sum of seven hundred and twenty dollars for attendance and services at each regular session of the General Assembly.” The section then goes on to provide the compensation which a member shall receive at an extra session. As you will see, the statute stipulates that the compensation shall be “for attendance and services at each regular session.” The session, as you know, begins and ends during one calendar year. If the member has to attend a special session, he receives compensation for such attendance.

In view of the provisions of the section to which I have referred, it seems to me reasonably plain that the $720 which a member receives for attendance and services at a session of the General Assembly is “one year’s salary attached to the office.” I am, therefore, of opinion that the amount of the primary fee to be paid by a candidate for the Senate or for the House is $14.40.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS — Candidates — Petitions — County Supervisors — County Officer.

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

HONORABLE W. HILL BROWN, JR.,
Commonwealth’s Attorney,
Manassas, Virginia.

MY DEAR MR. BROWN:
This is in reply to your letter of March 17, in which you request my opinion upon the question whether or not a candidate for the board of supervisors is deemed to be a candidate for a county office within the meaning of section 229 of the Code, and therefore whether he would be required to file with his declaration of candidacy the petition as required by said Code section.

I beg to advise that in an opinion given by this office in 1935 I held that, in my opinion, a member of the board of supervisors is a county officer and should file the required petition with his declaration of candidacy.

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

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

"ELECTIONS" "COUNTY OFFICERS"—Supervisors, Constables and Justices of the Peace as.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 6, 1939.

HON. E. T. HARGIS, Clerk,
Circuit Court of Russell County,
Lebanon, Virginia.

My Dear Mr. Hargis:
I am in receipt of your letter of April 3, in which you ask whether a member of the Board of Supervisors, a constable and a justice of the peace are county officers within the meaning of that portion of section 154 of the Code reading as follows:

" * * * 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."

This office has expressed the opinion for a number of years that the officers you mention are county officers within the meaning of section 154 of the Code. In the case of each officer the duties performed materially affect the county as a whole.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 20, 1939.

HON. JOHN M. GOLDSMITH,
Attorney for the Commonwealth,
Radford, Virginia.

My Dear Mr. Goldsmith:
I am in receipt of your letter of April 19, in which you quote from a letter addressed to you by the Treasurer of Radford, as follows:

"A person from the State of North Carolina moved to Radford during the first week of December, 1937, and has lived here since that time. He came to the office today and informed me that he wanted to pay State capitation
tax for the year 1939 and vote in the general election to be held on the 7th
day of November, 1939.

"He was advised that he was living in the City of Radford on January 1,
1938 and was, therefore, assessable with a State capitation tax for 1938, and
by the payment of this tax he would be qualified to vote in the November
election. He contended that while he lived here on January 1, 1938, he did
not become a citizen under the Constitution until one year from the date of
his arrival in Virginia, which time was in December, 1938; and, therefore, he
was not taxable with a State poll tax for the year 1938 although he lived
here on the taxable date.

"He refused payment of the capitation tax for the year 1938 and offered
$1.50 in payment of a State poll tax for the year 1939. The payment was
accepted and a receipt issued by this office.

"Please advise me if this man's name should be placed on the voting list
for the November, 1939 election."

If the individual involved became a resident of Virginia prior to January
1, 1938, he is assessable with the State capitation tax for the year 1938. The
liability to the capitation tax does not depend upon the length of time of resi-
dence, but upon the fact of whether or not the particular individual was a resident
of the State on January 1 of any year. The person about whom the Treasurer
writes has evidently confused the length of residence required to vote with resi-
dence for the purpose of taxation.

In order for this particular individual to qualify himself to vote, from the
facts stated by the Treasurer, he must pay his capitation tax for the year 1938,
inasmuch as he appears to have been a resident of Virginia on January 1, 1938.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation Tax—Liability for.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 20, 1939.

Mr. W. J. Garth,
Commissioner of the Revenue,
R. F. D. 2,
Stanardsville, Virginia.

My dear Mr. Garth:
I am in receipt of your letter of April 17, in which you state that—

"A man who lives in the District of Columbia applied to me to be assessed
with capitation tax for the years that he should be assessed with so that he
could become a voter in Greene County in the year 1939 election."

The capitation tax with which this individual is assessable depends upon the
time when he became a resident of Virginia. For example, if the individual be-
came a resident of Virginia during the year 1937, but after January 1 of said year,
he is only assessable with the 1938 capitation tax in order to qualify him to vote
in the November election of this year. If he became a resident of Virginia prior
to January 1, 1936, he is, of course, subject to capitation tax for the years 1936,
1937 and 1938. Section 20 of the Constitution and section 93 of the Code provide
in effect that an individual, in order to qualify himself to vote, in addition to
the other qualifications, shall pay all "poll taxes legally assessed or assessable
against him for the three years next preceding * * *." An individual, of course,
is not assessable with a capitation tax for any year in which he was not a resident
of the State. For instance, if he became a resident January 15, 1938, he may vote in all 1939 regular elections without the payment of any capitation tax.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Costs—Providing Booths, etc.—Duty of Counties.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 9, 1939.

HONORABLE DEXTER GOAD,
Attorney for the Commonwealth,
Hillsville, Virginia.

MY DEAR MR. GOAD:

This is in reply to your letter in which you request my opinion upon the question of the duty of the board of supervisors to provide such funds as may be requested by the electoral board for the establishment of voting places in the various precincts in the county.

Section 143 of the Code provides that the proper authorities of a county shall designate the voting place or places in the various precincts in the county. Section 160 of said Code imposes upon the electoral board the duty to provide at each voting place a small compartment or booth large enough to contain and conceal from general observation a voter, and also space for a desk or other convenience for writing.

Section 170 of the Code provides as follows:

"The cost of conducting elections under this chapter shall be paid by the counties and cities respectively."

In view of the foregoing statutory provisions, it is my opinion that the duty rests upon the board of supervisors to appropriate such funds as may be reasonably necessary to provide voting places in the several precincts in their county. It is primarily the duty of the electoral board to request of the board of supervisors the funds considered by it to be necessary for the purpose, and accompany said request with a detailed or itemized statement from which the reasonableness of the request will appear. In the event there is a disagreement between the electoral board and the board of supervisors as to whether the amount requested by the electoral board is reasonable and proper, the question would then become one for the determination of a court of competent jurisdiction.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Electoral Boards—Preparing Ballots—Qualifications of Candidates.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 23, 1939.

HONORABLE LOY J. COFFMAN,
Clerk of the Circuit Court,
Woodstock, Virginia.

MY DEAR MR. COFFMAN:

I have your letter of June 22, in which you request my opinion upon the ques-
tion whether or not the electoral board of a county should have printed upon the official ballot the name of a person who, by reason of failure to pay his capitation tax within the required time, is ineligible to vote in the primary.

Section 229 of the Code provides that the name of no candidate shall be printed upon any official ballot at any primary unless such person is eligible to vote in the primary in which he seeks to be a candidate.

While, in my opinion, it is not incumbent upon the electoral board to make any particular investigation as to the eligibility of candidates whose names are certified to it by the chairman or chairmen of the party to be printed upon the official ballot, nevertheless, if it is shown to the satisfaction of the electoral board that any person whose name is so certified is not qualified to vote in said primary election, then, in my opinion, the electoral board could not legally in the discharge of its duties print any such name upon the official ballot.

Of course, the question whether or not the information and evidence is sufficient to satisfy the electoral board as to the lack of qualifications of the proposed candidate is one which would have to be determined by the electoral board. In the event of a dispute of facts, the matter should be settled by a court of competent jurisdiction in an appropriate proceeding for that purpose.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Judges—Compensation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 22, 1938.

Mr. W. Edgar Sipe, Deputy Clerk,
Circuit Court of Rockingham County,
Harrisonburg, Virginia.

My Dear Mr. Sipe:
I am in receipt of your letter of August 20, from which I quote as follows:

"There seems to be some difference of opinion among a few of the election judges of the county as to the compensation they are entitled to for delivering the ballots and poll books to the county clerk's office after an election. I have referred them to section 200 of the election laws, although one of the judges desires that I obtain from you a letter stating the exact amount a judge is entitled to for this service, including mileage."

I do not see that I can add very much to section 200 of the Code, which prescribes the compensation of judges, clerks and other election officials. The section provides that "judges * * * shall receive as compensation for their services the sum of three dollars each for each day's service rendered, and the judge carrying the returns and tickets to and from his voting place and to the county clerk's office * * * shall receive the mileage now allowed to jurors on each mile necessarily traveled * * *." The mileage allowed jurors is 5 cents per mile. Therefore, the compensation of judges is $3 per day "for each day's service rendered" and 5 cents per mile for each mile necessarily traveled in "carrying the returns and tickets to and from his voting place and to the county clerk's office."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Judges and Clerks of—Compensation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 9, 1939.

HONORABLE JAMES A. WALLER, JR., Secretary,
State Soil Conservation Committee,
Blacksburg, Virginia.

DEAR MR. WALLER:
This will acknowledge your letter of June 8, with reference to the fees to be paid to judges and clerks of elections held under the 1938 soil conservation act.

By the terms of Virginia Code (Michie 1936) section 200, the fees of these officers are fixed at three dollars per day, unless a higher fee is fixed by the board of supervisors of the county. Also, under the provisions of this same section and Code section 6007, these officers are entitled to mileage at the rate of five cents per mile.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 24, 1939.

HON. L. F. HIGGINS, Treasurer,
Clifton Forge, Virginia.

MY DEAR MR. HIGGINS:
I am in receipt of your letter of April 19, from which I quote as follows:

"We have two candidates for the August Primary offering for the House of Delegates. The Primary fee, as I understand it, is two per cent of one year's salary, which in this instance will be $7.20. Will this amount be equally divided between the City of Clifton Forge and Alleghany County, that is $3.60 for each place?"

The section to which you refer provides in part as follows:

"Candidates for the Senate of Virginia or the House of Delegates of Virginia shall pay the primary fee to the treasurer of the candidate's county or city, and where the candidate's district is composed of more than one county or city the fee must be equally divided among the counties and cities in the district, and paid to the respective treasurers by the candidate."

In my opinion, the proper construction of the quoted provision in the case you put is that the fee shall be equally divided between the City of Clifton Forge and Alleghany County.

I note that you assume that 2 per cent of one year's salary of a member of the House of Delegates is $7.20. Section 3454 of the Code provides that each member of the General Assembly shall receive "the sum of seven hundred and twenty dollars for attendance and services at each regular session of the General Assembly." The section then goes on to provide the compensation which a member shall receive at an extra session. While you do not request my opinion on
the amount of the primary fee, I suggest that it be considered whether or not this fee is to be based upon the entire salary that the member receives for attendance upon the regular session.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Primaries—Candidates—Filing Fee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 28, 1939.

HONORABLE S. BERNARD COLEMAN,
Commonwealth’s Attorney,
Fredericksburg, Virginia.

MY DEAR MR. COLEMAN:

I am in receipt of your letter of June 26th from which I quote as follows:

“A gentleman announced that he would be a candidate for the sheriff of Spotsylvania County subject to the Democratic Primary. He thereupon procured the required number of signatures to his petition, fifty in number, as required by Section 229 of the Code, and with this petition filed his declaration with the Chairman of Democratic Committee of the County more than sixty days prior to the primary.

“His name not, however, comply with Section 249 of the Code, paying the fee required by that Section to the Treasurer of Spotsylvania County, and therefore no receipt was filed with the Chairman of the Democratic Committee with the declaration and petition as required in Section 249B.

“After the time had passed for the filing of the declaration for the primary, this gentleman tendered his fee to the Treasurer and now requests his name to be certified by the party officials as a candidate of that party.

“No other candidate filed his declaration for candidacy. The question now presents itself whether or not the failure of this person to comply with Section 249 regarding the payment of fees is such a failure as would prohibit his candidacy as a democratic nominee.”

Section 249 of the Code (Michie 1936) prescribes the fees that shall be paid by candidates for office at any primary. The Section further provides that the fees shall be paid “before he files his declaration of candidacy”. Also the Section contains this provision:

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

It seems that the candidate for Sheriff of Spotsylvania County in the Democratic Primary did not pay his fee within the time prescribed by the statute, and did not accompany his declaration by a receipt for the payment of said fee. It seems to me perfectly plain that the requirements of the statute which I have set out are mandatory, and that, not having complied with these requirements, the candidate’s declaration cannot be received or filed, and therefore, his name cannot be certified by the party officials as a candidate in the Primary. I have carefully considered the matter and I cannot see that there is any room for any other construction of the statute.

If the party authorities desire to nominate a candidate for this office, I am
of the opinion that such nomination will have to be made pursuant to the authority contained in Section 227 of the Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Primaries—Ballots—Including Names of Unopposed Candidates.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 27, 1939.

HONORABLE W. C. SAFER,
Chairman Democratic Committee of Loudoun County,
Leesburg, Virginia.

My Dear Mr. Safer:

I have your letter of May 25, and beg to advise that this office has heretofore ruled that where a person has filed as a candidate in a Democratic primary, as required by law, and no other candidate has filed in opposition to him, he shall be declared the nominee of the party for the office for which he filed. This is clearly provided for by section 246 of the Code. Since he is already the nominee of the party, it is obvious that his name should not be printed upon the ballot in the primary election. The party authorities, however, sometimes do certify the names of such candidates to the chairman of the electoral board to be printed on the ballot. While this is not in violation of any express provision of the statute, it is not required and, in my opinion, the best practice is not to print the name of the person who is already the nominee of the party.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Primaries—Unopposed Candidates.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 3, 1939.

HONORABLE S. H. EVANS, Secretary,
Electoral Board of Caroline County,
Woodford, Virginia.

My Dear Mr. Evans:

I have your letter of June 1, and beg to advise that, in my opinion, if the County Democratic Committee adopted a plan for the election of members at a primary under which the candidates who filed their declaration of candidacy should be declared elected in the event that the number so filing should not be in excess of the number to be elected, and gave due publicity to the fact that candidates were to be elected at such primary election, the plan would be a proper one and within the authority of the Committee, and the Committee should declare elected the ones whose declaration were filed in instances where the number of candidates did not exceed the number to be elected.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Primaries—Eligibility to Vote or Run in—Persons Who Voted for Republican Presidential Electors in Preceding General Election.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 26, 1939.

HONORABLE K. E. HARMAN,
Member House of Delegates,
Pulaski, Virginia.

MY DEAR COLONEL HARMAN:
This is in reply to your letter of May 24, in which you request my opinion upon the question of the eligibility of a person to vote and qualify as a candidate in the 1939 Democratic primaries under the following circumstances:

This person you say has always been a Democrat but he voted for the Republican presidential electors in the 1936 general election. In a subsequent election at which none of the Democratic nominees had opposition said person voted for all of the nominees of the Democratic Party. Since the said November 1936 election, however, this person has not voted in any general election where the Democratic nominees were opposed.

The Virginia statute and the Democratic Party Plan both relate to this question. Section 228 of the Code provides that every person qualified to vote at the election for which the primary is held, and who is not disqualified by reason of other requirements in the law of the party to which he belongs, may vote in the primary. This section further provides that "no person shall be permitted to vote for the candidates of any party in any primary unless such person is a member of such party and in the last preceding general election, in which such person participated, he or she voted for the nominees of such party."

Since the person to whom you refer in your letter has voted for the nominees of the Democratic Party in the last general election in which he participated, he is not disqualified to vote or be a candidate in the 1939 primaries by reason of the above quoted provision.

In 1928 a great number of Democrats in the State voted for the Republican electors in the Hoover-Smith presidential election, and thereafter the question arose whether they were thereby rendered ineligible to vote in the Democratic primaries of 1929. The State Democratic Executive Committee, in order to settle the question, requested of my predecessor in office, the late Honorable John R. Saunders, then Attorney General, an official opinion upon that question. On January 31, 1929, Colonel Saunders rendered an opinion to the said Democratic Committee in which he quoted the following two sentences from sections 222 and 226 of the Code:

"This chapter shall apply to the nomination of candidates for such offices as shall be nominated by a direct primary and to no other nominations.

* * * * * * * *

"This chapter shall not apply to the nominations of presidential electors, nor to the nominations of candidates to fill vacancies, unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries."

It will be observed that these sections are a part of the same Code chapter in which section 228 above quoted from is found. Colonel Saunders' opinion held that by reason of the above quoted provisions contained in sections 222 and 226, presidential electors were not nominees of the party within the meaning of the Virginia statutes, and he concluded his opinion as follows:
"After a careful reading of those portions of section 222 and 226 above quoted, and other provisions contained in the primary law, I am of the opinion that the right of a Democrat to participate in the August 1929 primary is not to be tested by the vote of such person for presidential electors in the 1928 presidential election, and Democrats who voted against the Democratic electors in the 1928 election, if otherwise qualified, are entitled to vote in the August 1929 primary election."

There have been five sessions of the General Assembly held since the above interpretation of the statute, but its provisions have not been amended. The construction then given it must therefore be accepted as correct under well settled principles of statutory construction. *Atlantic & D. R. Co. v. Lyons*, 101 Va. 11.

This official definition of the meaning of the words "nominees of the party" was acquiesced in and adopted by the Democratic Party authorities in conducting the 1929 primaries, and must be deemed to be the sense and meaning which the party itself attributes to said words. Three years after this official interpretation, at the 1932 Norfolk convention, the Democratic Party adopted a primary plan which provided that no person should be permitted to vote in any Democratic primary unless he voted for all of the "nominees of the Democratic Party" at the last preceding general election in which he voted and in which they had opposition, and also that the name of no candidate shall be printed upon any official primary ballot unless such person files with his declaration of candidacy a statement in writing to the effect that he voted for all the "nominees of the Democratic Party" at the last preceding general election in which he voted and in which they had opposition.

It will be observed that in drafting the foregoing provisions the party convention employed the identical words which had been construed previously by Colonel Saunders as having no application whatever to presidential electors. I can see no escape from the conclusion that these words were intended to have the same meaning when used in the party plan as was then being attributed to them by the party authorities. If it had been the intention to include presidential electors within the term "nominees of the party", undoubtedly the language employed would have expressly so provided because at the time the convention adopted the plan these words, standing alone, were not considered to embrace such electors.

I am of opinion, therefore, that the fact that these same words were employed by the party authorities, without expressly including the electors compels the conclusion that it was intended that they should have the same meaning then being attributed to them in the conduct of the party primaries. It is my opinion, therefore, that the person to whom you refer in your letter is not disqualified from voting in the 1939 Democratic primaries by reason of the fact that in 1936 he voted for the Republican presidential electors.

Your next question is whether or not such person is eligible to be a candidate in the 1939 Democratic primaries and sign the above referred to written statement required of all primary candidates by the party plan.

The test of eligibility to become a candidate in the primaries is the same as the test of eligibility to vote therein. In my opinion, therefore, the person to whom you refer, if otherwise qualified, is eligible to be a candidate in the 1939 Democratic primaries and may properly make the written statement required by the said primary plan of the Democratic Party above referred to because the words "nominees of the party", as they have been construed in conducting Democratic primaries, do not include the Democratic presidential electors.

Yours very truly,

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

ELECTIONS—Primaries—Voters Coming of Age Between Primary and General Election—Capitation Taxes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 27, 1939.

HONORABLE WILLIAM O. FIFE,
Commonwealth's Attorney,
Charlottesville, Virginia.

MY DEAR MR. FIFE:
I have your letter of June 24, in which you request my opinion upon certain questions relating to the election laws.

Your first question is whether a person who will become twenty-one years of age between the date of the next August primary and the date of the November election following can register and vote in the August primary, notwithstanding the fact that such person was not twenty-one years of age on the date of the primary.

It is my opinion that such person can register and vote in the August primary if otherwise qualified. See section 26 of the Virginia Constitution and section 228 of the Code of Virginia.

You also inquire whether such person is required to pay the capitation tax only for 1940.

It has been the uniform ruling of this office that, under the constitutional and statutory provisions applicable, such person would pay the capitation tax for that year only. See section 420 of the Tax Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Referenda—List of Voters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 13, 1939.

HONORABLE CARTER B. GALLAGHER,
Clerk of the Circuit Court of Clifton Forge,
Clifton Forge, Virginia.

MY DEAR MR. GALLAGHER:
In your letter of March 9 you request my opinion upon section 2930 of the Code of Virginia in regard to the certified list of voters to be used in a special election upon the change of the form of government of the City of Clifton Forge.

You state that the last election of the mayor was held in June 1936; also that a complete council is not elected at one time, but that councilmen are elected for a period of four years, six being elected every two years.

You ask if, inasmuch as a complete council is not elected at one time, the list of certified voters which was used for the election of the six councilmen in June 1938 should be used or should the list of certified voters which was used for the election of the mayor in 1936 be used.

Section 2930 provides "Upon the petition of electors, equal in number to at least ten per centum of those qualified to vote at the last preceding general election at which a mayor or council was elected **. It also provides as follows: "** Accompanying the petition of said electors there shall be a certificate from the clerk ** which shall show the number of persons qualified to vote at the last preceding regular June election for municipal officers. ** 

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
The first provision deals with the number which must join in the petition, while the second provision governs the list which is to be certified by the clerk.

It is my opinion that the two above mentioned provisions refer to the same class of qualified voters and that the class referred to was that existing at the last preceding regular June election at which a mayor or councilman were elected. When, as in the case with the City of Clifton Forge, a complete council is not elected at one time it might be said that a new council is elected at each time a group of councilmen are elected in accordance with the provisions of the city charter.

It is my opinion that the first quoted provision of this section, when it speaks of the election of a council, was not intended to be inapplicable when a complete council is not elected at one time, but was intended to apply when a group of councilmen are elected at the regular election, particularly since the section later refers to the last preceding general election for municipal officers.

I am of the opinion, therefore, that the list of certified voters which was used for the election of the six councilmen in June 1938 should be used for this special election.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars—Compensation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 17, 1938.

HON. M. W. PULLER, Clerk,
Circuit Court, Henrico County,
Richmond, Virginia.

MY DEAR MR. PULLER:
I am in receipt of your letter of November 15, in which you inquire as to the compensation of a registrar under existing law.

Section 200 of the Code of Virginia, as amended in 1938 (Acts 1938, p. 246) provides that a registrar shall receive the sum of $3 for each day's service rendered. There was a former provision in section 96 of the Code that a registrar should receive $1 for posting notices. However, this section, as it was amended in 1938 (Acts 1938, p. 246), omits this compensation for posting notices. Of course, the registrar is also entitled to fees allowed by law for registering voters.

You also ask the following question:

"I should also like to know if a Registrar, who is serving as Judge of an Election, receives compensation as Registrar and also as Judge of an Election, as the Registrar is compelled to register persons desiring to do so, on the day of the Primary or the Special Election."

If a registrar is also a precinct judge of election and actually serves in both capacities on any day, then I am of opinion that he is entitled to the compensation provided for both officers. The statute expressly provides that a registrar may act as precinct judge of election and, if he does so and also sits as registrar on the same day, I see no reason why he should not receive the compensation provided for both officers. Of course, the situation would not arise on the day of a general election for a registrar may not register persons at that time so as to enable them to vote in that election.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Registrars—Registration After Sundown.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 16, 1939.

HON. PAUL E. BROWN,
Attorney for the Commonwealth,
Fairfax, Virginia.

My Dear Mr. Brown:
I am in receipt of your letter of June 14, in which you raise the following question:

"Another question that has arisen in one precinct in one particular is that of the time of registering persons. One of the registrars has arbitrarily stated that he did not deem it lawful to register any person after sundown. I have been unable to find any law setting forth the hours in which a person must register, and will appreciate your ruling on this matter, but I wish you would make it separate from the other ruling."

In reply, I beg to advise that I am in accord with the view that you express and this office has heretofore so ruled. I know of no statute which prohibits a registrar from registering a person after sundown. Indeed my information is that it has been the practice for many years for many registrars, for the convenience of the public, to register persons after sundown.

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

ELECTIONS—Special—Certifying Results—Hampton Sewage Disposal Contest.

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

HONORABLE R. B. PRESTON, Chairman,
Hampton Roads Sewage Disposal Commission,
115 Bank Street,
Norfolk, Virginia.

My Dear Mr. Preston:
I have your letter of October 7, in which you request my opinion upon the question whether or not the election results in the city of Hampton, the town of Phoebus and the county of Elizabeth City should be certified by the county commissioners or by the local election commissioners in each of those separate jurisdictions.

In my opinion, it is not material whether they are certified by the county election commissioners or by the separate groups of election commissioners. The legal effect of the vote will become a question for the court to determine in the event any one of these separate jurisdictions should not have a majority vote in favor of the creation of the sanitation district. The essential matter is to have the facts before the court, and I think this can be accomplished through either of the procedures suggested in your letter and in the letter addressed to you by
Mr. Roland D. Cock, Attorney for the Commonwealth, and Mr. S. M. Gibson, Deputy Clerk, of Elizabeth City county.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Special, Town—Town in Two Counties—What Officials Should Serve.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 17, 1938.

Mr. W. T. Hicks, Secretary,
Carroll County Electoral Board,
Hillsville, Virginia.

MY DEAR MR. HICKS:

This is in reply to your letter of August 16, in which you state that you have been served with a copy of an order of the Circuit Court, directing you to appoint judges and clerks to conduct a special election for the Town of Galax, Virginia, submitting to the town voters the question of the issuance and sale of certain municipal bonds. You state further that the greater portion of the area of the Town of Galax is located in Carroll County, but that the majority of the voters of said town reside in Grayson County. You request my opinion as to whether or not this referendum election should be conducted by the election officials of Carroll County or by those of Grayson County.

Section 2995 of the Code imposes this duty upon the electoral board of the county in which the town, or the greater part thereof, is situated. This presents, of course, a question of fact, and I infer from the service upon you of a copy of the order of the court that the court has already judicially determined that the greater part of the Town of Galax, within the meaning of the statute, is located in Carroll County. If my interpretation of this court order is correct, it is my opinion that the election officials should obey and comply with the order of the court.

You also inquire as to what persons would be qualified to vote in the special election which is to be held on the 30th day of August, 1938.

This office has recently ruled that all persons qualified to vote in the November, 1938, general election are qualified to vote in a special election held during the month of August.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Special—Qualifications of Voters.

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

HONORABLE W. E. NEBLETT,
Attorney for the Commonwealth,
Lunenburg, Virginia.

DEAR MR. NEBLETT:

This is in reply to your request for my opinion upon the question of whether in a special election to be held in Lunenburg County on the 8th day of November,
1938, upon the question of the removal of the court house, the qualification of voters is to be determined by the provisions of chapter 136, page 188 of the Acts of the Extra Session of 1915, or whether said qualification shall be controlled by section 83 of the Code.

The provisions of the 1915 act are not carried forward into the 1919 Code. Section 6567 of said Code provides as follows:

"All the provisions of the preceding chapters shall be in force upon and after the thirteenth day of January, nineteen hundred and twenty; and all acts and parts of acts of a general nature, in force at the time of the adoption of this Code, shall be repealed from and after the said thirteenth day of January, nineteen hundred and twenty, with such limitations and exceptions as are hereinbefore or hereinafter expressed."

Section 83 of the Code prescribes the qualifications of voters at all special elections, and, in my opinion, the provisions of said section 83 are controlling in the special election to which you refer.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Special—Voters—Prepayment of Capitation Taxes—Time.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 30, 1938.

HONORABLE C. L. BOOTH,
General Registrar,
Danville, Virginia.

DEAR MR. BOOTH:

I am in receipt of your letter of November 28, in which you call my attention to the fact that a special election has been called in the city of Danville for the purpose of electing a mayor to succeed the late Honorable Harry Wooding. Your first question is as follows:

"Are all persons who were qualified for the November, 1938, election entitled to vote on December 20, 1938?"

They are.

You then ask:

"Some persons who were not qualified for the November, 1938, election are paying their poll taxes now for 1936, 1937 and 1938, which qualifies them for June, 1939, election. Are they entitled to vote on December 20, 1938?"

They are not. Section 83 of the Virginia Election Laws provides:

"* * * at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. * * *"

You will see from the above quotation that all persons who were qualified to vote in the November election, held on the Tuesday after the first Monday in November of any year, are entitled to vote at a special election held after the second Tuesday in June of that year, and this includes a special election held between the November election and the first day of the following year. In addition to those persons, the following are also entitled to vote in your special election to be held on December 20, 1938:
First: Those persons who have become of age since the first day of January, 1937, and who have paid one year's capitation tax and registered.

Second: Those persons who, having moved into the State from outside since the first day of January, 1937, and before December 20, 1937, have registered, or who do register, in time to qualify them to vote in your special election.

Third: Those persons, otherwise qualified, who have paid all capitation taxes, assessed or assessable against them for the three preceding years, six months prior to December 20, 1938, although they did not pay such capitation taxes six months prior to the regular November election of this year, and were not qualified, for that reason, to vote in said election.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Town—Prepayment of Capitation Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 8, 1939.

Hon. W. Hill Brown, Jr.,
Attorney for the Commonwealth,
Manassas, Virginia.

My Dear Mr. Brown:
I am in receipt of your letter of May 6, from which I quote as follows:

"Is it not true, in accordance with the provisions of section 2997, Code of Virginia 1936 (Michie), that all residents of a town who are qualified to vote in the November general election are eligible to vote in the town election which is held on the second Tuesday in June?"

This office has heretofore ruled that, pursuant to section 21 of the Constitution and section 82 of the Code, a person, to be eligible to vote in the town elections to be held in June, must have paid the State capitation taxes assessed or assessable against him during the three years next preceding that in which he offers to vote at least six months prior to the election. This means that, to be eligible to vote in the town elections to be held in June of this year, a person must have paid his capitation taxes on or before December 13, 1938.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Towns—Voters—Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 19, 1939.

Miss Josephine H. Neal,
Deputy Clerk,
Circuit Court of Orange County,
Orange, Virginia.

Dear Miss Neal:
Please pardon my delay in not having replied sooner to your letter of June 14, but I was out of the city several days last week.
REPORT OF THE ATTORNEY GENERAL

You ask my advice as to the length of time a person must live in an incorporated town in order to become eligible to vote in a town election.

A person moving to a town from anywhere in the State, including the outside section of an election precinct or magisterial district in which the town is located, must have resided in the town for six months before being eligible to vote in an exclusively town election.

Where a town is a part of the territory included in a precinct and there is an election for precinct magisterial, county or State officers a person may vote in a town when the voting place of the precinct is in the town. This applies to the right to vote in a primary as well as a general election.

No person can vote in a town election even though such person has moved into the town from an outlying part of a district or any other district of the county or any other county or city of the State, unless he or she has resided in the town in which a town election is being held for six months prior to the election.

Very truly yours,

EDWIN H. GIBSON,
Assistant Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., May 5, 1939.

HONORABLE L. M. COYNER,
Treasurer of Fairfax County,
Fairfax, Virginia.

MY DEAR MR. COYNER:

I have your letter of May 4, from which it appears that you desire my opinion as to whether or not you should place upon the list of persons whose capitation taxes have been paid for the three preceding years provided for by section 109 of the Code the name of a person who has paid to your office his capitation taxes for 1937 and 1938, and has produced to you a receipt from the treasurer of the city of Alexandria showing the payment of his 1936 capitation tax in that office.

It is my opinion, under these circumstances, that you have authority to place his name on your list. Section 109 of the Code would seem to contemplate such action, as it does not restrict the names to be placed on the list to those who have actually paid their taxes to the treasurer making the list.

I call your attention also to the provisions of section 115 of the Code, which would permit the person to whom you refer to vote upon the production of certificates from the respective treasurers to whom his capitation taxes have been paid in such a case as you refer to.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Voters—Prepayment of Capitation Tax—Time.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
Richmond, Va., December 15, 1938.

Honorable W. L. Painter,
Treasurer, Tazewell County,
Tazewell, Virginia.

My Dear Mr. Painter:
I am in receipt of your letter of December 13, in which you request my opinion as to the last day upon which persons may pay capitation taxes in order to qualify to vote in the Tazewell and North Tazewell town elections which will be held on June 13, 1939, that date being the second Tuesday in that month.

The law requires the payment of all capitation taxes six months prior to such election. Section 5, eighth clause, of the Code of Virginia, provides that, where a statute requires an act to be done a certain time before any proceeding, there must be that time exclusive of the day for such proceeding, but the day on which such act is done may be counted as part of the time. Accordingly, it is my opinion that December 13 is the last day upon which capitation taxes may be paid in order to qualify one to vote in this election.

The above requirements do not apply to persons who became of age after January 1, 1938. Such persons may vote in this election if they pay their capitation taxes and register on or before the last day of registration prior thereto.

Sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Voters—Prepayment of Capitation Tax—Taxes Paid But Name Omitted from List.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
Richmond, Va., November 1, 1938.

Mr. C. D. Shannon,
Judge of Election,
Saltville, Virginia.

My Dear Mr. Shannon:
I have your letter of October 27, in which you inquire as to the law applicable to the qualification as a voter of a person who paid his capitation tax six months before the election, but whose name by inadvertence was omitted by the county treasurer from the list of persons whose taxes had been so paid. You desire information upon the question of whether or not such person may vote although his name does not appear upon the tax list.

This office has repeatedly ruled for many years that the requirements of the statute and the Constitution on this subject are mandatory. The law requires the treasurer to post a list of persons whose capitation taxes have been paid within the required time in certain public places, and gives all persons thirty days within which to apply to the court to have his name placed on said list in the event it has been improperly omitted. When this time has elapsed, neither the court nor the treasurer has the right to place a person’s name on such list, and, under the provisions of the statute, since his name does not so appear he is not qualified to vote in the following election. Of course, when the treasurer makes up his next list his name should be included as to elections thereafter occurring.

The only exceptions to the requirement that a person’s name must appear
on this treasurer's list are in cases where a person has recently become twenty-one years of age, or has recently moved into the State, and in cases where a voter is transferred from one city or county to another city or county and a part of his taxes have been paid in one of such localities and a part in the other. In this last mentioned case, section 115 of the Code permits the taxpayer to vote upon the production of certificates from the respective treasurers evidencing the fact of the payment of the required taxes.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

ELECTIONS—Voters—Prepayment of Capitation Taxes—New Residents. Id.—Id.—Army, etc., Officers Stationed in Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., APRIL 28, 1939.

HON. E. R. LAINE,
County Treasurer,
Isle of Wight, Virginia.

MY DEAR MR. LAINE:

I am in receipt of your letter of April 27, from which I quote as follows:

"The first question involves the requirements and eligibility to register and vote of persons coming into Virginia from another state and establishing their residence here. As I understand it a person twenty-one years of age or more who has come into Virginia and established residence here since January 1, 1938, and who will have been residing here one year come the general election November 7, 1939, may register and vote without having paid any State capitation tax. Is this correct?"

Your understanding is correct and in accordance with the uniform ruling of this office. A new resident coming into the State is only required to pay such capitation taxes as have been assessed or are assessable against him.

Your second question is as follows:

"The second question involves persons in military service of the United States. As I understand it an officer, soldier, or seaman in the United States Army or Navy is not eligible to vote under any conditions yet I cannot find any provision in the Virginia Code or election laws which prohibits their voting. Am I correct? Since I have not been able to find any prohibitory statute I have wondered if they might be ineligible to vote on account of Federal law."

Persons in the military or naval service are not on account thereof disqualified to vote in Virginia. You probably have in mind section 24 of the Constitution, which provides in part as follows:

"No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage in the State, or in any county, city or town thereof by reason of being stationed therein; * * *"

The quoted language, however, simply means in effect that the mere fact of a soldier or sailor being stationed on a military or naval reservation in Virginia does not of itself constitute such a person a resident of Virginia. However, it is perfectly possible, and indeed there are many such cases where a soldier or a
sailor is an actual *bona fide* resident of Virginia within the meaning of the election laws, and, if the other requirements of the law are met, he may register and vote in this State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 2, 1939.

HONORABLE W. H. DUKE,
Chairman of the Electoral Board,
Portsmouth, Virginia.

MY DEAR MR. DUKE:

This is in reply to your request for my opinion upon the question whether or not a person who moved into Virginia at any time after January 1, 1938, may vote in any elections held in Virginia which take place during the year 1939 and after said person has been a resident of the State for one year or longer.

Section 18 of the Constitution provides that "Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; * * *".

Section 21 of the Constitution provides that as prerequisite to the right to vote every person must "personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote."

It has always been the construction of our statutes with reference to assessing capitation taxes and personal property taxes in Virginia that the taxes are assessable as of the first day of January each year. The person to whom you refer, having moved into the State after the first of January, 1938, was not assessable with any capitation tax for the year 1938, and, therefore, has paid all of such capitation taxes as are required by the Constitution to be paid by him. The effect of this, of course, is that he does not have to pay any capitation tax at all in order to vote in an election held during the year 1939 after he has been a resident of the State twelve months.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Voters—Eligibility—By Whom Determined.

Id.—Voting Lists—How Prepared—Prepayment of Capitation Taxes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 12, 1939.

HONORABLE H. L. HULCE,
City Treasurer,
Room 105, City Hall,
Richmond, Virginia.

MY DEAR MR. HULCE:

This is in reply to your letter of January 11, in which you request my opinion
upon the three questions hereinafter repeated by me in the order contained in your letter.

1. "Who is the one to say whether a person is entitled to vote?"

The judges of election are the persons designated by law to determine whether any person offering to cast a vote is eligible to do so.

2. "Who is to decide as to the way a voting list should be be prepared?"

The treasurer, of course, has the final responsibility of deciding this question, although the courts have authority and power to correct any errors either of omission or commission which the treasurer may make. The duties of the treasurer with respect to the preparation of the list of persons whose capitation taxes have been paid are provided for by the Constitution of the State and by statutes, and the treasurer should comply with such provisions as interpreted by the courts.

3. The effect of your third question is as follows:

"Is it the duty of the treasurer to place upon the said list of persons who have paid all capitation taxes assessed or assessable against them during the three preceding years the names of persons who have not paid three years' taxes where the treasurer is in doubt as to whether taxes for all three of said years have been assessable against such persons?"

It is my opinion that it is the duty of the treasurer to place upon said list the names of all persons within his city or county who have been assessed with, and have personally paid not later than six months prior to the election for which the list is prepared, their State capitation taxes for all or any one of the three years immediately preceding the preparation of the list, unless it appears to said treasurer from the records, books, and papers of his office that such person or persons have failed to pay taxes with which they have been assessed for one or more of the three preceding years. (See Zigler v. Sprinkel, 131 Va. at page 419).

I think the foregoing statement should be qualified to this extent, however, that if the treasurer knows of his own personal knowledge that a person who has paid his capitation taxes for only one or two of the three preceding years was actually assessable with taxes for all of the said years, then the name of such person should not be placed upon his books. If the treasurer is in doubt as to what taxes were assessable against a person and there is no delinquency in any such tax actually assessed against such person, then, in my opinion, the name of such person should be included on the list.

I am further of opinion that the said list to be so compiled by the treasurer should show thereon in separate columns the separate years of the three immediately preceding in which such taxes have been paid by each individual. This will enable the judges of election to determine by questioning any person offering to vote, whose taxes do not appear from said list to have been paid for all of the three preceding years, any facts which the person offering to vote relies upon to excuse him from the payment of any one of said years in which the tax has not actually been paid.

The treasurer should not include on said list any person who appears from the records in the treasurer's office to be delinquent in the payment of his capitation tax for any one of the three preceding years for which the same was actually assessed, provided such delinquency continued to exist after the expiration of said six months period within which same could be paid in order for such person to be qualified to vote.

Sincerely yours,

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

ELECTIONS—Voters—Registered Voter Who Has Once Lost and Subsequently Regained Virginia Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
Richmond, Va., March 13, 1939.

Honorable B. P. Harrison,
Commonwealth's Attorney,
Frederick County,
Winchester, Virginia.

My Dear Mr. Harrison:

This is in reply to your letter of March 11, in which you request my opinion upon the qualification of a person to vote in Virginia who was formerly a registered voter in Virginia, but who moved to the District of Columbia and established his domicile there, abandoning his former Virginia domicile. In the Spring of 1938, he returned to Virginia, abandoning his domicile in the District of Columbia and again establishing his domicile in Virginia. You inquire as to whether it is necessary for this person to pay any poll taxes in order to vote in the elections in Virginia which will be held during the year 1939.

This office has frequently ruled that in a case of this kind such person was not assessable with any poll tax for the year 1938 and, therefore, it was not necessary for him to pay any poll tax at all in order to vote in the 1939 election.

You state also that this person’s name has not been stricken from the registration list and inquire whether it should now be stricken and whether he should be required to again register.

This is a question which does not seem to be specifically covered by the statutes, and I am inclined to the view that it would be a useless formality to have his name stricken from the registration list and again placed thereon. However, I can well understand that the registrar would be entitled to again interrogate him on the question of his residence in Virginia and the length of time he has lived here, and it may be that it would be the safest policy to follow for such a person to again appear before the registrar and establish the fact that he is now a resident of the State. This is quite a technical matter and I do not believe it should finally determine the right of a person to vote, if he is able to satisfy the judges of election, at the time he offers to vote, that he has been a resident of Virginia twelve months prior thereto.

I do not think that in a case of this kind it is necessary for the voter to have a certificate from the Commissioner of the Revenue, as I doubt very much if the Commissioner of the Revenue has any jurisdiction to pass upon this question. I think that the question is one to be decided by the election judges at the time that the person offers to vote, and that if he can satisfy the election judges that he has been a resident of the state for one year and has paid all capitation taxes assessable against him during the three preceding years, he should be permitted to vote. Of course, if no such taxes have been assessable during that period, none would have to be paid.

All of the foregoing is upon the assumption that this person moved out of Virginia prior to January 1, 1936, and before that date established his residence in the District of Columbia. If he was a resident of Virginia after January 1, 1936, he was assessable with a poll tax for that year and same would have to be paid in order for him to vote. The same thing is true of the years 1937 and 1938, if he left the state after January 1 of either of those years.

Sincerely yours,

Abram P. Staples.
Attorney General.
ELECTIONS—Voters—Transfer of Registration Where Books Destroyed.  
Id.—Id.—Domiciled Citizens Temporarily Living Out of State—"Actual Resident" for Purposes of Town Elections.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., MAY 2, 1939.

HONORABLE W. BARTON MASON,  
Chairman of the Electoral Board,  
Orange, Virginia.

MY DEAR MR. MASON:  
This is in reply to your letter of May 1, in which you request my opinion upon the following two questions:

First: You state that there is a person living in Gordonsville who is qualified to vote in every way except the fact that he is not registered in that town. You also state that he last voted at Galax, but that the registration books there were destroyed by fire and therefore it is impossible for him to obtain a transfer. You request my opinion upon the question whether it is proper for the registrar at Gordonsville to register him upon his registration books upon the statement to the registrar in writing that the facts are in accordance with the foregoing, and that the registration books upon which his name was formerly entered have been destroyed.

In my opinion, this is the correct procedure and, upon these facts being contained in his written application to the registrar, it is the duty of the registrar to enter his name upon his books.

Second: You state that there is also a person who was born and raised in Gordonsville and maintains his legal residence there although temporarily residing in the District of Columbia, and that he has always been considered eligible to vote in the county election.

Under the interpretations of our statutes in Virginia it is not necessary for a person to have his place of abode in the town or county of which he is a legal resident. Having once established a residence in a county, city or town, he continues to be a resident thereof until he has actually lived in some other place and has formed an intention to make his permanent abode there. The mere fact, therefore, that he is living in the District of Columbia at the present time does not prevent him from being a resident of the town of Gordonsville within the meaning of the term as applied to our voting laws under the decisions of our Supreme Court of Appeals.

With reference to the question whether or not he would be disqualified from voting in town elections although he is qualified to vote in county elections, I beg to advise that it is my opinion, if such a person is entitled to vote in a county election, he is likewise entitled to vote in those conducted in the town.

It is true that section 2997 of the Code contains this provision:

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

However, I do not think the word "actual" as used in the above quoted provision can be given any special significance by reason of the provisions of sections 18 and 21 of the Constitution. Section 18 of the Constitution provides as follows:

"Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; * * *."
Under the provisions of section 21 of the Constitution, every person who has properly registered under the provisions of section 20 and is otherwise qualified as to residence under section 18 of the Constitution above quoted, and who has paid all poll taxes assessed or assessable against him under the Constitution during the three years next preceding that in which he offers to vote, is eligible to vote for all officers elected by the people.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 28, 1939.

HONORABLE J. J. TEMPLE,
Commonwealth's Attorney,
Prince George, Virginia.

My Dear Mr. Temple:

This is in reply to your letter of May 25, in which you request my opinion upon the eligibility of a person to vote in a magisterial district where he has had his permanent residence for years, but who has moved out of the district and now has his place of abode in a house owned by him about one hundred yards over the district line.

In my opinion, the question of the particular district in which the person you refer to should vote is to be determined by the intention of the person as to his permanent residence. Under the decisions of our Supreme Court of Appeals, when a person has once established a residence it can be changed only by an actual establishment of a residence in another place. In order to establish such new residence there must be an actual abode coupled with an intention to make such new place a permanent residence.

If the person to whom you refer considers himself merely temporarily residing in his new abode and intends to return at some time in the future to his old place of abode, then I think he should vote in the district in which he formerly had his place of abode. However, if he has made up his mind to permanently reside in the new district, then he should vote there. After all, the question depends on the voter's intention and this is a matter about which he alone is able to speak.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 27, 1939.

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

Dear Mr. Whitehead:

I am in receipt of your letter of June 22nd asking in which district a person should vote under the following circumstances:
"He owns property in Banister and Chatham districts, and until about three years ago lived in Banister district, and voted in Banister district, but now lives in Chatham district but has not transferred from Banister district."

In reply, beg to advise that if the individual involved has abandoned his residence in Banister district with the intention of establishing his domicile in Chatham district, he should vote in the latter district. If, however, the individual is but temporarily residing in Chatham district, having the intention of retaining his domicile in Banister district and eventually returning there to live, he should vote in Banister district.

I have not attempted to discuss the principles involved, since the above is in accord with the uniform ruling of this office in similar cases for many years.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 19, 1939.

HON. HOWARD NEWLON,
Judge of Election,
Brandy, Virginia.

DEAR MR. NEWLON:

I am in receipt of your letter of June 16, in which you ask my advice as to the right of a person who has moved from Stevensburg Magisterial District to another district of Culpeper County to return to Stevensburg District and vote in the August primary.

The right of such a person depends entirely upon whether such a person has removed permanently from Stevensburg District to another district, or, so far as this is concerned, to another county or city of the State, or to another State with intention to give up Stevensburg District as his or her domicile. This means that a person whose voting domicile or residence or home was in Stevensburg District has left that district with the purpose of establishing a permanent home or residence elsewhere with no present intention at the time of leaving of returning to Stevensburg District.

Thus, you will see that the right of a person who has left Stevensburg District to return and vote there depends upon the intention of the person more than upon the fact that he or she has removed from the district, and this intention must be passed upon by the judges of election, whether a primary or a general election.

Yours very truly,
EDWIN H. GIBSON,
Assistant Attorney General.
ELECTIONS—Voters—New Residents.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 16, 1939.

HON. PAUL E. BROWN,
Attorney for the Commonwealth,
Fairfax, Virginia:

My Dear Mr. Brown:

I am in receipt of your letter of June 14, in which you ask if a person who has been a resident of Virginia for more than a year, although not assessed or assessable with a capitation tax, may register and vote in the primary and general elections to be held this year. You say:

"* * * According to the many rulings made by your office in this connection, it is my understanding that any person who may have moved into this county from another state after January 1, 1938, and prior to November 6, 1938, is entitled to vote in the elections held in this county during the year 1939, that is, the primary and general elections, without paying any capitation tax."

Your understanding is entirely in accord with a great number of opinions expressed by this office on the subject.

Section 18 of the Constitution of Virginia provides in part that:

"Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; * * * ."

The State capitation taxes "as hereinafter required" are those "legally assessed or assessable against him for the three years next preceding that in which he offers to register." Section 20 of the Constitution of Virginia. A person becoming a resident of Virginia after January 1, 1938, and prior to November 6, 1938, manifestly has not been "assessed" with a State capitation tax for 1938, since this tax is assessable only against persons who were residents of Virginia on January 1, 1938, nor, of course, is such a person "assessable" with a State capitation tax for the year 1938, or for any of the three years next preceding the election to be held this year.

It is entirely plain from the above that, if the other requirements of the statutes are met, a person who will have been a resident of Virginia for a year or more prior to the general election to be held in November, even though he was not assessed or assessable with any capitation tax, is entitled to register and vote in the said general election.

As to the eligibility of such a person as above described to vote in the primary to be held in August, he is clearly so entitled to vote in such primary, provided he complies with the other requirements of the statutes regulating primaries, in view of the following provisions of section 228 of the Code:

"All persons qualified to vote at the election for which the primary is held, and not disqualified by reasons of other requirements in the law of the party to which he belongs, may vote at the primary; except that:

"No person shall vote for the candidates of more than one party:

"No person shall be permitted to vote for the candidates of any party in any primary unless such person is a member of such party and in the last preceding general election, in which such person participated, he or she voted
REPORT OF THE ATTORNEY GENERAL

for the nominees of such party; and, upon challenge, such person shall declare on oath that he or she is a member of such party and supported such nominees as hereinbefore required before being permitted to vote."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Residence—Women.
Id.—Towns—Prepayment of Capitation Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 29, 1939.

HONORABLE W. B. MASON,
Chairman of the Electoral Board,
Orange, Virginia.

DEAR MR. MASON:
I have your letter of May 27, in which you ask two questions which I will answer in the order stated.

First, you inquire whether or not the provisions of section 82, relating to the time of residence in the State, county, and precinct in order to render persons eligible to vote, apply to women voters as well as men.

It is my opinion that there is no doubt about the provisions being equally applicable to men and women alike.

Your second question is whether or not residents who are qualified to vote for members of the General Assembly next November are entitled to vote in town elections to be held in June. You refer to section 2997 of the Code, which provides that "The electors of a town shall be actual residents thereof and qualified to vote for members of the General Assembly".

I do not think that this provision has any relation to the payment of capitation taxes. If it should be construed as authorizing persons to vote who have not paid their capitation taxes six months prior to the town election, it would be unconstitutional and in violation of the Constitution's provision that such taxes shall be paid six months prior to the date of the holding of the election. This has been the uniform ruling of this office for many years.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Prepayment of Capitation Taxes—Voter Coming of Age January 1.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 6, 1939.

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

DEAR MR. MAHON:
I have your letter of June 2, in which you ask the following question:
"Is a person who was born on January 1, 1938 assessable with capitation tax for that year, or can he pay his capitation tax for the year 1939 at this time and register and vote in the primary on August 1, 1939?"

I take it that your reference to a person "born on January 1, 1938" is a typographical error, and that you intend to inquire about a person who becomes twenty-one years old on January 1, 1938.

A person becoming twenty-one years of age on January 1, 1938, is assessable with 1938 capitation taxes under section 310 of the Tax Code. Such person, therefore, not having come of age at such a time that no poll taxes was assessable against him for the year preceding the year in which he offers to register (Constitution section 20; Code section 93), may register and vote in the 1939 elections upon payment of his 1938 capitation taxes six months before the election in which he seeks to vote. Constitution sections 20-21; Code section 93.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTION—Voters—Residence and Prepayment of Capitation Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 8, 1939.

Miss Helen V. Bailey, Registrar,
Coiner Motor Company,
Gordonsville, Virginia.

DEAR MISS BAILEY:

I have your letter of June 7, requesting my opinion upon certain questions arising under the election laws.

First: You wish to know whether a person who moves into the State after January 1, 1938, and who is in all other respects eligible to vote in the 1939 elections, may do so without paying any capitation tax.

Since such a person was not a resident of the State on or before January 1, 1938, there are no capitation taxes assessable against him for any of the three years preceding that in which he offers to vote and hence, being in other respects qualified, he is entitled to vote in the 1939 elections. Constitution of Virginia, sections 18-21; Virginia Code (Michie 1936) section 93.

Your remaining three questions all relate to the voting qualifications of persons who are not actually residing in the municipality in which they seek to vote, and all are controlled by the same general principles.

The qualifications of such persons to vote in such municipal elections, in spite of the fact that they are actually residing outside the municipality or even outside the State, will depend in each case upon the question whether such persons are legally domiciled within the municipality. Assuming that they were originally residents of the municipality, under the law they retain such residence until a new domicile is acquired elsewhere. In order to acquire a new domicile, such persons must move to another place with the intention of making such other place their home.

Thus, the difficult question of determining the legal residence or domicile of any person depends very largely on his intention or mental attitude toward the place of his residence. This, of course, is always a difficult question and one which must be determined on all the facts of each particular case.

I realize that a more precise answer to your question is desirable but the law does not afford a more exact standard than this for determining the question of domicile.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Mr. F. C. Stover, Secretary,
State Board of Embalmers and
Funeral Directors of Virginia,
Strasburg, Virginia.

DEAR Mr. Stover:

In your letter of June 5 you state that the State Board of Embalmers and Funeral Directors has construed Section 1721 of the Code of Virginia as providing that no funeral director can be the manager of more than one place of business and that each funeral home must have a licensed funeral director who has a financial interest in the business as manager.

Section 1721 provides, in part, as follows:

"At least one member of every firm and the manager of each place of business conducted by any corporation that desires to engage in the business or practice of funeral directing, shall be a licensed funeral director, but no assistant, no member of any firm, and no officer or employee of any corporation shall engage in the care, preparation, disposal and burial of dead human bodies, or the management of burials, or the discharge of any of the duties of a funeral director, unless he shall be a licensed funeral director under the provisions of this chapter; provided, however, that an assistant or a member of a firm or an officer or employee of a corporation licensed as an assistant funeral director may perform any of the acts aforesaid. * * *"

It is my opinion that the provisions of this section dealing with the business of funeral directing as conducted by partnership are different from those provisions dealing with such business as conducted by a corporation. You will note that it requires only that at least one member of every firm shall be a licensed funeral director, while it requires that the manager of each place of business conducted by a corporation must be a licensed funeral director. Evidently the Legislature deemed it less likely that a partnership would conduct several different funeral homes than that a corporation should do so and did not, therefore, deem it necessary that the different funeral homes conducted by a partnership, in case there should be such, should each have a licensed director as manager. It is my opinion that in the case of partnership the statute does not make such a requirement.

The provision that the manager of each place of business conducted by any corporation shall be a licensed funeral director is open to two possible constructions. It might be contended that it is possible for one person to manage more than one place of business and that if he is a licensed funeral director both places may be managed by him rather than having a separate licensed funeral director as manager of each home. However, the more reasonable construction is that the Legislature intended to require each place of business conducted by a corporation to have its own manager, he being the person whose time is fully occupied in supervising and controlling the operation of such home, and that such person should be a licensed funeral director. In view of the fact that the Board has consistently construed this statute as providing that no funeral director could be the manager of more than one place of business, it is my opinion that the Board should continue to so construe the statute as to corporations.

There is nothing in this statute, however, that requires such manager to have a financial interest in the business.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
MR. F. C. STOVER, Secretary,
State Board of Embalmers and
Funeral Directors of Virginia,
Strasburg, Virginia.

DEAR MR. STOVER:

In your letter of June 5, addressed to Mr. Rogers of this office, you state that prior to January 1 all persons licensed by the State Board of Embalmers and Funeral Directors were sent a letter informing them that the law required them to make application for the renewal of their license on forms required by the Board. You recite the case of a licensee who failed to apply for a renewal of his license before December 1 as required by law, but who on January 31 sent to the Board his renewal fee unaccompanied by the formal application required by the Board. You state that the Board requested him to execute the proper renewal application form and also the reinstatement form, but that the applicant has as yet refused to execute the reinstatement form and delayed some time in executing the renewal form. The chief information which the Board seeks to secure by the reinstatement form is whether or not the applicant has been performing the duties of a funeral director during the period in which he was not licensed. You also state that upon investigation the Board has found that this applicant has been engaged in this business during the period in which he has been unlicensed.

You ask if the Board should issue a license to any such applicant who refuses to execute the form set up by the Board for use in requesting reinstatement of licenses.

Section 1719 authorizes the Board to make and adopt such rules and regulations for the carrying out of this act as may be necessary. Section 1720b states that applications for a renewal of a license shall be made in such form as is required by the rules and regulations of the Board.

It is my opinion, therefore, that the Board may refuse to grant any original or renewal license so long as any applicant refuses to execute such forms requesting reasonable information required by the Board. The reinstatement form, a copy of which you enclosed in your letter, is, in my opinion, a very reasonable and proper one.

You also state in your letter that, when an applicant continues to engage in business without having secured a renewal of his license because of failure to execute the proper forms after having been requested to do so numerous times by the Board, the Board considers such person as having willfully violated the law. You ask if the Board may for that reason refuse the reinstatement of his license.

Since the statute makes it unlawful to engage in the business of funeral directing without a license from the State Board, and since it also provides that the Board may refuse to grant a license, if the applicant therefor has been guilty of willfully violating any provisions of the act, it is my opinion that the Board may refuse the reinstatement of the license of any applicant who has conducted himself in the manner which you describe.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
EXTRADITION—Authority of Governor to Promise Return of Prisoner After Trial.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 20, 1938.

HONORABLE RAYMOND L. JACKSON,
Secretary to the Governor,
Richmond, Virginia.

DEAR MR. JACKSON:

This is in response to your letter of September 16, in which you state that the Governor desires my opinion as to his authority to agree with the Governor of Maryland that a Maryland prisoner surrendered by the authorities of Maryland to the authorities of Virginia, for the purpose of being tried on a charge of murder in the courts of Virginia, will be returned by the Virginia authorities to the Maryland authorities at the expense of the Commonwealth of Virginia upon the termination of the trial of such Maryland prisoner in the courts of this State.

Section 5 of Chapter 404, pages 757-758, of the Acts of 1938, provides as follows:

“If, pursuant to the order or request of the Governor, or of any court or Commonwealth’s Attorney of this State, or any other authorized officer, any prisoner of the United States or the District of Columbia, or of any other State, be tendered to the custody of the superintendent of the State penitentiary, or any duly authorized officer or guard of the penitentiary, either within this State, or to be transported to this State, to be held for trial for crime in Virginia, or as a witness in any criminal proceeding in Virginia, the said superintendent, officer or guard, or either of them, are hereby authorized to receive said prisoner into custody, and they, and each of them, are hereby clothed with the same powers with respect to such custody as are possessed by them or any of them over prisoners held by them or any of them after conviction of crime and sentence to the State penitentiary by the courts of this State.”

It is my opinion that the purpose, intent and effect of the foregoing provision is to empower the officers therein named to retain custody of any prisoner surrendered to him by the authorities of another state, and to dispose of such prisoner in such manner as in each case may be required. The Act contemplates that the out-of-state prisoner will be surrendered to the custody of the superintendent or a guard of the State penitentiary. The Governor, as the head of the Executive Department of the State, possesses the authority to direct the superintendent of the penitentiary as to the disposition to be made of any such prisoner in his custody, and, in my opinion, the Governor does have authority to enter into an agreement with the Governor of Maryland for the return by the penitentiary authorities of any such prisoner after the trial in this State is terminated.

I might suggest that, for the better assurance of the authorities of Maryland, if they so desire, it might be well to also have Major Youell, in whose custody the prisoner will be held, to also agree for such return of the prisoner. It is my opinion that the expenses incident thereto may be paid out of the appropriation for the general criminal expenses of the State.

If the prisoner is brought into Virginia pursuant to a requisition, I am not at all clear as to the authority of the Governor to agree for the prisoner’s return and do not undertake to pass upon this question at this time. I recommend proceeding under the 1938 Act above quoted, and that the request for the prisoner be made by the Governor upon the condition for the return of the prisoner as above indicated.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 28, 1938.

HON. MILTON I. HARGRAVE, Clerk,
Circuit Court of Dinwiddie County,
Dinwiddie, Virginia.

MY DEAR MR. HARGRAVE:
I am in receipt of your letter of October 4, in which you ask the following question:

"Please advise whether or not the Circuit Court should allow witness and arrest fees payable out of the State treasury to the salaried enforcement officers of the Alcoholic Beverage Control Board when the fine and costs are not paid by the individual."

Inasmuch as enforcement officers of the Alcoholic Beverage Control Board are paid a salary by the State and their expenses are also paid, I do not think it would be proper for their arrest fees or their fees as witnesses to be paid out of the State treasury where the fine and costs are not paid by the defendant. Since the officers are not allowed to retain these fees when paid by the defendant, but are required to turn them in to the Board, it would seem a useless gesture to have the fees paid out of the State treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 17, 1938.

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

MY DEAR MR. WHITEHEAD:
I am in receipt of your letter of August 15, in which you ask:

"Kindly advise whether or not, in your opinion, there is any distinction, as far as the arrest fee is concerned, in a misdemeanor and a prohibition misdemeanor."

I can find no existing statute providing any different arrest fee for a sheriff, sergeant or constable in the case of a misdemeanor under the Alcoholic Beverage Control law from the arrest fee prescribed by section 3508 of the Code.

Very sincerely yours,

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

FEES—Clerks and Sheriffs—Confiscation of Automobiles Under ABC Law.

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

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

My Dear Mr. Broaddus:

This is in reply to your letter of July 11, in which you request certain information relative to the proper fees to be paid the clerk of the court and sheriff in proceedings for the confiscation and sale of automobiles captured while being used in the transportation of unlawful alcoholic spirits in violation of the alcoholic beverage control statute.

As to the fees due to the clerk, it is my opinion that they should be the same as fees allowed for rendering like services in criminal cases. However, if the clerk renders any services in connection with such proceedings which are not covered in the general scale of fees applicable to criminal cases, but where fees for such similar services are provided by law for civil cases, it is my opinion that the latter would prevail.

I have been unable to find any specific provision in the statute for the fee applicable for the seizure of the cars. In this case, I think it is proper that the court follow the provisions of section 4960 of the Code, which provides that "when in a criminal case an officer or any other person renders any other service, for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable * * *".

I am of the opinion that the seizure of the car would be deemed to be a criminal case within the meaning of this statute, and that the amount to be allowed the sheriff is a question for the court.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEES—Clerks—Issuing Marriage Licenses.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., OCTOBER 25, 1938.

HON. B. I. BICKERS, Clerk,
Circuit Court of Greene County,
Stanardsville, Virginia.

My Dear Mr. Bickers:

I am in receipt of your letter of October 19, in which you inquire as to fees of the clerk of the court provided by statute for issuing marriage licenses.

The fee for issuing a license is $1. See subsection 10 of section 3484 of the Code.

Section 5074 of the Code requires each of the parties contemplating marriage to state certain things under oath before a person qualified to take acknowledgments or to administer oaths. If the clerk administers these oaths, I am of opinion that he is entitled to 25 cents for each oath so administered. Subsection 29 of section 3483 of the Code.

In addition, you are, of course, familiar with the requirement that a wafer with the seal of the court superimposed thereon be affixed to the license. The cost of this wafer is $2, but, of course, this item is paid by the clerk into the State
REPORT OF THE ATTORNEY GENERAL

The above charges are to be paid by the persons applying for the license. In addition, the clerk is entitled to a fee of 10 cents for reporting each marriage, as required by section 5096 of the Code. This fee is payable out of the State treasury. Subsection 3 of section 3484 of the Code.

I know of no other fees to which the clerk is entitled in connection with the issuance of marriage licenses. However, I realize that there are so many statutes dealing with fees that it may be I have overlooked one. If you have in mind any statute authorizing any additional fees, I shall be glad if you will point it out to me and I shall give the matter further consideration.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1938.

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

My Dear Mr. Johnson:

Thank you very much for your letter of July 21, calling my attention to the former opinion of this office with reference to the payment of fees in a coroner's proceedings.

It is my opinion that the provision in section 4814 of the Code, requiring all expenses incurred for the coroner's proceedings to be allowed by the court of the coroner's county or corporation, to which a return of an inquisition would properly be made, before said expenses are payable out of the treasury of the county, city, or State, is applicable to all fees of the sheriff and of the coroner which arise by reason of services rendered under section 4806 to 4818, inclusive, of the Code.

Section 4814 undertakes to provide for the manner in which all of these fees and other expenses shall be paid;—that is, whether by the county or city, or by the State. Unless the word "proceedings" be construed to embrace the service of the coroner in viewing the body and making an examination thereof, as well as making an autopsy in cases where no inquisition is held, there would be no provision as to the manner of payment of said fee for such services.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEES—Transfer of Real Property—One Conveyance Covering Several Tracts.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 31, 1938.

Hon. J. Sol Wrenn, Clerk,
Circuit Court of Greenville County,
Emporia, Virginia.

My Dear Mr. Wrenn: I am in receipt of your letter of October 26, in which you ask the following question:
“In collecting the charges for admitting a deed of bargain and sale to record the clerk among other things collects one dollar for the transfer of the property, that is when one tract of land is involved. What I want to know is, if there are several tracts of land involved, should the clerk charge one dollar for each tract, or should the one dollar charged cover all tracts conveyed in one deed?”

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

“For making an entry transferring to one person lands before charged to another, one dollar, which shall be charged to the person to whom the transfer is made, and be a compensation for all tracts in the commissioner’s county or city conveyed by the same deed.”

Considering this language, I am of opinion that, where one deed conveys several tracts of land, the clerk should only collect a fee of one dollar for the commissioner of the revenue.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEE OFFICERS—Excess Fees—Computation—Accrual Basis.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 25, 1939.

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

My Dear Mr. Downs:
I am in receipt of your letter of April 21, in which you ask if in determining whether or not excess fees are due the Commonwealth by a sheriff the cash receipts and disbursements basis or the accrual basis should be used.

The pertinent section is 3516 of the Code, and the question is not answered in terms by this section. However, from a consideration of the whole section, I am inclined to be of the opinion that it is contemplated that the cash receipts and disbursements basis should be used. My information is that this is the basis that is now used in the majority of cases. It may be that, if the books of the sheriff are so kept, the accrual basis could be used, but I am of opinion that the better view is that the cash receipts and disbursements basis is proper. Manifestly, it would not be proper to change from one basis to the other from year to year.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEE OFFICERS—Reports—Salaries Paid to Deputies by Locality.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 25, 1939.

HON. LEROY HODGES, Comptroller,
Commonwealth of Virginia,
Richmond, Virginia.

My Dear Colonel Hodges:
I am in receipt of your letter of January 18, in which you ask if compensation
paid to deputy clerks of court by boards of supervisors of certain counties under authority of chapter 326 of the Acts of 1938 (Acts 1938, page 489) should be reported by their principals under sections 3516 and 3516-a of the Code of Virginia as “fees, allowances, commissions, salaries, or other emolument of office.”

The effect of the Act of 1938 is simply to allow boards of supervisors to pay to the deputy clerks of the circuit courts additional compensation. I take it that this compensation, when allowed, is paid direct to the deputy clerks and does not pass through the hands of the clerks at all. In other words, it is purely a matter between the deputy clerks and the boards, and the clerks have no control over it whatsoever.

Sections 3516 and 3516-a require reports from clerks of courts and other officers of “fees, allowances, commissions, salaries, or other emolument of office.” The expenses of the office shall also be reported. It is apparent that it would be very helpful to the Compensation Board for the compensation paid to the deputy clerks to be reported, for then the Board would have a complete picture of the whole situation. I do not imagine that the clerks will object to furnishing this information. However, as a legal proposition, it seems to me reasonably plain that the word “office” as it is used in these sections refers to the office of the clerk. Inasmuch as the clerk has nothing to do with this additional compensation which may be paid to the deputy clerks under the Act of 1938, nor has the Compensation Board any control over the action of the Board of Supervisors in this respect, I do not see how it can be considered as a salary or emolument of the clerk’s office. My conclusion is that this salary paid to the deputy clerks is not required to be reported by the clerk under the provisions of sections 3516 and 3516-a of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Collection of Out of Deceased Defendant’s Estate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 16, 1939.

Hon. John J. Morris,
Trial Justice of Greene County,
Stanardsville, Virginia.

My Dear Mr. Morris:
I am in receipt of your recent letter, in which you ask:

"* * * whether a fine imposed by a trial justice or justice of the peace against a man can be collected from his personal representative after the death of the person so fined. In other words, does a fine of $10 with costs of $18.25, in favor of the Commonwealth, bind the assets of a person after the death of such person, and do the same constitute a lien upon his real estate and his personal estate?"

Chapter 102 of the Code deals with the recovery and collection of fines. Section 2552 thereof provides for the clerk of the court, in the case of fines imposed by justices, to issue a fieri facias if the fine and costs are not paid. From a consideration of our statutes dealing with the recovery of fines, I am of opinion that it is contemplated thereby that a fine imposed by a justice may be collected from the estate of the individual fined. The judgment for fine and costs is certainly a final judgment for money and, as stated above, a fieri facias may be issued on such judgment. Freeman on Judgment (5th Ed.) at page 1966, says:
"Applying the general principle that judgments which may be satisfied
levy and sale operate as liens, a fine, where it may be enforced in this man-
ner, should create a lien as in other cases."

See also McCue v. Commonwealth, 109 Va. 302.

The priority of the fine and costs over other liens would depend, of course,
upon whether or not the judgment or an abstract thereof was properly docketed.
This office has heretofore ruled that a judgment for costs does not bear in-
terest. I am of opinion also that the fine does not bear interest. I can find no
statute providing for interest on either the fine or the costs. Section 6259 pro-
vides for interest on a judgment where the action is on contract or for tort,
but judgment for a fine does not come, in my opinion, within the scope of this
statute.

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

FINES—Disposition of—Arrest by State Officer Where County Has Paral-
lel Ordinance.

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

Hon. L. Brooks Smith,
Trial Justice for Accomac County,
Accomac, Virginia.

My Dear Mr. Smith:

I am in receipt of your letter of September 23, in which you ask what dis-
position should be made of fines collected by your office where the arrest was
made by a member of the State police or a game warden, and the county has a
local ordinance paralleling the State law.

In a case where the arrest is made by a member of the State police, appointed
by the Division of Motor Vehicles, I call your attention to section 2154 (169) of
the Code, which provides that:

"In all cases in which the arrest is made or the summons issued by an
officer of the Division of Motor Vehicles or any other division of the State
government, for the violation of the motor vehicles laws of this State, the
person arrested or summoned shall be charged with and tried for a violation
of some provision of this Act (Motor Vehicle Act) and all fines and for-
feitures collected upon conviction * * * shall be credited to the literary fund."

This section makes it plain that it is the duty of the State police in cases of
arrest for violation of the motor vehicle laws to charge a violation of a State
law, and, upon conviction on such charge, the fine should go to the State to be
paid into the literary fund. This is true even in the case where there is a local
ordinance paralleling the State law.

So far as I can find there is no such statute as that stated above relating to
arrests made by game wardens. I am informed, however, that there are very
few, if any, local ordinances of counties paralleling the State statutes relating to
game, inland fish and dogs. Where the warrant charges a violation of State law,
the fine imposed, of course, should go to the State to be paid into the literary
fund. If there is a valid local ordinance paralleling the State game laws and the
warrant charges a violation of such local ordinance, then the fine should go to
the locality, but, as I have indicated, my information is that there are very few, if any, local ordinances in counties paralleling the game laws.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Disposition of—Violations of Local Ordinances, Where Validity of Ordinance in Doubt.

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

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

MY DEAR MR. DOWNS:
I am in receipt of your letter of August 22, which I quote in full:

"I have your letter of August 16, 1938, as follows:

"'In response to your letter of July 26th, you are advised that Section 2575 of the Code of Virginia provides that:

""The proceeds of all fines collected for offenses committed against the State, and directed by section one hundred and thirty-four of the Constitution of Virginia to be set apart as a part of a perpetual and permanent literary fund, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the literary fund, and shall be used for no other purpose whatsoever."

"Section 65 of the Alcoholic Beverage Control Act also prohibits any county, city or town from passing any ordinance or resolutions regulating or prohibiting the manufacture, bottling, etc., of alcoholic beverages, except the power granted them under Section 26 of the Act to impose license fees. It would, therefore, appear that all fines collected for a violation of any provision of the Alcoholic Beverage Control Act should be paid into the State treasury."

"'In view of our conversation this morning over the telephone, I should like for you to advise me whether or not I have interpreted your opinion correctly, and, if not, please advise me as to the correct interpretation."

I note that you have interpreted the letter written by this office under date of July 26, 1938, as requiring the payment by the trial justice into the State Treasury of fines collected under a warrant charging a violation of a county ordinance, where the county ordinance may be invalid by reason of the fact that it undertakes to regulate or prohibit the manufacture, bottling, and so forth, of alcoholic beverages.

This interpretation of said letter is not in accordance with my own views. If a county enacts an ordinance, even though same be invalid, a person charged with a violation of said ordinance has the option whether or not he will question the validity of the ordinance. If he does not question same and submits to a fine,
and pays same without appeal within the time permitted by law, it is my opinion
that the State has no right whatever to demand that the fine be paid into the
State treasury to the credit of the literary fund. Every ordinance of a county
is presumed to be constitutional and valid until declared otherwise by the courts.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FINES—Disposition of—Offense Covered by Both Statute and Ordinance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 21, 1939.

Hon. A. H. Goff, Clerk,
Circuit Court of Buchanan County,
Grundy, Virginia.

My Dear Mr. Goff:

I am in receipt of your letter of March 17, in which you advise that the
Board of Supervisors of Buchanan County has passed an ordinance paralleling
the State driving-while-drunk statute. You then ask the following question as
to the disposition of fines imposed for driving while drunk:

"Should a fine collected on a conviction on a drunken driving charge and
in which the reading of the warrant or indictment is as in any other criminal
violation, and does not mention a violation of an ordinance of the county, be
paid to the Treasurer of the State of Virginia? And should only those fines
collected on convictions in which the warrant specifically cites that it was a
violation of an ordinance of the particular county in which the charge was
tried be paid to the Treasurer of the County?"

When you speak of the warrant reading "as in any other criminal violation
and does not mention a violation of an ordinance of the county", I presume that
you refer to a warrant charging a violation of a State law. In such a case the
fine should always be paid into the treasury of the State, as provided by statute.
The fine should be paid into the treasury of the county only when the warrant
specifically charges a violation of the county ordinance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Disposition of—Town Ordinance Cases Tried Before Trial Justice.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 19, 1939.

Hon. L. Brooks Smith,
Trial Justice,
Accomac, Virginia.

My Dear Mr. Smith:

I am in receipt of your letter of May 16.

Section 4987-f of the Code gives to trial justices exclusive jurisdiction of
all offenses against the ordinances, laws and by-laws of the respective counties,
cities and towns for which he is appointed, and of all other misdemeanors with
certain exceptions not pertinent here. Subsection (12) of this section, however,
continues in the mayor of a town "all jurisdiction now vested in such mayor or other trial officer pertaining to * * * the trial of cases involving violation of city and town ordinances * * *"), provided the Council of the town adopts a resolution mentioned in the subsection.

I am of the opinion that the trial justice and the mayor of a town have concurrent jurisdiction in cases involving the violation of the town's ordinances. However this may be, whether the trial justice or the mayor tries the case, if the warrant charges a violation of a town ordinance, the fees and fines must be paid into the town treasury. The town is responsible for the board of a prisoner committed to jail for a violation of a town ordinance. In other words, the disposition of the fine is controlled by the warrant. If the warrant charges the violation of a town ordinance, even though the case may be tried by a trial justice, the fine should be paid into the treasury of the town; and, if the warrant charges the violation of a county ordinance or State law, the fine goes to the county or to the State, in conformity with the warrant. Of course, as you know, the mayor of a town may not try cases involving violations of State laws or county ordinances.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Judgments for—Effect of Serving Term for Non-Payment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 18, 1939.

Hon. Coleman B. Yeatts,
Chatham, Virginia.

My Dear Mr. Yeatts:
I am in receipt of your letter of March 15, from which I quote as follows:

"The practice has been in the surrounding counties and, so far as I am able to observe, the general policy is to record a judgment for a fine and costs upon the occasion of a citizen violating one of the criminal laws of the State, and even though the convicted individual is committed to jail and to the road force to work the fine and costs out, this judgment continues to remain on the docket as a lien against any real estate which he might own.

"Kindly advise me whether or not in your opinion this is the State law and, if it is the law, whether in your opinion the Code should be amended so as to relieve a convicted individual of the judgment for fine and costs after he has served the time in jail or on the road force."

I recently had occasion to express an opinion on the effect on a fine when a person is committed to jail for non-payment of same and quote below therefrom:

"This is entirely a matter of statutory provisions. I know of no statute which provides that, where a person is committed to jail for non-payment of fine, the fine is satisfied by confinement in jail. Therefore, I am of opinion that in such a case the fine is still collectible. However, I call your attention to section 2095 of the Code, under which persons who are convicted and held to labor in the State convict road force, or in a chain gang, or at the State Farm or State Industrial Farm for Women, for the non-payment of fine and costs, or costs alone, are entitled to a monetary credit for each day such person shall work and for each other day of confinement, with a limitation of six months confinement. This section also provides that upon discharge
from custody the fine and costs, or costs alone, of every prisoner shall be discharged in full, although his credits for days of work and other days of confinement are not sufficient to pay the fine and costs, or costs alone, in full."

I believe that the above will answer your question.

Whether or not the statute law should be amended so as to relieve a person committed to jail for non-payment of a fine from any further liability on account of the fine is a matter about which there may be a difference of opinion, and which, of course, only the Legislature can decide.

I suggest for your consideration that, if a limited jail sentence should be made to discharge all liability on account of a fine imposed, then perhaps many persons who could pay a fine might be disposed to serve the limited time in jail rather than pay the fine, thus greatly increasing the already large criminal costs. The literary fund of the State, which is, as you know, largely made up of fines and forfeitures, would also be decreased.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Receipts for—Distribution of Receipt Books—Sheriffs—Justices of the Peace.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 7, 1938.

COLONEL LEROY HODGES,
State Comptroller,
Richmond, Virginia.

DEAR COLONEL HODGES:

This will acknowledge your letter of October 3, 1938, requesting my opinion as to whether, in distributing to the clerks of circuit and corporation courts official receipt books for fines, you should provide sufficient copies for redistribution to sheriffs and justices of the peace.

Virginia Code (Michie 1936) section 2546 provides that:

"(a) Every officer collecting a fine, fine and costs or costs where no fine is imposed, shall give an official receipt therefor * * *

(b) The auditor of public accounts (whose duties in this respect have, of course, been transferred to the Comptroller) "shall prepare forms of official receipts for fines and distribute them to the clerks of the circuit courts of the counties and cities having no corporation or hustings court, also to the clerks of corporation or hustings courts of the cities, for their use and for distribution to the justices of their respective counties and cities."

This section further provides for the numbering and proper authentication of these forms by the Comptroller, and requires that each receipt shall have a stub, on which delivery of the receipt shall be attested by signature of the person paying the fine.

Finally, the statute provides that "receipt in any other form shall not be valid against the Commonwealth".

This statute clearly contemplates that every person paying a fine shall be given an official receipt therefor, and that the collection of every fine shall be recorded and accounted for through the use of these official forms. Sheriffs necessarily collect a substantial number of fines through the execution of process.
It follows that, to carry out the manifest purpose of the statute, these officers must be provided with official receipt blanks.

It is my opinion, therefore, that paragraph (b) of the statute, expressly providing for redistribution of the official blanks to justices, should not be construed to prevent redistribution to sheriffs, and that the Comptroller should supply to the clerks of circuit and corporation courts official fine receipt books in numbers sufficient for redistribution to sheriffs and sergeants.

As to the propriety of supplying receipt books for redistribution to justices of the peace, it would not seem necessary for these officers to have official forms in the absence of any duty on their part to collect fines. For this reason, unless it can be pointed out to me wherein the functions of a justice of the peace include the collection of fines, I am of the opinion that trial justices are the only justices to whom official receipt books should be forwarded.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Judgment for Fine and Costs—Effect on, of Defendant Serving Term for Non-Payment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 14, 1939.

Hon. John H. Powell, Clerk,
Circuit Court of Nansemond County,
Suffolk, Virginia.

My Dear Mr. Powell:

I am in receipt of your letter of April 11, in which you ask the following question:

"Where a defendant in a criminal case is given a fine and costs and a judgment is docketed for that fine and costs against the said defendant, is he entitled to any credit on the judgment against him when, because of his failure to pay the fine and cost, he serves a term in jail for the same?"

I know of no statute which provides that, where a person is committed to jail for non-payment of fine and costs, the fine and costs are satisfied by confinement in jail. Therefore, I am of opinion that, even though a jail sentence has been served on account of failure to pay fine and costs, both of these items are still collectible.

You are, of course, familiar with section 2095 of the Code giving persons monetary credit on fine and costs who are held to labor on State convict road force or in a chain gang, etc. However, I take it that your question relates simply to confinement in jail in default of the payment of the fine.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
FINES—Remittance of After Successful Appeal from Trial Justice, Where Fine Previously Turned Over to Clerk.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 13, 1939.

Hon. John H. Booten,
Trial Justice,
Luray, Virginia.

My Dear Mr. Booten:

I am in receipt of your letter of the 9th, in which you state that on December 26 a person was tried before you for drunken driving and convicted and fined. He appears to have paid the fine and costs and subsequently noted an appeal within the ten day period. In the meantime, you have disposed of the fine and costs, as provided by sections 4987-m and 2550 of the Code. In the particular case before you the appeal was not perfected, but you desire to know what you should do in similar cases which may arise in the future.

The statute relating to the disposition of fine and costs do not contemplate such a situation as you present, and I imagine that such cases will very rarely occur. As a general rule, fines and costs are not paid by defendants if they propose to appeal. In view of the small number of such cases that will arise, I suggest that a practical way to handle them will be as follows: The trial justice usually has on hand funds belonging to the county and State respectively. If in a case like the one you present the defendant should be acquitted by the court of record, I suggest that the trial justice refund to the defendant the amount of fine and costs out of the funds which he has on hand. Then in making his next report to the clerk he could deduct the amount which he has previously turned over to the clerk, with the proper notation on the report explaining the deduction. In his next settlement with the officer or officers to whom fees are directly disbursed he could also deduct the amount, on account of the particular case, paid to such officers, explaining the reason therefor. Of course, the records of the trial justice should also carry a full explanation of the transaction.

This seems to me to be a practical solution of the matter and is one which as an accounting proposition the Auditor of Public Accounts advises me that he approves.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FIRE LAWS—“Hotel,” etc., “of Over Three Stories in Height,” etc.—What Constitutes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 16, 1939.

Honorable Thomas B. Morton,
Commissioner of Labor,
Richmond, Virginia.

Dear Mr. Morton:

This is in reply to your letter of May 13, in which you ask for a construction of the language of that portion of section 3141 of the Code of Virginia which provides:
"It shall be the duty of the owner or owners, of every factory, work-
shop, mill, saw-mill or place where the manufacture of goods of any kind
is carried on, and of every hotel, college, hospital, orphan asylum, mercantile
establishment and office building of over three stories in height, or where:
as many as ten persons are regularly employed, lodged, entertained or in-
structed above the second story of such building, and theatres and public
places of amusement, regardless of height, and of every school building
having an auditorium above the first floor, to provide for the safe exit of
the occupants thereof in case of fire by the erection, construction or main-
tenance in good condition of fire escapes of the most improved modern de-
sign. * * *"

You ask if that section would apply to a hotel having three stories, the-
third one of which has 14 rooms equipped to take care of as many as 25 persons
which is in use throughout the year, sometimes being filled up, sometimes occu-
pied by very few persons.

Statutes of this kind requiring buildings of certain types to be equipped with
fire escapes are enacted for the protection of those using such buildings from
the hazards of fire and are generally construed liberally in order to effect the
purpose for which they are enacted. See 9 American Jurisprudence, page 221.

The Virginia statute applies to all hotels of over three stories in height
and also to those of three stories where as many as ten persons are regularly
lodged above the second story. It is my opinion that the statute applies to all
three-story hotels which are equipped to lodge more than ten persons above
the second story, and which the management holds out to the public as being in
readiness at any time to accommodate that number on the third floor, and which,
in fact, has occasion to do so from time to time.

Though there may be times when the hotel is occupied by very few people,
if it is equipped and held ready for occupancy by a larger number, then, if more
than ten persons are lodged on the third floor from time to time, such is not
an unusual state of affairs but, on the contrary, is an occurrence in the regular
course of the hotel’s business.

It is my opinion, therefore, that such a hotel as the one to which you refer
is one in which ten or more persons are regularly lodged above the second floor
within the meaning of section 3141, and should comply with the requirements of
that section.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FIRE FIGHTING—Cooperative Agreement Between County and Town.
Counts—Liability in Tort—Damage by Fire Truck.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 14, 1939.

HONORABLE EMORY L. CARLTON,
Commonwealth’s Attorney,
Tappahannock, Virginia.

DEAR MR. CARLTON:

This will acknowledge your letter of June 7, in which you request my opinion
upon certain questions arising in connection with a proposed agreement between
the County of Essex and the Town of Tappahannock.

The proposed contract is for the purchase and maintenance of fire fighting
equipment which will be owned by the Town of Tappahannock. Under this
agreement, the town equipment will be used in fighting fires within the county and within a radius of three miles from the town, in return for which the county is to pay a fixed sum for each fire.

Your first two questions relate to the authority of the Board of Supervisors to enter into such a contract, and to make the payments required thereunder out of its general county funds.

Virginia Code (Michie 1936) section 2730c in terms authorizes "Any two or more of the counties, cities and towns of this State * * * to enter into such contracts and agreements as they may deem proper" for the acquisition, maintenance, etc., of certain public improvements or services, including equipment for fighting fires. While the language of this section, as just quoted, is not very apt for this purpose, it is my opinion that the Act was intended, and should be construed, to authorize such a contract between a county and a town. It is my opinion, therefore, that the Board of Supervisors is authorized to enter into a contract such as you describe, and to make the required payments out of its general county funds.

You next inquire whether, under such a contract, the County of Essex would be liable for damages caused by the negligent operation of such fire equipment. In my opinion it would not, since it is well settled that a county cannot be held liable in tort, and since it seems clear that no other basis of liability, such as an implied contract, can be established in the case of purely negligent wrongs. * * * Fry v. Albemarle County, 86 Va. 197, 9 S. E. 1004; Field v. Albemarle County, 2 Va. Dec. 67, 20 S. E. 954. * * *

Yours very truly,

ABRAM P. STAPLES,  
Attorney General.

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FOODS—"Ice Cream Plants"—License Hotel.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., AUGUST 5, 1938.

MR. S. S. SMITH, DIRECTOR,  
Dairy and Food Division,  
Department of Agriculture and Immigration,  
Richmond, Virginia.

MY DEAR MR. SMITH:

I am in receipt of your letter of August 3, in which you ask if the Jefferson hotel should secure the license provided by section 1173 of the Code, as amended in 1938 (Acts 1938, p. 496). You state that the Jefferson hotel operates an ice cream plant, the product of which is sold and served to their guests. You further state that the hotel is buying cream for use in the manufacture of the ice cream.

Section 1175 of the Code provides that a license shall be secured by * * * every * * * ice cream plant * * * where milk or cream is received by purchase or otherwise * * *.

In my opinion, the language of the statute plainly embraces the business of the Jefferson hotel, as described by you, and all others similarly situated.

Yours very truly,

ABRAM P. STAPLES,  
Attorney General.
FOODS—Milk—Use of Paper "Bottles".

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 1, 1938.

Mr. J. H. Meek, Director,
Division of Markets,
Department of Agriculture and Immigration,
Richmond, Virginia.

Dear Mr. Meek:
I am in receipt of your letter of October 28, in which you ask if paper containers may be used for the sale of milk in Virginia. Your inquiry is directed to the question whether the use of paper containers for the sale of milk would violate any Virginia statute relating to weights and measures. You state in your letter that the officers in the Dairy and Food Division of the Department of Agriculture and Immigration advise that they consider that paper containers "would meet all of their requirements from the standpoint of sanitation".

Section 1485(19) of the Code (Michie 1936) prescribes certain requirements as to bottles and jars used for the sale of milk or cream, and, among other things, makes it a misdemeanor for a manufacturer to sell milk or cream bottles which do not comply with these requirements. However, there is nothing in this section which requires that milk or cream be sold only in bottles, as that term is generally understood. The effect of this section is simply to prescribe certain specifications when bottles are used.

From such examination of the statutes as I have been able to make, I cannot find any statute which can be said to prohibit the sale of milk or cream in any container other than bottles. Indeed, section 1211(1) of the Code (Michie 1936) seems to expressly contemplate that milk may be sold in other containers than bottles.

My conclusion is therefore that so far as any law relating to weights and measures is concerned milk and cream may be sold in Virginia in other containers than bottles. I am not, of course, suggesting in any way that if these other containers are used they must not comply with all of the requirements contained in the statute relating to the sale of milk.

Very truly yours,
Abram P. Staples,
Attorney General.

GAMBLING—Forfeiture of Money in Hands of Bookmaker.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 12, 1939.

Honorable John M. Arnold,
Commonwealth's Attorney,
Norfolk, Virginia.

Dear Mr. Arnold:
You have asked if money placed as wagers upon horse races, which has been seized upon the arrest of a bookmaker, should be forfeited to the State.

I know of no statute or rule of common law providing for the forfeiture of such stakes to the Commonwealth. While there are certain statutes providing for the seizure of slot machines and certain other gambling apparatus, together
with the money used therewith, and for the forfeiture of the same to the Commonwealth, these statutes purport to deal only with the specific gambling apparatus named. See sections 4676 and 4694a of the Code of Virginia. There is no similar provision in section 4682, which makes bookmaking illegal.

It is my opinion, therefore, that while money placed as bets may properly be seized as evidence upon the arrest of a bookmaker, it should be returned to the owner upon completion of the trial, or applied on any fine which may be imposed on him.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

GAMBLING—Shooting Galleries Offering Prizes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 3, 1939.

HON. W. HILL BROWN, JR.,
Attorney for the Commonwealth,
Manassas, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of March 29, in which you ask the following question:

“I have been asked whether a shooting gallery which uses the enclosed target is considered gambling or is the same a game of skill rather than chance.”

It appears from the card which you enclosed that, if a person places any one of the three shots in a designated circle on the target, he receives a cash award of 50 cents; if he places two of the three shots in the designated space, he receives a cash award of $1 and, if he places all three shots in the designated space, he receives an award of $3.

Your inquiry has been carefully considered by me and, in my opinion, the enterprise described is purely a game of skill and is not covered by or in violation of any of the statutes relating to gaming.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG LAWS—Compensation for Stock Damaged by Dogs—Resident’s Stock Killed in Another State.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 20, 1939.

HON. HUGH T. ESTES,
Commonwealth’s Attorney,
New Castle, Virginia.

DEAR MR. ESTES:

I have your letter of March 15, requesting my opinion upon the following question:
"A farmer of Craig County, Virginia, had his sheep assessed in this state in 1938. Sometime during the latter part of the year, he moved his sheep into the state of West Virginia and a number of them were killed by dogs in West Virginia. Is it legitimate and right for the Board of Supervisors of Craig County to pay for depredations done by dogs in the state of West Virginia?"

The authority of counties and cities to compensate owners of livestock or poultry for damages done to such stock or poultry by dogs is governed by sections 74-80 of the Game, Inland Fish and Dog Code.

These sections provide for setting up in each county or city, out of funds collected through sales of dog licenses, a local "dog fund" from which, after deduction of certain expenses, such compensation is to be paid. The statutes contain no express provision as to what county or city shall make such payments in any particular case: section 74 simply requires that the claimant must make proof of his loss to "the board of supervisors of the county or council," etc., "of any city within ninety days after sustaining such damage". Section 80 authorizes disbursements for such purpose out of the dog fund "of the county or city."

These sections can hardly be construed to mean that such claims are payable by more than one county or city in a given case. Taking the statutes as a whole, it is my opinion that "the county" or "the city" referred to in the statute—the county or city from whose dog fund compensation should be made, and to whose governing body the owner's claim should be presented, is the county in which the damage is done.

I note that my predecessor, the late Colonel John R. Saunders, expressed a similar view of this statute in a letter dated October 17, 1930, addressed to Mrs. Mildred M. Cooper, of Bramwell, West Virginia.

It is my opinion, therefore, that the statute does not authorize the board of supervisors of Craig County to pay the claim to which you refer.

Your very truly,

ABRAM P. STAPLES,
Attorney General.
of these funds according to balances remaining on December 31, and since the
amendment was, of course, in effect before December 31, 1938, I know of no
reason why the terms of such amendment should not be applied in the distribu-
tion of 1938 collections.

It is my opinion, therefore, that in distributing any surplus above $250 which
may have remained in your county dog fund on December 31, 1938, no appor-
tionment to the towns should be made.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG LAWS—Expenditures of Commis-
sion—Contribution to Field Trial.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHLAND, VA., JANUARY 27, 1939.

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

MY DEAR MR. DOWNES:
I have your letter of January 25, which is as follows:

"We are engaged in auditing the accounts and records of the Commis-
sion of Game and Inland Fisheries and note an invoice dated October 15,
1937 to Dr. Foy Vann, Treasurer, Virginia Fox Hunters’ Association, Medi-
cal Arts Building, Norfolk, Virginia. The details of the invoice are as
follows:

‘From the minutes of the Commission, September 17, 1937:

‘Messrs. Jeter and Sitton of the Virginia Fox Hunters’ Association,
appeared with reference to the field trials to be held by that Association
the last week in October and asked the financial aid of the Commission in
this connection. In view of the fact that the Commission furnishes game
for the bird dog field trials, it felt warranted in making a donation to this
Association in helping defray the expenses for stables, horses, etc., as has
been done heretofore, and, upon motion duly carried, the sum of two hun-
dred dollars ($200) was allocated for this purpose.

Make check for .............................. $200.00’

“I would like for you to advise me as to whether or not this expendi-
ture is a legal one.”

Upon receipt of the foregoing, I got in touch with the Commission of Game
and Inland Fisheries and made inquiry as to the reasons for the appropriation
to which you refer. Pursuant to that inquiry, I have received from Mr. M. D.
Hart, Executive Secretary, a letter as follows:

“With reference to invoice dated October 15, 1937 to Dr. Foy Vann,
Treasurer of the Virginia Fox Hunters’ Association, about which some
question has been raised by the Auditor of Public Accounts relating to the
authority of the Commission to make such expenditure, I beg to advise that
for some years the Commission has taken the view that meetings of the
various game associations have resulted in spreading information of great
educational value with reference to the protection of wildlife. These meet-
ings have developed a spirit of cooperation with the Commission in creating public sentiment against violations of the game laws and regulations.

"With this purpose in view, the Commission felt that it was in a sense engaging jointly with the Association in defraying the necessary cost which would be incurred and felt that the expenditure was well worthwhile from an educational standpoint."

You will observe from the foregoing that, while the payment is designated in the voucher as a donation, the transaction in contemplation of law, from the standpoint of the Commission, would have the status of a joint undertaking between the Commission and the Fox Hunters Association to hold and successfully conduct meetings of the Association for the purpose of disseminating educational work with reference to the protection of wild life.

Section 3305 of Michie's 1936 Code (Acts 1930, page 635), in conferring general authority upon the Commission, contains a provision conferring upon the Commission the following power:

"** to employ speakers and lecturers to disseminate information concerning the wild life of the State and the protection, replenishment and propagation thereof; and to have and to exercise such other powers and to do such other things as it may deem advisable for the conservation, protection, replenishment, propagation of and increasing the supply of game birds, game animals and fish and other wild life of the State."

Generally speaking, where a broad power of this kind is conferred upon a commission, its discretion in the matter of expenditures intended to accomplish any legitimate purposes within the scope of its powers is likewise very broad, and, in my opinion, the Commission of Game and Inland Fisheries was possessed of ample power to contribute the sum of two hundred dollars toward the holding of a meeting of the Virginia Fox Hunters Association if, in the view of the Commission, such meeting would have a helpful result from an educational standpoint, as stated in the letter of Mr. M. D. Hart, Executive Secretary.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG LAWS—Game Sanctuaries—Commission's Power to Establish.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., DECEMBER 22, 1938.

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

DEAR MR. NOLTING:
This is to acknowledge receipt of your letter of December 21, which reads as follows:

"We would like to have your opinion if the Commission of Game and Inland Fisheries, on its motion, has the authority to cover into a state game sanctuary any city or municipality."

I do not think that your Commission is authorized to declare a city or other municipality a State game sanctuary.
Section 6 of chapter 247 of the Acts of 1930 provides for the establishment of State game sanctuaries. This section also provides for the assignment, by any landowner, of wild life rights on his land, and authorizes the Commission to use such land as it sees fit as a State game sanctuary for a period of not less than five years, with further authority in the Commission to make certain rules and regulations permitting the landowner certain hunting and trapping rights in such sanctuary.

It is true that section 4 of the same chapter invests the Commission with large, general powers to acquire by purchase, lease, exchange, gift or otherwise such lands and waters anywhere in the State as it may deem expedient and proper, with certain other additional discretionary powers for the purpose of conducting and carrying on such operations for the preservation and propagation of game birds, game animals, fish and other wild life, and "to purchase, lease or otherwise acquire lands and waters for game and fish refuges, preserves or public shooting and fishing and to establish such lands and waters under appropriate regulations."

I understand that the Commission of Game and Inland Fisheries passed a resolution establishing the city of Alexandria as a State game sanctuary. I also understand that the query contained in your letter is with reference to the authority of the Commission in this instance, although your question is of a general character.

While I do not think that the Commission can, by resolution, establish a city as a State game sanctuary, I am of the opinion that a city, by appropriate municipal legislation, can enter into an agreement with the Commission for the use of the unoccupied lands owned by such city as a game sanctuary.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG LAWS—Licenses—Fishing Without—License Acquired Before Warrant Issued.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 20, 1939.

Hon. M. P. Farrrier,
Trial Justice,
Pearsburg, Virginia.

My Dear Mr. Farrrier:

I am in receipt of your letter of May 18, in which you put the following question:

"A, who should have but had not secured a license, was seen fishing with rod and reel, by the game warden.

"The game warden did not put A under arrest nor did he then give him a summons to appear in court for fishing without a license. A day or two thereafter, the game warden gave A a summons to appear before the trial justice on a subsequent day, to answer the charge of fishing without a license, but prior to the service of the summons on A, he goes to the clerk and secures a proper license.

"Does the securing of the license by A prior to his being summoned to appear to answer the charge, operate to relieve A of the penalties prescribed by the former part of the section?"

It seems clear to me that the fact that A procures the proper license after the commission of the offense does not relieve him of the penalties prescribed by
REPORT OF THE ATTORNEY GENERAL

section 3305 (27) of the Code. The warrant, although issued after the license had been secured, speaks as of the time of the offense and at that time A did not have a license. In my opinion, your question must be answered in the negative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Hunting Licenses—Lessee of Hunting Rights.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 10, 1938.

Hon. B. D. Peachy,
Commonwealth's Attorney,
Williamsburg, Virginia.

My Dear Mr. Peachy:

This will acknowledge your letter of October 4, requesting the opinion of this office as to whether a person who rents the hunting privilege on another's land is required to have a hunting license for hunting on such land while accompanied by the owner.

I agree with the conclusion suggested in your letter, to the effect that there is nothing in the law to exempt such persons from the hunting license requirements.

Virginia Code (Michie 1936) section 3305(19) provides that "It shall be unlawful to hunt, trap or fish in or on the lands or inland waters of this State without first obtaining a license," subject to certain specified exceptions. The only exceptions applicable to hunters are (1) the exception applicable to landowners themselves, and (2) the exception applicable to "tenants, renters or lessees," hunting on the lands of which they are tenants, renters or lessees "and on which they reside" with the written consent of the landlord.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—License Requirements—Employee or Non-Resident Lessee of Landowner.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 5, 1939.

Honorable David Nelson Sutton,
Commonwealth's Attorney,
West Point, Virginia.

Dear Mr. Sutton:

This will acknowledge your letter of December 28, requesting the opinion of this office on two questions arising under the Game, Inland Fish and Dog Code.

Your first question is stated as follows:
"The owner of a tract of marsh land hires a man or uses one of his regularly employed men for the purpose of trapping the marsh, is a license required of this hired man performing those duties for the owner?"

Inasmuch as Virginia Code (Michie 1936) section 3305(19), which is the statute requiring license for hunting, trapping and fishing, makes no exception in favor of employees of exempt or licensed parties, I can find no ground for holding that such an employee may trap without first obtaining a license.

You next put the following question:

"A is the owner of a tract of marsh land and leases it to B to trap for fur-bearing animals, B to pay as rent a certain portion of the proceeds realized from the fur caught on the marsh, is B required to take a license?"

The statute just cited provides that

"It shall be unlawful to hunt, trap or fish in or on the lands or inland waters of this State without first obtaining a license, subject to the following exemptions:"

The only exemption which could affect this case is contained in the following paragraph of the statute:

"License shall not be required of bona fide tenants, renters or lessees to hunt, trap or fish within the boundaries of the lands or waters of which they are tenant, renter or lessee and on which they reside; provided such tenant, renter or lessee has the written consent of the landlord upon his person."

(Italics supplied.)

In view of the unambiguous language of the statute it would seem that a tenant of land on which he does not reside, or does not occupy, whether because the land is inherently incapable of occupancy or for any other reason, must acquire a license to hunt, fish or trap thereon. It is my opinion, therefore, that such a lessee cannot bring himself within any exception to the first paragraph of section 3305(19) and must, therefore, obtain the license required by that section.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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GAME, INLAND FISH AND DOG CODE—Permits to Seine Minnows for Sale—Of Whom Required.

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

HON. WILLIAM H. LOGAN,
Commonwealth's Attorney,
Woodstock, Virginia.

My Dear Mr. Logan:

I have your letter of September 8, requesting my opinion as to the proper construction of Virginia Code (Michie 1936) section 3305(33), and the Commission of Game and Inland Fisheries regulation adopted pursuant thereto, dealing with permits to seine minnows for sale.

Specifically you wish to know whether such permits should be obtained by
persons who are employed to assist in the seining of minnows which are to be sold by their employer.

Both the statute and the regulation in question refer to the permit simply as a permit “to catch minnows for sale.”

The primary function of the Commission of Game and Inland Fisheries, and the policy behind the Game and Inland Fish Laws, is the conservation of game and fish. It does not seem consistent with this function and policy to construe the statute and regulation in question as imposing an ordinary business license tax for the privilege of engaging in the business of selling minnows, regardless of the number of assistants or the number of seines involved, and exempting all persons who actually take the minnows unless such persons are themselves engaged in that business.

On the other hand, it would seem more consistent with the policy of the Game and Inland Fish Laws to tax the privilege of taking minnows which are intended for sale, regardless of whether the sale is to be made by the person who operates the seine or by some other person who may have employed him.

It is the opinion of this office, therefore, that every person engaged in the catching of minnows which are to be sold should be required to obtain one of the permits in question.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

HONORABLE EDWARD H. RICHARDSON,
Commonwealth’s Attorney,
Salem, Virginia.

DEAR MR. RICHARDSON:

I have your letter of October 13, requesting my opinion as to the authority of the Commission of Game and Inland Fisheries to adopt and enforce a regulation in the following terms:

“It is unlawful to hunt game birds with or by means of any automatic-loading or hand-operated repeating shotgun capable of holding more than three shells, the magazine of which has not been cut off or plugged with a one-piece metal or wooden filler incapable of removal through the loading end thereof, so as to reduce the capacity of said gun to not more than three shells at one time in the magazine and chamber combined.”

Section 33 of the Game, Inland Fish and Dog Code, Virginia Code (Michie 1936) section 3305(34), expressly authorizes the Commission to adopt such regulations as it may deem advisable in order “to restrict, extend or prohibit in any degree the provisions of law obtaining in any county in this State for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal, or fish from inland waters ***” This section contains provisions for the publication of notice in the county to be affected, and for giving the public an opportunity to be heard.

The measure to which you refer is certainly one “to restrict, extend or prohibit” in some degree the “hunting, taking”, etc., of wild birds, and hence it seems clear that the Legislature has intended and undertaken to confer on the Commission authority to adopt and enforce such a regulation. While the legislative
power to delegate such authority is certainly not unlimited, it is sufficient to say
that I know of no constitutional limitation so clearly applicable here as to justify
this office in holding that the General Assembly has overstepped its powers in
this particular.

Of course, the validity of such a regulation in any county would depend
upon whether the statutory requirements as to notice and hearing had been com-
piled with: as you point out in your letter, section 34 of the Game, Inland Fish
and Dog Code, Virginia Code (Michie 1936) section 3305(55), which authorizes
the Commission to make certain regulations without previous notice and hearing,
obviously has no application here. However, I am sure you will agree that the
question of whether such notice and opportunity to be heard have been given with
respect to any particular county is a question of fact which this office is in no
position to determine.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Sale of Canned Trout.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 2, 1939.

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

Dear Mr. Hart:

This will acknowledge your letter of June 1, requesting my opinion as to
the legality of importing for sale canned Norwegian Trout.

Virginia Code (Michie 1936) section 3305(40) provides in part that "***
it shall be unlawful for any person to *** possess, *** sell, *** purchase,
*** transport, *** or import at any time or in any manner any species of
bass or trout, or the carcass or any part thereof, except as specifically permitted
by this act ***."

Also Code section 3305(44) provides in part that "It is unlawful to sell or
buy, *** or to traffic or trade in *** any wild bird, wild animal or fish pro-
tected by law ***." (The act specifies certain exceptions not relevant here.)

It can hardly be said that the language of these statutes clearly and un-
ambiguously applies to the sale, etc., of canned fish. In my opinion, in view of
the fact that these are penal laws, and that the manifest legislative purpose and
intent hardly extend to the sale of canned fish, the statutes quoted should not be
construed to prohibit such sale.

The obvious purpose of these statutes is to protect wild life of the State from
commercial hunting and fishing by prohibiting altogether the marketing of cer-
tain game birds, animals, and fish. Since, however, it would not be possible for a
cannery to operate under existing laws, the marketing of canned trout would not
seem germane to such purpose.

I find no further legislation upon the subject, and it is my opinion, therefore,
that our laws do not prohibit the importation of canned trout for sale in this
State.

Sincerely yours,

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

GAME, INLAND FISH AND DOG CODE—Search Warrants—Searching Dwellings for Game Illegally Taken.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 16, 1939.

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

DEAR MR. MASON:

I have your letter of January 11, requesting my opinion as to whether a search warrant may issue for the search of a dwelling on a showing of reasonable grounds to believe that such dwelling contains wild birds or animals which may be evidence of a violation of the game laws.

As you point out in your letter, section 3305(16) of the Virginia Code (Michie 1936), in providing that a dwelling shall not be searched without a warrant, seems to pre-suppose the possibility that a search warrant might be issued for such purpose. However, Code section 4820, which undertakes to define specifically the purposes for which search warrants may be issued, contains nothing which would authorize the issuance of a warrant for this purpose.

There are, of course, certain other statutes authorizing the issuance of search warrants for particular purposes not mentioned in section 4820, but none applicable to your present inquiry.

While the question seems never to have been dealt with by our Supreme Court of Appeals, it is quite well settled that a search warrant can never be issued except pursuant to and strictly in accordance with express statutory authority. See 24 R. C. L., page 706, section 8.

It is my opinion, therefore, that there is no authority for the issuance of a search warrant for the purpose of searching a dwelling for game birds or animals to be used as evidence of a violation of the game laws.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Second Offenses Under Suspension of License and Requirement of Bond.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 30, 1938.

HONORABLE R. O. GARRETT,
Trial Justice,
Cumberland, Virginia.

DEAR JUDGE GARRETT:

I have your letter of November 26, requesting my opinion as to whether, upon convicting a person of a second offense under the Game, Inland Fish and Dog Code, it is your duty to revoke his hunting license and require him to give bond conditioned upon compliance with the Game Laws. You also ask my opinion as to whether, in case such person takes an appeal from your judgment, his license should be suspended and such bond should be required pending appeal.

Virginia Code (Michie 1936) section 3305(28) provides that:
"If any person be found guilty of violating any of the provisions of the hunting, trapping or inland fish laws a second time, the license issued to said person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction. * * *.

(Italics supplied.)

Virginia Code (Michie 1936) section 3305(60) provides that:

"If a person be convicted a second time of any offense mentioned in this act," (the Game, Inland Fish and Dog Code) "the justice rendering judgment therefor shall require him to give a bond for not less than one hundred dollars, with sufficient surety, for his good behavior for a year * * *.

(Italics supplied.)

In view of the language of these sections, it seems clear that the requirements to which you refer are mandatory, and that you have no discretion as to whether the license shall be revoked and the bond exacted.

In case an appeal is duly taken from a judgment of your court convicting the defendant of such a second offense, I am of the opinion that his license cannot be revoked and no bond can be required pending the determination of the appeal. The statutes just quoted must necessarily be construed to mean that these steps shall be taken only after a final judgment for a second offense. Pending an appeal to a circuit or corporation court, the judgment of a trial justice cannot, of course, be deemed final, since, in case the appeal is matured and the matter actually tried, the judgment of the trial justice becomes a nullity, the trial in the appellate court being de novo. Virginia Code (Michie 1936) sections 4987f, 4989, 4990.

It is my opinion, therefore, that it is the mandatory duty of the trial justice, after a final judgment in his court convicting a person of a second offense under the Game, Inland Fish and Dog Code, to suspend such person's license and to require the bond described in section 3305(60) above, but that, if an appeal is taken from such judgment, the trial justice cannot either suspend the license or require the bond unless and until such appeal should be dismissed so as to make the justice's judgment final.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Licenses—Two-Day Non-Resident License Covering Sunday.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 24, 1939.

HONORABLE LEAMON LEDMAN, Clerk,
Circuit Court of Prince William County,
Manassas, Virginia.

MY DEAR MR. LEDMAN:

I have your letter of May 20, in which you ask whether, in my opinion, you may lawfully issue a nonresident a two day fishing license covering Saturday and Sunday.

I am afraid that I will have to disagree with you as to your authority to issue this license. I can find nothing in the statute to prevent its issuance. The license is state-wide in its operation, and there is no state-wide law against fishing on Sunday. Of course, this license would not authorize a person to fish on Sunday in a county where same was prohibited by law.
As I view the matter, the issuance of the license would not confer on any person the right to violate any law which prohibits fishing on Sunday. I do not believe, however, that the clerk of the court would be charged with the responsibility of determining whether or not it is lawful to fish on Sunday in any particular county. If the holder of the license does fish in violation of the laws, he can be punished therefor; but the question, after all, is one for the court to decide and I believe that the clerk should issue the license in a case of this kind.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 27, 1939.

HONORABLE C. CARTER LEE,
Commonwealth's Attorney,
Rocky Mount, Virginia.

DEAR MR. LEE:

I have your letter of February 20, requesting my opinion on the following two questions:

"(a) Is the county required to pay the game warden any amount, if so, what amount, for killing any dog found unlicensed, or any dog which has been killing sheep or fowl?

"(b) If such payment is not required by law, is it permissible in the discretion of the Board of Supervisors?"

In reply to your first question, I find nothing in the law which requires counties to make special allowances to game wardens for these services. Special allowances for killing unlicensed dogs were formerly required to be paid to all wardens under the terms of Chapter 390, Acts 1918, but this statute was expressly repealed by Chapter 247, Acts 1930, under which such allowances are now required only as to "game wardens in cities" (Virginia Code (Michie 1936) §3305(72)). Similar fees for killing dogs which have been guilty of injuring stock have never, so far as I can find, been required.

It is my opinion, therefore, that counties are not required by law to make the special payments to which you refer.

Your second question would seem to be expressly answered by the terms of Code section 3305(81), dealing with the disposition of the dog license fund. After prescribing the purposes to which the fund shall primarily be applied, this section provides that " * * * if the remainder is sufficient [it shall be used to pay], all damages to livestock or poultry and if the board of supervisors desires, they may make therefrom an allowance to the game warden for services * * * ." (Italics supplied.)

It is my opinion, therefore, that the board of supervisors may, in its discretion, make special allowances such as you describe out of any unexpended balance in the county dog fund.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
GENERAL CONTRACTORS—Law Regulating—Application to Work Financed by FHA.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 8, 1939.

Mr. Chas. P. Bigger, Executive Secretary,
State Registration Board for Contractors,
108 Exchange Building,
Richmond, Virginia.

My Dear Mr. Bigger:

I have your letter of April 7, requesting my opinion as to whether the requirements of chapter 431, Acts of 1938, relating to the business of general contractors, are applicable in cases of construction work which is being financed with the assistance of the Federal Housing Administration.

This will advise that I find nothing in the Act itself and know of no rule of general law which would affect the operation of this statute in such cases.

Very truly yours,

Abram P. Staples,
Attorney General.

GENERAL CONTRACTORS—Law Regulating—"Speculative" Builder.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 5, 1939.

Honorable Charles P. Bigger,
Executive Secretary,
State Registration Board for Contractors,
108 Exchange Building,
Richmond, Virginia.

Dear Mr. Bigger:

I have your letter of April 3, requesting my opinion as to a question arising under Chapter 431, Acts 1938, Virginia Code (Michie 1936) Chapter 175E.

The statute in question provides for regulating the "practice of general contracting," and defines a "general contractor" as

"** * any person, firm, association, or corporation that for a fixed price, commission, fee, percentage, undertakes to bid upon, or to construct or superintend the construction of, any building, highway, bridge, railway, sewer, pipe line, grading, or any improvement, or structure, where the cost of the undertaking is twenty thousand dollars or more; ** **." [Code §4359(103)].

You wish to know whether this definition is applicable to a "speculative builder," who for speculative purposes employs subcontractors to build a group of houses costing in the aggregate more than $20,000.

The manifest purpose of the statute is to regulate the practices and insure the qualifications of those who hold themselves out to the public as professional builders on a large scale, and offer to sell their services as such.

Accordingly, it is my opinion that the phrase, "for a fixed price, commission,
fee, percentage,” refers to a price, commission, etc., charged or exacted by the contractor in exchange for his services.

I do not believe, therefore, that the statutory definition is applicable to one who does not sell his services as a builder at all, but rather builds his own houses and sells nothing but the finished product.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

HAMPTON ROADS SANITATION DISTRICT—Election—Ballots—Form of.

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

Honorable George H. Parrish, Chairman,
Electoral Board,
Portsmouth, Virginia.

Dear Mr. Parrish:

Honorable R. B. Preston, Chairman of the Hampton Roads Sewage Disposal Commission, has requested that I write and give you my opinion as to the form of ballot necessary to be used in connection with the submission to the qualified voters of the proposed Hampton Roads Sanitation District the question of the creation of said District.

Section 5, paragraph 3(b), imposes the duty upon the regular election officers of the counties and cities located in whole or in part within said area to cause to be printed and distributed, in the manner prescribed by law for printing and distributing other ballots, the proper number of ballots for the submission of the above mentioned question. The form of ballot is prescribed by the statute and is as follows:

"Do you favor the creation of the Hampton Roads Sanitation District?"

☐ YES
☐ NO

"To vote "Yes" on the question, place a checkmark (\(\checkmark\)) or cross (+ or X) in the space opposite the word "Yes"; to vote "No" on the question, place a checkmark (\(\checkmark\)) or cross (+ or X) in the space opposite the word "No"."

The statutory provision above referred to is contained in the Acts of 1938, at pages 508-509. The ballot should contain the entire matter above, including the instructions to the voters as to the method of marking the ballot, since the statute provides for placing such instructions on the ballot.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE LUCIAN H. SHRADER,
Member of the House of Delegates,
Amherst, Virginia.

DEAR MR. SHRADER:

I have before me your letter of September 15, in which you request my opinion as to the proper construction of the 1938 amendment to section 2 of chapter 415 of the Acts of 1932. The precise question presented is whether the amendment authorizes the expenditure on certain streets, in towns containing 3,500 inhabitants or less, of funds available for construction and maintenance of the secondary highway system; or, stated differently, whether construing together sections one and two of said 1932 Act, as amended, such funds may now be expended on those streets in such towns which were maintained by the county boards of supervisors prior to the 1932 Act.

Section 1 of said 1932 Act (Acts 1932, p. 872) originally provided as follows:

"That there be, and is, hereby, created and established the secondary system of State highways, to consist of all of the public roads, causeways, bridges, landings and wharves in the several counties of the State as of March first, nineteen hundred and thirty-two, not included in the State highway system."

In January, 1934, the question was raised as to whether the streets or highways in incorporated towns were included, and my predecessor in this office officially ruled that they were not.

In 1936 said section 1 was amended so as to read as follows:

"There is hereby created and established the secondary system of State highways to consist of all of the public roads, causeways, bridges, landings and wharves in the several counties of the State, as of March first, nineteen hundred and thirty-two, not included in the State highway system, including such roads and community roads leading to and from public school buildings, streets, causeways, bridges, landings and wharves in incorporated towns having thirty-five hundred inhabitants or less according to the census of nineteen hundred and twenty, and in all towns incorporated since nineteen hundred and twenty, as constitute connecting links between roads in the secondary system, and in the several counties and between roads in the secondary system and roads in the primary system of the State highways, not, however, to exceed two miles in any one town." (Acts 1936, p. 615.)

The effect of this amendment was to require the inclusion in the secondary system of certain roads serving as connecting links with other State highways, wharves, and public schools, etc. This provision as to mandatory inclusion in the secondary system, however, is limited to two miles of highways or streets.

Section 2 of the 1932 Act as originally enacted (Acts 1932, p. 873) contained the provision set out below with the exception of the words underscored, the underscored portions having been added by amendment in 1938 (Acts 1938, pp. 1002-3):

"At least once in each calendar year after January first, nineteen hundred and thirty-three, the representative of the Department of Highways in charge of such secondary system of State highways in each county or some
representative of said department designated by the State Highway Commissioner shall meet with the board of supervisors of each such county at a regular or special meeting of said board, notice of which meeting shall be posted by the county clerk at the front door of the courthouse of such county ten days before such meeting, and there discuss and advise with said board of supervisors and the citizens present plans and proposals for the maintenance and improvement, including construction and reconstruction, of such secondary system of State highways in such county, and towns as were maintained by the boards of supervisors before the passage of this act. After which discussion each such board of supervisors shall make written recommendations to the Department of Highways as to the expenditure of funds for such work in such county and towns; and the Department of Highways shall observe and follow such recommendations in so far as they are compatible with the department’s general plans and available funds will permit, having due regard to the maintenance and improvement of all existing roads in said county and towns in said secondary system.”

It will be observed that the definition of the secondary highway system as contained in section one, as amended, does not expressly exclude any streets or highways in towns. On the other hand, the amendment to section two clearly provides that, in those cases where the boards of supervisors recommend it, the Highway Department may expend funds allotted to the secondary system on those highways in towns under thirty-five hundred inhabitants which were maintained by the boards of supervisors prior to the 1932 Act. It is a cardinal principle of statutory construction that no provision of a statute may be discarded or ignored unless it is impossible to give effect to same, and that apparent inconsistencies in different provisions or sections of a statute must be reconciled if possible.

I am of opinion, therefore, that the 1938 amendment must be given effect and therefore, where the boards of supervisors make written recommendation to the Department of Highways for the expenditure of a portion of the county’s secondary highway allotment on those streets and highways of a town containing thirty-five hundred inhabitants or less which before the 1932 Act were maintained by said supervisors, the Highway Department has authority to comply with such recommendations if, in its judgment, same meet the requirements of compatibility as provided in section two as above quoted.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Secondary—State Construction and Reconstruction of Within Incorporated Towns.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 1, 1938.

MR. C. S. MULLEN, Acting Highway Commissioner,
Department of Highways,
Richmond, Virginia.

My dear Mr. Mullen:

Mr. D. Gardiner Tyler, Jr., Assistant Attorney General, has shown me your letter of November 30, 1938, in which you inquire as to the meaning which was intended to be given to my letter of September 23, 1938, addressed to Honorable Lucian H. Shrader, Member of the House of Delegates, Amherst, Virginia, relating to the construction of the 1938 amendment to section 2 of Acts of 1932, page 873.
REPORT OF THE ATTORNEY GENERAL

In my said letter, I stated that in my opinion the Highway Department has authority to comply with recommendations of the boards of supervisors for the expenditure of a portion of the county’s secondary highway allotment on the construction and reconstruction of those streets and highways of towns in Virginia containing thirty-five hundred inhabitants or less, provided such streets and highways were maintained by the boards of supervisors before the 1932 Act was passed. You inquire in your letter to Mr. Tyler whether this should be construed as enlarging the restriction contained in section 1 of said 1932 Act, as amended by Acts of 1936, page 615.

It is my opinion that the two mile limitation contained in the 1936 amendment has been eliminated by the amendment of 1938; that if a board of supervisors recommends that funds alloted for secondary highways be used in constructing or reconstructing highways in such a town, the Department of Highways may comply with this recommendation even though the mileage within the town exceeds two miles if, in the opinion of the Department of Highways, such construction meets the requirements of compatibility set forth in section 2 and quoted in my letter to Mr. Shrader, a copy of which letter was sent to the Department of Highways when written.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Sidewalks in Incorporated Towns.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 30, 1939.

HONORABLE R. E. WILSON,
Clerk of the Board of Supervisors,
Hampton, Virginia.

DEAR MR. WILSON:

This is in reply to your letter of May 26, in which you request my opinion upon the question whether or not the fact that the city of Hampton is a magisterial district of Elizabeth City County would have the effect of authorizing the State Highway Commission to construct, improve, and maintain sidewalks and walk-ways within said city. About two months ago, Honorable G. A. Massenburg, a member of the House of Delegates from Hampton, had this question under discussion with Mr. Shirley, and Mr. Shirley referred the matter to this office for investigation.

I have carefully considered the question and am unable to reach any conclusion which would permit the Department of Highways to construct sidewalks in the city of Hampton.

While it is true that the city of Hampton is a magisterial district of Elizabeth City County, it is also true that all incorporated towns in the State are magisterial districts, or parts of magisterial districts, in the counties in which they are located. The statute authorizes this work to be done only “outside of cities and incorporated towns”.

Since towns are excluded as well as cities, and since towns are also a part of a county as above stated, there is no distinction which can be made between the city of Hampton and the towns and cities generally throughout the State in so far as this statute is concerned.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HON. J. B. HAYWOOD,
Commissioner of the Revenue,
Hopewell, Virginia.

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

"Please advise me whether or not it is necessary for an Equalization Board to be appointed this year in the City of Hopewell, which contains less than twelve thousand population; and if you rule that said board shall be appointed, is the City Council of the City of Hopewell required to record a yea and nay vote before the court acts."

The statute involved is section 344 of the Tax Code, and the pertinent portion thereof reads as follows:

"The corporation or hustings court of any city containing a population of twelve thousand or less according to the last preceding United States census, and if any such city has no corporation or hustings court, then the circuit court having jurisdiction therein, or the judge of any such court in vacation, may, in the year nineteen hundred and thirty-four and every fourth year thereafter, if the council or other governing body shall so direct by a resolution approved by a majority of all of the members thereof, by a recorded yea and nay vote, create and appoint for such city a board of equalization of real estate assessments; provided, however, that for the city of Hopewell, such board shall be appointed by the circuit court of said city, or by a judge thereof in vacation, as soon as may be practicable after the first day of February of any such year."

You will observe that in general in cities of 12,000 population or less the board of equalization may be appointed in the year 1934 and every fourth year thereafter "if the Council or other governing body shall so direct * * *." You will observe the proviso in the quoted paragraph applicable to Hopewell. It is true that this proviso says that the board "shall" be appointed by the circuit court of the city. I do not interpret this proviso, however, as making it mandatory for this board to be appointed in Hopewell every four years. The quoted paragraph stipulates that the board shall be appointed by the corporation or hustings court of the city, if the city has such a court, and, if not, by the circuit court. At the time the proviso as to Hopewell was put in it did have a corporation court, and it is my opinion that the only purpose of the proviso was to provide that the board should be appointed by the circuit court of the city instead of the corporation court. I do not think that the word "shall" in the proviso should be construed to take away from the City Council its privilege of determining whether or not it should direct the court to appoint the board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
INDUSTRIAL COMMISSION—Witnesses Before—Compulsory Attendance and Compensation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., SEPTEMBER 13, 1938.

MR. W. F. BURSEY, Secretary,
Industrial Commission of Virginia,
Richmond, Virginia.

DEAR MR. BURSEY:

I have your letter of August 31, requesting this office to advise you as to the law governing compulsory attendance of witnesses before the Industrial Commission, with special regard to the matter of attendance fees and mileage, and the right of a witness when summoned to demand prepayment thereof.

Section 1887(55) of the Code of Virginia, 1936, to which you refer in your letter, authorizes the Industrial Commission, each member thereof, and any person deputized by the Commission to issue summonses or subpoenas for the attendance of witnesses. This section further confers on the Commission, and on any member or deputy thereof, the same powers for enforcing such process as are conferred on circuit courts. Finally, this same section provides that witnesses summoned before the Commission shall receive the same allowances as for attending courts in civil cases.

As to the amounts of these allowances, under section 3529 of the Code, each witness attending under a summons is entitled to an attendance fee of 50 cents per day and a mileage allowance of 4 cents per mile for each mile, in excess of ten miles, necessarily traveled, plus any tolls or ferry charges actually paid by him.

For the enforcement of such process, the proper proceedings are prescribed by section 6220 of the Code. Under the provisions of this section, however, a witness is entitled to demand that there be paid to him, a reasonable time before he is required to attend, his mileage and one day's attendance fee, and if this demand is not complied with he cannot be compelled to attend or be punished for failure to do so. I find no provision of law requiring a tender of fees or mileage unless such a demand is made.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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INSANE, EPILEPTIC, ETC.—Sterilization Proceedings—By Whom Commenced.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., FEBRUARY 20, 1939.

HONORABLE MORTON G. GOODE, Chairman,
State Hospital Board,
309 N. 12th Street,
Richmond, Virginia.

DEAR MR. GOODE:

I have your letter of February 16, requesting my opinion as to whether sterilization proceedings may legally be commenced by the Superintendent of the new Petersburg State Colony, for the sterilization of patients in such Colony.
Virginia Code (Michie 1936) sections 1095(h)-1095(m), constituting the 1924 Act authorizing the sterilization of congenitally insane, feebleminded, and epileptic persons in proper cases, provide that such proceedings shall be begun by the superintendent of one of the State institutions therein named.

By chapter 131 of the Acts of 1938, the Petersburg State Colony is expressly made a separate State institution, and provision is made for the appointment of a superintendent thereof.

In view of the fact that the 1924 sterilization law specifically enumerates the institutions whose superintendents may commence these proceedings, and does not, of course, include the new Colony, it is my opinion that the Superintendent of such Colony is without authority to do so.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTIC, ETC.—Sterilization—Consent of Patient or Parents—Effect of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 7, 1939.

Dr. J. S. DeJarnette, Superintendent,
Western State Hospital,
Staunton, Virginia.

Dear Dr. DeJarnette:

I have your letter of April 1, requesting my opinion as to whether you may lawfully perform an operation for the sterilization of a certain individual under circumstances described in the correspondence which you enclose.

It appears that the mentality of this individual has been questioned, but (as I understand the facts) that he probably is not afflicted with any form of hereditary insanity or feeblemindedness. It also appears that he is willing to be sterilized, and that (he being a minor) the consent of his parents also has been or can be obtained.

Of course, if upon a commitment to your institution it should develop that this individual’s case can be brought within the terms of Virginia Code (Michie 1936) chapter 46B, providing for the sterilization of inmates afflicted with inheritable insanity, feeblemindedness, etc., there is no question as to the legality of proceeding under the terms of that statute.

I take it, however, that you wish to know whether, in view of the subject’s consent and that of his parents, it would be lawful to perform such an operation without reference to the requirements of Code chapter 46B.

There is clearly nothing in the law authorizing you to perform such voluntary sterilizations in your official capacity. However, the question whether it would be lawful for you to do so as a private individual and physician is more difficult.

Except for the Act referred to above relating to sterilization of defectives, we have no statute dealing expressly with the performance of such operations. Voluntary sterilization for eugenic or non-therapeutic purposes is neither expressly prohibited nor expressly permitted. Furthermore, the courts of this country have never, so far as I can discover, passed upon the question whether such operations, in the absence of statute, are lawful. In the decided case most nearly in point, Christensen v. Thornby, 192 Minn. 123, 255 N. W. 620, the Supreme Court of Minnesota expressly declined to decide whether the voluntary sterilization there involved would have been lawful had there been no therapeutic necessity for it.
It may be said, therefore, that the question of the legality of such voluntary sterilizations, when performed for purely eugenic purposes, is an open one. It has been suggested that the legal propriety of such operations is especially doubtful in States where (as in Virginia) the statute for sterilization of defectives includes the following provision:

"Nothing in this act shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed by this State, which treatment may incidentally involve the nullification or destruction of the reproductive functions." [Virginia Code (Michie 1936) §1095m.]

This provision, it has been pointed out, may well be taken to prohibit by implication the performance of such operations where "sound therapeutic reasons" do not exist, or where the destruction of the reproductive functions is not merely incidental to a medically indicated treatment. Miller and Dean, Liability of Physicians for Sterilization Operations, 16 Am. Bar Ass'n Jour. 158.

This being the state of the law on the subject, I cannot advise you that it would be lawful for you to sterilize the man in question unless it develops that his is a proper case for proceeding under chapter 46B of the Code, the legality of such an operation being a matter which could be positively established only by express legislative enactment or judicial decision of the precise question.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSURANCE—Countersignature by Resident Agent—Policy Already Countersigned by Virginia Agency.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., Augst 31, 1938.

ALCOHOLIC BEVERAGE CONTROL BOARD,
Richmond, Virginia.

Attention: Mr. V. F. Johnston.

GENTLEMEN:

This is in response to your request for my opinion as to whether or not it is necessary, under the provisions of section 4222 of the Code of Virginia as amended by Acts of 1938, for the Board to require the countersignature or attestation of resident agents of Virginia for a policy of insurance issued to the Board, where the policy is already countersigned by a Virginia resident agency and the countersignature on behalf of such agency is made by a person who is a resident of Virginia.

In my opinion, it is not necessary for the Board to require other signatures to said policies.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
JAILORS—Compensation—“Maximum Compensation”—How Computed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 6, 1939.

Honorable C. H. Morrissett,
Member of the Compensation Board,
Richmond, Virginia.

My Dear Mr. Morrissett:

I have before me your letter of April 2, 1939, in which you inquire as to whether or not certain interpretations of my letter of December 15, 1938, which the Board has under consideration are in conformity with the views of this office with respect to said letter.

The first question presented is whether or not, in determining the maximum permissible compensation of sheriffs and sergeants in counties and cities, the amount which should be disregarded under section 3516 of the Code should be controlled by the amount of profits or net compensation realized by the sheriffs or sergeants from the board of prisoners, or whether the Compensation Board should treat the gross amount paid to such an officer for the care and feeding of prisoners as compensation.

I am advised that it has been the practice of the Board to allow as deductible operating expenses of such an officer, the estimated cost of food and supplies which he will have to purchase for the feeding and care of prisoners, with the result that only the surplus remaining in his hands from the gross compensation would be considered as net compensation in determining the amount which this officer may retain as the compensation of his office, and before he will be under obligation to refund the excess above that payment as provided by law.

It is my opinion that this same principle should be applied as to amounts paid to such an officer by the localities for the feeding and care of prisoners convicted of violation of local ordinances, and that it would be a plain violation of the intention of the statute, as well as a violation of equity and common sense, to consider money paid to such an officer for the obvious purpose of buying food and supplies as compensation of the officer. The clear purpose of the statute was to allow the officer to receive the additional amount in excess thereof as compensation for his services in connection with the care and feeding of prisoners.

I believe a simple illustration will suffice to show the injustice of the application of a different rule. Suppose the City of Richmond should pay to the sergeant of said City $20,000 for the care and feeding of prisoners convicted of violating city ordinances, and that out of this amount the sergeant is required to expend $17,500 for food and supplies and other necessary expenses. If the sergeant were to be considered by the Compensation Board as receiving this entire $20,000 as compensation, then he would necessarily have to pay for the privilege of holding the office of sergeant instead of being compensated therefor.

While this perhaps is an extreme illustration, it serves to demonstrate the fallacy of the application of any such principle to determine the amount which such an officer is to receive as compensation for performing the duties of the office. If this rule were applied, it would no doubt be impossible to secure anyone to perform the duties of the office of the sergeant of the City of Richmond.

It is my opinion, therefore, that the Compensation Board should ascertain by such investigation as it deems proper what are the profits which have been earned by the sheriff or sergeant out of the gross amount allowed for the feeding and care of the prisoners, and that this profit should be considered by the Board upon exactly the same basis as if it were a salary paid to the officer in that amount by the county or city for the performance of services where the
compensation is not fixed by State laws. This salary, of course, is to be disregarded in arriving at the maximum net compensation which the officer may retain to the extent provided for in section 3516 of the Code.

It is further my opinion that, where the compensation of the local officer is fixed by State law and the localities are given no discretion in the matter of their payment, they should be treated as having the same status as fees or compensation paid to the officer by the State, and do not come within the exception of those items which are to be disregarded to the extent above stated.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Detention in One County of Persons Charged With Crime in Another.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 6, 1939.

MR. T. WILSON SEAY, Sheriff,
Henrico County,
22nd & Main Streets,
Richmond, Virginia.

MY DEAR MR. SEAY:
This is to acknowledge receipt of your letter of the 4th instant requesting the opinion of this office as to whether it is proper for you to receive prisoners for the purpose of detention in the Henrico jail who have been arrested and charged with the commission of some offense in another county, and in this connection, it is my opinion that except in cases of emergency where the prisoner is threatened with mob violence or is a notorious, dangerous prisoner likely to escape from an ordinary county jail, that you would not be justified in accepting such prisoners in the absence of an order entered by the court having jurisdiction of the case as contemplated by Section 2872 of the Code of Virginia.

Section 2872 of the Code reads in part as follows:

"When a county or city is without a sufficient jail or its jail is to be removed, rebuilt, or repaired, the court thereof may adopt as its jail the jail of another county or city until it can obtain a sufficient jail. * * * In any case, should it become necessary or expedient for the safe keeping of any prisoner or for other good cause, a court or the judge thereof in vacation may commit such prisoner to a jail other than that located in his county or city * * * ."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 25, 1939.

Hon. C. S. Glasgow,
Town Attorney,
Lexington, Virginia.

My Dear Mr. Glasgow:

I am in receipt of your letter of January 13, in which you desire my opinion as to whether the costs of supporting prisoners in jail, where such prisoners have been convicted in a mayor's court of a violation of a town ordinance, must be borne by the town or by the State.

The authority of this office to give official opinions is quite limited, as you will see from the enclosed card. However, in view of the importance of the question and of the fact that it relates to a matter of State law, I think that it is proper for me to express the opinion of this office.

As a matter of general law, a municipal corporation is liable for the support of prisoners committed to jail for the violation of municipal ordinances duly passed. McQuillin on Municipal Corporations, 2nd Ed., Sec. 2628. Therefore, unless there exists legislation under which the State has assumed this responsibility, I think that the liability is upon the municipal corporation.

In your letter you use the illustration of a conviction under a town driving-while-drunk ordinance. The authority of a town to pass a statute paralleling the State driving-while-drunk law is contained in chapter 225 of the Acts of 1936 (Acts 1936, page 1015). However, this Act expressly provides that the State shall not be chargeable with any costs in connection with any prosecution for a violation of such a paralleling ordinance, nor shall any such costs be paid out of the State treasury.

The Appropriation Act of 1938, in providing funds for criminal charges, stipulates that "out of this appropriation shall be paid the costs incident to the arrest and prosecution of persons charged with a violation of State laws * * *.

See Acts 1938, pages 795, 805, 876.

Section 3510 of the Code relates to the fees of jailors. I think the reasonable construction of this Act, however, is that it deals with prisoners committed to jail for violation of State laws. Certainly there is nothing in the section requiring the State to pay the costs of prisoners committed to jail for violation of local ordinances.

By section 3030 of the Code, cities and towns may establish and maintain jails, but under section 2856 a town which has no jail of its own "shall have the use of the jail of the county in which such town is located." Certainly there is nothing in this latter section which requires the State to pay the expenses of local prisoners. This office has heretofore expressed the opinion that the rate of compensation of jailors for keeping and boarding city or town prisoners is a question to be determined by agreement between the jailor and the municipal corporation.

Section 2075 of the Code provides for the transfer of prisoners confined in jail for the violation of a town ordinance to work in the State convict road force. However, by section 2077, the Superintendent of the Penitentiary is reimbursed for keeping and supporting prisoners in the convict road force, and he is required to render a monthly account to the Comptroller for the support of prisoners convicted of violation of State laws "and to the auditors or clerks of councils of such cities or towns from which he has received prisoners committed to jail for a violation of an ordinance of any such city or town, or who were in jail under a capias pro fine issued for a failure to pay a fine imposed for a violation of such ordinance." The same section goes on further to provide: "the
several cities and towns properly chargeable therewith shall remit to the super-
intendent of the penitentiary such sums for keeping and supporting such pris-
oners taken from jails as were committed for the violation of their ordinances
as would have been repaid under the respective ordinances, or in the absence of
such special ordinance, the same sums as are allowed jailors under section thirty-
five hundred and ten."

I need not call your attention to the fact that, where a fine is imposed for
violation of a city or town ordinance, it is paid into the treasury of the locality.
Whether or not these fines are sufficient to reimburse the town for the expense
of enforcing its criminal ordinances, I am not advised, nor does this seem to be
a material factor in determining the legal question presented.

In my examination I have found no statute which can be said, even by im-
plication, to impose upon the State the liability of defraying the costs of sup-
porting prisoners committed to jail for violations of municipal ordinances. In-
deed it appears that the State, both by implication and by specific statutory pro-
visions, is prohibited from paying these costs.

Upon a consideration of the whole question, my conclusion is that the city
or town, as the case may be, is responsible for paying for the support of pris-
oners committed to jail for violation of local ordinances.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND JAILORS—Receiving Prisoner Without Warrant or Com-
mitment.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 25, 1939.

Hon. L. McCarthy Downs,
Auditor of Public Accounts,
Richmond, Virginia.

My Dear Mr. Downs:

I am in receipt of your letter of April 21, in which you ask the following
question:

"I should like to have your opinion as to whether or not the sheriff,
jailer, or sergeant is required by law to have a commitment for each person
admitted to jail; and, also, whether a person may be placed in jail without
a warrant being sworn against him."

The reason for your inquiry is not entirely clear to me. If it relates to a
sheriff's or jailer's fees for receiving a person in jail, which fees have been cer-
tified to the Comptroller by a court and paid, I refer you to another letter
written to you today on the subject of court orders certifying fees and allow-
ances in criminal cases. I presume that in ninety-nine per cent of the cases
where persons are received in jail, there is either a warrant sworn out or a com-
mitment by a court. It may frequently happen, however, that, where a misde-
meanor or a felony is committed in the presence of an officer, the criminal may
be taken to jail before a warrant is sworn out. Where a person is brought to
jail by a police officer, an offence having been committed in the presence of the
officer, I do not think that the jailer should refuse to receive such a person
merely because the officer had not had an opportunity at that time to have a
warrant sworn out. It is entirely true, however, that in order to hold a person
in jail there must be appropriate process in any case.

Very sincerely yours,

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

JAILS AND PRISONERS—Release—Authority Required for.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 7, 1939.

Honorable T. Wilson Seay,
Sheriff Henrico County,
22nd and Main Streets,
Richmond, Virginia.

My Dear Sheriff:

I have your letter of March 5, in which you state that a prisoner was arrested in Hanover County under a warrant charging him with being suspected of automobile theft. It seems from your letter that he was held principally for investigation by the Federal Bureau of Investigation, and that the agent of that Bureau has concluded that it is desirable to release the prisoner. You inquire whether or not it will be necessary for the prisoner to be taken before the court of Hanover County in order to be released.

It is my opinion that this is not necessary. If the trial justice, before whom the warrant is returnable, will dismiss the same and order a release of the prisoner on motion of the Commonwealth’s attorney or of the arresting officer and send you a copy of the order or proper official notice of his action, I think this will be sufficient to justify you in releasing the prisoner without sending him to Hanover County.

On the other hand, if you desire to do so, I see no objection to turning the prisoner over to the sheriff of that county to be held by him for such action as may be later determined.

Sincerely yours,

Abram P. Staples,
Attorney General.

JUDGES—Retirement of—Judges Not in Office Since Passage of Act.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 11, 1938.

Honorable James H. Price,
Governor of Virginia,
Richmond, Virginia.

Dear Governor Price:

This is in reply to your letter of June 30, in which you request that I examine the recent Act providing for the retirement of circuit and corporation court judges in this State, and give you my opinion concerning the rights, if any, of Honorable Thomas B. Robertson to receive the benefits of the retirement compensation as therein provided.

The Act to which you refer appears on page 354 of the Acts of 1938. The retirement privilege of receiving an annual compensation in an amount equal to three-fourths of the basic annual salary received by a retiring judge immediately prior to his retirement is conferred upon any judge of a corporation court who has attained the age of seventy years and has served not less than fifteen years as judge of said court. In order to receive said benefits, the Act provides for his “giving the Governor notice in writing of his intention so to do, stating in such notice the date upon which such retirement will become effective. Upon
receipt of such notice the Governor shall notify the Comptroller as to such retirement and the effective date of the same."

It seems that the Honorable Thomas B. Robertson was judge of the corporation court of the City of Hopewell and that this court was abolished by the Act of the General Assembly at the session of 1934. Since that time Judge Robertson has not held a judicial position in this State.

In my opinion, the 1938 Act above referred to is prospective in its operation and applies only to persons who, after the effective date, shall resign and notify the Governor in accordance with the provisions of said Act.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Execution—Issuance of on Judgment Confessed in the Office.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 20, 1939.

HONORABLE GEORGE R. WALTERS, Clerk,
Prince George Circuit Court,
Prince George, Virginia.

MY DEAR MR. WALTERS:

I have your letter of June 13, in which you request my opinion upon the following question:

"Does the Clerk have the authority to issue an execution forthwith at the request of the creditor or attorney in fact on a confession of judgment in the clerk's office?"

Paragraph (g) of Virginia Code (Michie 1936) section 6130a provides that

"The clerk shall forthwith docket such judgment in the current judgment lien docket in his office and shall issue execution thereon as he may be directed by the creditor therein named, or his assigns, in the manner prescribed by law."

In my opinion, the phrase "in the manner prescribed by law" does not relate to the time of issuing execution on such judgment, and the statutory provision quoted above provides ample authority for the issuance of the execution immediately upon entry of the judgment if this is requested by the judgment creditor or his assigns.

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

JUDGMENTS—Liens—Priorities—Effect of Docketing.
Id.—Id.—When Entered by Trial Justice.

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

HONORABLE W. N. HANNAH,
Attorney for the Commonwealth,
Palmyra, Virginia.

DEAR MR. HANNAH:

This is in reply to your letter of October 29, in which you request my opinion upon the question of the priorities between two judgments rendered under the following circumstances:

(1) The Commonwealth obtained a judgment for a fine, or upon a legal obligation, against A in a trial justice's court on January 1, 1938, but same was not docketed.
(2) B, a creditor of the debtor A, in February, 1938, obtained in the circuit court of the county a judgment against A and has the same promptly docketed in February in the judgment lien docket of the clerk's office of the circuit court.
(3) In the following September, in a suit to subject the lands of the judgment debtor A lying in said county to the liens against same, the question has been raised as to which judgment has priority; the judgment in favor of the Commonwealth which was recovered in a trial justice's court and never docketed, or the judgment in favor of B recovered after the Commonwealth's judgment but docketed promptly.

You state in your letter that two questions have been raised, first, as to whether or not a judgment obtained in a trial justice's court is a lien from the time of rendition or from the time of its docketing, and, second, whether or not, even if same is a lien from time of its rendition, where same was never docketed, it would have priority over a judgment subsequently recovered in a circuit court which has been docketed.

I have been unable to find in the statutes any distinction between the time of taking effect or general validity of a judgment rendered by a trial justice and a judgment rendered by a circuit court, or other court of record.

Section 6470 of the Code states that "Every judgment for money rendered in this State, by any State or federal court, other than by confession in vacation, shall be a lien on all the real estate of or to which the defendant in such judgment is or becomes possessed or entitled, at or after the date of such judgment, *** ."

Sections 6022 to 6025, inclusive, of the Code provide for the rendering of judgments by justices of the peace and the method of entering same, both by endorsing on the writing, account, or other paper, on which the claim is based, and also by entering same in a book kept for that purpose. The last named section provides for the certification by the justice of an abstract of the judgment so rendered.

Section 4987(6) of Michie's 1936 Code, which is a part of the trial justice act, confers upon trial justices all powers theretofore conferred by other statutes upon justices of the peace, which would make the statutes above referred to applicable to such trial justices.

Section 5461 of the Code provides that the clerk shall docket judgments of a justice of the peace upon an abstract delivered to him certified by the justice, or where the book in which the judgment was rendered by the justice has been filed with the clerk under the provisions of section 6024.

I have been unable to find anything in the Code which would make any dis-
tinction, in so far as the lien thereof is concerned, between a judgment rendered by a trial justice and a judgment rendered by a court, except that in some cases the lien of a judgment rendered by a court of record relates back to the first day of the term in which the judgment is rendered (See section 6470).

It is my opinion, therefore, that the lien of a judgment rendered by a justice is effective as of the date of the rendition of the judgment, assuming of course that no appeal is taken.

The next question relates to whether or not the docketing of the subsequent judgment would give it priority over the lien of the prior judgment which was not docketed.

In the case of Gordon v. Rixey, 76 Va. 694, it was held that the statute providing for the docketing of a judgment does not affect the lien of the judgment except as to purchasers for value and without notice of same. The docketing has no effect so far as the priorities between judgment creditors is concerned. See section 6471 of the Code.

This principle which was stated in the case just cited was further recognized and affirmed by statute in the latter part of section 6470 of the Code herefore referred to, which contains this provision:

"Judgments against the same person shall, as among themselves, attach to his real estate, and be payable thereout in the order of the priority of such judgments, respectively."

It follows from the foregoing, therefore, that I am of opinion that, where no rights of purchasers for value and without notice are involved, the docketing of a judgment, or the failure to docket same, does not in any way affect the rights or priorities of the judgment creditors as among themselves, and this is true regardless of whether the judgments are recovered in the trial justice's court or a court of record.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Fees—Issuing Warrants—Several Defendants.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 22, 1938.

Hon. William D. Prince,
Trial Justice of Sussex County,
Stony Creek, Virginia.

My Dear Mr. Prince:
I am in receipt of your letter of December 21, in which you ask my opinion as to the fee to which a justice of the peace is entitled for issuing a civil warrant where there is more than one defendant.

The fees of justices of the peace are set out in section 3481 of the Code. The fifth paragraph of this section provides as follows:

"For issuing any warrant in which the Commonwealth is not plaintiff, including the issuing of subpoenas, fifty cents, provided, however, in cities between one hundred thousand and one hundred and seventy thousand inhabitants by the last United States census the charge shall be one dollar."

It is my view that this section limits the fee of a justice of the peace for issuing a warrant in a case to 50 cents (excepting in certain cities) and that a
justice of the peace may not charge more than 50 cents for issuing a warrant, irrespective of the number of defendants. The statute seems to leave no room for any other construction.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Jurisdiction—Granting Bail.
Id.—Issuing Criminal Warrants—Requiring Prepayment of Fees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 3, 1938.

Mr. W. W. Haskins,
Justice of the Peace,
Prospect, Virginia.

My Dear Mr. Haskins:
I am in receipt of your letter of July 25, in which you ask if a justice of the peace, under the Trial Justice Act, may grant bail under the general law as it now exists and receive his fees therefor.

I am of opinion that a justice of the peace still has this power, as is clearly shown by subsection 7 of section 4987-f of the Code of Virginia.

A justice of the peace also still has power to issue warrants in criminal cases, and you inquire whether in such cases he may demand of the complainant that the fee for the issuance of the warrant be paid in advance.

This question was answered a few years ago in a pamphlet gotten out by this office relating to trial justices and justices of the peace, as follows:

“There is no provision of law by which a complainant in a criminal matter may be required to pay in advance a fee for the issuance and service of a warrant. As a matter of practice, I am informed, many officers who issue criminal warrants refuse, in some cases, to issue the warrants unless the fee therefor is paid in advance, but I know of no authority by which a complainant can be compelled to pay these fees. The Trial Justice is vested with discretion to determine whether any case is a proper one for the issuance of a warrant.”

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Jurisdiction—Issuance of Warrants.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 16, 1939.

Mr. R. J. Matthews,
Justice of the Peace,
Passapatanzy, Virginia.

My Dear Mr. Matthews:
I am in receipt of your letter of June 13, in which you ask if a justice of the peace may issue warrants.
In reply, you are advised that subsection (7) of section 4987-f of the Code expressly provides that:

"... Justices of the peace within their respective counties and mayors or other trial officers, within their respective territorial jurisdictions shall, however, have the same power to issue attachments, warrants and subpoenas within the jurisdiction of the trial justice as is conferred upon the trial justice, and they shall also have power to grant bail in any case in which they are now authorized by general law to grant bail and to receive their fees therefor, but said attachments, warrants and subpoenas shall be returnable before the trial justice for action thereon."

It is plain, therefore, that a justice of the peace may continue to issue warrants as provided in the above quotation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Assistant Commissioner and Inspectors—Necessity for Oath of Office.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 27, 1939.

HONORABLE THOMAS B. MORTON,
Commissioner of Labor,
Richmond, Virginia.

My Dear Mr. Morton:

This is in reply to your request for an opinion as to whether or not the Assistant Commissioner of Labor, factory inspectors, and mine inspectors should take an oath of office.

Section 269 of the Code of Virginia provides that "Every person before entering upon the discharge of any function as an officer of this State shall take* and subscribe the following oath: **

Whether or not a given individual is an officer or a mere employee is a question which depends upon several considerations, such as the nature of the individual's duties, i.e., whether or not he exercises in his own right any prescribed independent authority of a governmental nature; definite tenure or duration of office; the creation of the office by constitutional or statutory provision, i.e., whether the position is created by virtue of such a provision or whether it arises out of a contract between the government and the employee; etc.

Section 1799 of the Code, providing for the powers and duties of the Commissioner of Labor, provides that he shall have authority to appoint such assistants as may be necessary to carry out the objects of the Bureau, and that he may appoint such factory inspectors and other assistants as may be necessary to aid him in the inspection of factories, etc. The duties of such person are to be prescribed by the Commissioner of Labor. No term of office is prescribed for the Assistant Commissioner or the factory inspectors. There is no enumeration of the specific duties of such persons as distinguished from the duty of the Commissioner to carry out the provisions of law dealing with this Bureau. They appear to be more employees of the Commissioner, subject to his direct control, having no specific official duties in their own right and who may be hired and fired at the Commissioner's will.

It is my opinion, therefore, that the Assistant Commissioner of Labor and factory inspectors are not officers of the State, but, rather, mere employees and, therefore, do not have to take an oath of office.
By section 1835 (as amended in 1938), the Division of Mines is continued. It is under and subject to the control of the Bureau of Labor and Industry. This section provides that this Division shall be in charge of an official to be known as the State Mine Inspector. The duties of the State Mine Inspector are specifically set out in the sections following section 1835. He is appointed by the Commissioner of Labor. Section 1836 enumerates certain specified causes for his removal from office by the Commissioner. No specified term of office is provided.

It is my opinion that the State Mine Inspector is an officer of the State and should take an oath of office, since the statute speaks of him as an officer and specifically sets out his duties.

The sections dealing with the Department of Mines (sections 1835-1887) speak chiefly of the State Mine Inspector and his duties. No specific duties of the assistant mine inspectors are set out, and they have no independent authority to order mines found by them to be unsafe to be closed. On the other hand, section 1870 provides that this shall be done only by the State Mine Inspector. It is my opinion, therefore, that assistant mine inspectors are not State officers and do not have to take an oath of office.

If, in fact, duties of a police nature are delegated to the Assistant Commissioner of Labor, factory inspectors, and mine inspectors, it is my opinion that these individuals should take an oath of office, since, in the final analysis, whether or not a person performs governmental duties is the controlling element. Though, as I have stated above, it does not appear that the statutes specifically impose such duties upon those individuals, they are, in a sense, deputies of the heads of the departments and, if certain official duties are delegated to them, it is my opinion that they should take an oath of office.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Children—Employment of on School Days—Certain Exceptions.

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

HON. THOS. B. MORTON,
Commissioner of Labor,
Richmond, Virginia.

MY DEAR MR. MORTON:
I am in receipt of your letter of December 14, from which I quote as follows:

"A question has been raised by Mr. Fletcher Kemp, Superintendent of Arlington County Public Schools, regarding the proper construction of section 15 of the State Child Labor Law, a marked copy of which is enclosed. "Our inspector at Alexandria reports that Mr. Kemp has discussed this matter informally with Mr. Lawrence Douglas, Commonwealth's Attorney of Arlington County, who seems to think that the section in its wording implies that caddying is the only exception made for employment of children on days that school is in session and that such employment is allowed only after school hours. This Department has been of the opinion that section 15 in its practical application intends that any boy between the ages of 12 and 16 may be employed in street trades in accordance with the provisions of this section as long as such employment does not interfere
with his schooling. Girls, of course, cannot be employed in street trades until they are 18 years old."

The section of the Child Labor Law in question, as last amended, may be found in chapter 409 of the Acts of 1936 (Acts 1936, p. 775). The pertinent portion of the section, the language of which you desire construed being underscored, is as follows:

"No boy under fourteen years of age, and no girl under eighteen years of age shall be employed, permitted or suffered to work in a street or public place in the occupation of peddling, bootblacking or distributing or selling newspapers, magazines, periodicals or circulars, or engaged in any gainful occupation, in a street or public place, except that any boy between twelve and sixteen years of age may engage in the occupation of bootblacking or distributing and selling newspapers, magazines, periodicals or circulars which are by law permitted to be distributed and sold, or running errands or delivering parcels, or caddying or other outdoor employment, at such time or times between six o'clock ante meridian and seven o'clock post meridian, in each day that the public schools are not in session, except that on days in which school is in session he may caddy after school hours within the limits herein provided; provided such boy procures and carries on his person a badge as hereinafter provided. * * * *

I think it reasonably clear from a consideration of the italicized language that a boy between twelve and sixteen years of age may engage in the designated occupations on the days that the public schools are in session, provided he is not working during the time in each day that the schools are actually in session. I do not think there would be any question about the correctness of this construction were it not for the last exception reading "that on days in which school is in session he may caddy after school hours within the limits herein provided." However, you will observe that caddying is limited to after school hours, whereas he may engage in the other occupations either before or after school hours within the time limits provided. Probably the reason for limiting caddying to after school hours was that ordinarily this occupation would be followed at a point some distance from the schools and it was, therefore, thought advisable by the General Assembly not to permit a boy to caddy before school hours.

I note that the construction I have placed upon the section is in accord with the uniform administrative practice of your Department. Even if there were any doubt as to the meaning of the language, I think, and our Supreme Court has so held, the construction which the administrative department has placed upon the law is entitled to great weight.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Children—Refusal of Badges for Newsboys, etc.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 13, 1939.

HONORABLE THOMAS B. MORTON,
Comissioner of Labor,
Richmond, Virginia.

DEAR MR. MORTON:

This is in reply to your request for my opinion upon the question whether
or not a person authorized under the Virginia Child Labor Law to issue badges to children desiring to engage in the work of peddling, bootblackening, or distributing or selling newspapers, magazines, periodicals or circulars, or engage in any gainful occupation, in a street or public place, is vested with discretion to refuse to issue such a badge to a child who has complied with the requirements of sections 4, 5, 6, 7 and 15 of said child labor statute.

I am unable to find any provision in the statute which vests any discretion whatever in the issuing officer, and I am of the opinion that any child who, accompanied by the parent, guardian, or custodian, has made application as required by these sections, and has complied with the other requirements thereof, is entitled to be issued a badge.

You also request my opinion upon the question as to whether this badge is a permit which would confer upon the boy holding same any greater privilege than that which a person older than the minimum age limit would have without a badge.

I do not consider that the badge is any authority to engage in any particular act. It merely relieves the child from liability for punishment for violation of the child labor law itself because not possessing a badge.

You state you have been advised that in some places in the State children possessing these badges make themselves a nuisance on the streets.

This, in my opinion, is not a question within the scope of the child labor laws but rather the police power and regulatory jurisdiction of the city in which the objectionable actions take place. Similar nuisances could, of course, be committed by children above the minimum age not requiring a badge. This feature of the matter, I think, should be dealt with by the council of the city and suitable ordinances requiring licenses and other regulatory provisions should be enacted to regulate the evils complained of.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Hours of, for Women—Exception as to Handling Leaf Tobacco.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 26, 1938.

HONORABLE THOMAS B. MORTON,
Commissioner of Labor,
Richmond, Virginia.

MY DEAR MR. MORTON:

This is in reply to your letter of October 21, in which you request my opinion as to the interpretation of subclause (c) in the first paragraph of section 1808 of the Code of Virginia, as amended by the Acts of 1938, page 770.

This section provides that no female shall be employed in certain occupations more than forty-eight hours in any one week nor more than nine hours in any one day of twenty-four hours, provided that "nothing in this section shall be construed to apply to females whose full time is employed * * * in the handling or re-drying of leaf tobacco during the tobacco market seasons * * * provided such females are not employed more than ten hours in any one day of twenty-four hours for a period of not exceeding ninety days in any one year."

The questions raised by your letter are two:

First: Whether the period of ninety days means a consecutive period or whether the statute should be construed as prohibiting the employment of such
females for more than ten hours a day during any ninety days during the mar-
keting seasons in any one year, and for more than nine hours on all other days
in the year.

Second: Whether the word "year" means the calendar year or any one con-
secutive twelve month period.

As to the first question, in my opinion, the language should be construed
as prohibiting such employment for more than ten hours per day during any
ninety days in the entire year whether such days be consecutive or not and for
more than nine hours on all other days during the year. To construe the act
otherwise would seem to permit the employment of such females for more than
nine hours a day for a considerable number of days greater than ninety in the
whole year, provided that such excess of employment is not during a period of
ninety days. This is obviously not the purpose of the statute. I think it is clear
that the statute was intended to limit the number of days of such excess em-
ployment to ninety for the entire year and that it further limits these ninety days
to the tobacco market seasons.

I am further of opinion that the word "year" as used in the statute should
be construed to mean the calendar year.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Hours of Labor—Telephone Operators;
Id.—Employees in Greenhouse.

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

HONORABLE THOS. B. MORTON,
Commissioner of Labor,
Richmond, Virginia.

Dear Mr. Morton:

This is in reply to your letter of July 14, in which you request my opinion
upon the question of whether or not the telephone operators employed in the
exchange of the Clifton Forge-Waynesboro Telephone Company come within
the provisions of chapter 409 of the Acts of 1938, relating to the hours of labor
of women.

The said section prohibits the employment of women in any work shop for
a greater period of time than forty-eight hours in any one week, or nine hours
in any one day of twenty-four hours. The question presented is whether or
not the telephone exchange is a work shop within the meaning of this statute.

The women employed in the telephone exchange are engaged in manual work,
and in the manipulation of machinery. While, of course, this work requires a
high degree of skill, nevertheless, it is work of the type which the statute was
designed to cover by the term "workshop", inasmuch as it involves both physical
and mental fatigue.

It is clear from the statute that women employed in greenhouses of a florist
are covered by the statute, although such greenhouses may not be strictly a mer-
cantile establishment and would probably be classified as a work shop. This, of
course, would depend upon the method adopted by the employer in the operation
of the greenhouse and his florist shop.

The analogy, however, I think is sufficient to make it clear that women
employed in the operation of a telephone exchange of the type you refer to come
within the provisions of said Act.

Your very truly,

ABRAM P. STAPLES,
Attorney General.
LABOR LAWS—Hours of, for Women—What Vocations Regulated—
Beauty Shops.

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

HONORABLE THOMAS B. MORTON,
Commissioner of Labor,
Department of Labor and Industry,
Richmond, Virginia.

My Dear Mr. Morton:
This is in reply to your letter requesting my opinion upon the question whether or not the statute known as the Hours Law for Women, being section 1808 of the Code of Virginia as amended by chapter 409 of the Acts of 1938, is applicable to the employment of women in "beauty shops".

I have made quite a careful investigation of the decisions of the courts, both in Virginia and throughout the United States, and I have been unable to find any proceedings which have any bearing upon this question. The statute provides that "No female shall be employed, suffered,* or permitted to work in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment in this State more than forty-eight hours in any one week, nor more than nine hours in any one day of twenty-four hours. * * *"

There are certain exceptions to the foregoing language, such as bookkeepers, stenographers, and office executives, and, in addition thereto, women employed in certain seasonal agricultural industries, and also in mercantile establishments located in towns of less than two thousand inhabitants or in country districts. These exceptions do not affect the general application of the statute to persons engaged in manual work.

The general spirit, object, and purpose of the statute seems to be to prohibit the employment of women in manual labor for a period of time greater than that specified. The work of women in "beauty shops" is quite similar to that of men in barber shops. The occupation of the workers in both of these types of shops is almost exclusively manual. The very fact that the word "shop" is commonly used to describe a barber shop would seem to classify the establishment as a work shop within the commonly accepted meaning of such terms.

It is my opinion, therefore, that the statute to which you refer is applicable to the employment of women in "beauty shops".

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

LABOR LAWS—Hours of, for Women—"In Any One Week".

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 20, 1938.

HONORABLE THOMAS B. MORTON,
Commissioner of Labor,
Richmond, Virginia.

Dear Mr. Morton:
In my letter to you of June 25, 1938, with reference to the meaning of the words "in any one week" in connection with the limitation of working hours of women to forty-eight hours within said period, I stated the following:
"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."

I desire to supplement the foregoing as follows:

It is my opinion that the provisions of the statute referred to, prohibiting the employment of women in certain types of labor for more than forty-eight hours in any one week, are sufficiently broad to empower the Commissioner of Labor to use as a sole unit, standard, or test for determining whether or not there has been an employment in excess of forty-eight hours in said period of one week a standard week beginning immediately after midnight on each Sunday and ending at midnight on the following Saturday. In other words, the employment of this unit of time as a test of determining whether the provisions of the Act have been violated would obviate the necessity of your inspectors undertaking to determine whether or not in any definite period of seven days there might have been an employment for a greater period than forty-eight hours. That is, the sole test to be applied would be whether there has been an employment greater than forty-eight hours in each and every week commencing Sunday morning and ending Saturday night.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

LANDLORD AND TENANT—Dispossession for Default—Notice.
Trial Justices—Disposition of Court Papers After One Year.

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

Hon. W. Howard McClintic,
Trial Justice,
Warm Springs, Virginia.

Dear Mr. McClintic:

In your letter of August 3 you ask if a man is renting a house by the month and is in arrears in rent does he have to have thirty days' notice before serving a warrant of unlawful detainer.

Section 5448 of the Code (Michie 1936), a part of the chapter dealing with the action of unlawful detainer, provides as follows:

"If any tenant or lessee of premises in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming or agriculture, being in default in the payment of rent, shall so continue for five days after notice, in writing, requiring possession of the premises or the payment of rent, such tenant or lessee shall thereby forfeit his right to the possession. In such case the possession of the defendant may, at the option of the landlord or lessor, be deemed unlawful, and he may proceed to recover in the same manner provided by this chapter."

You also ask in what manner should a trial justice dispose of a judgment after one year where no fee has been paid to cover the filing of the same by the clerk of the circuit court.
Section 4987-j of Michie's Code, dealing with papers connected with any of the proceedings before a trial justice, makes it mandatory that such papers should be delivered to the clerk's office of the circuit court of the county, or the corporation court of the city in which the case was disposed one year after final disposition by a judgment, or otherwise by the trial justice.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

LITERARY FUND—Sale of Securities and Reinvestment of Proceeds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 1, 1938.

DR. SIDNEY B. HALL,
Superintendent of Public Instruction,
Richmond, Virginia.

DEAR DOCTOR HALL:

I have before me your letter of November 28, 1938, in which you request my opinion upon the questions hereinafter set out.

It appears that the Virginia State Board of Education has acquired and now holds as a part of the literary fund certain "certificates" issued and sold to the Board by various state educational institutions pursuant to the provisions contained in the following Acts of the General Assembly of Virginia: Acts 1926, p. 829; Acts 1928, p. 324; Acts 1936, p. 1043. The Board now desires to sell these certificates, or a part of them, and reinvest the proceeds in bonds of county, town and city school boards to be executed by said school boards for the amounts of various loans to be made from the literary fund. You request my opinion upon the question of the authority of the Board to sell the said certificates and so reinvest the proceeds.

The creation and establishment of the literary fund is provided for by section 134 of the Virginia Constitution, while section 135 requires that the "annual interest on the literary fund" be made available for the operation of the public schools of the primary and grammar grades. Obviously, in order for the fund to produce "annual interest" it must be loaned out or invested in interest bearing securities of some kind, and this is clearly contemplated by section 135 of the Constitution. In recognition of this purpose the General Assembly enacted a provision (Code of Virginia, section 632), that the literary fund "shall be invested and managed by the State Board of Education as prescribed by section 633" (of the Code); and also, that "the principal of the said fund shall always remain unimpaired and entire, and the annual interest arising therefrom shall be dedicated exclusively to the support and maintenance of public schools in this State". Said Code section 633, (referred to in section 632), prescribes the types of securities in which the Board of Education may invest the literary fund. Securities eligible for such investment are restricted by this section as follows: (a) bonds of the State of Virginia; (b) bonds of the United States; (c) certain first mortgage railroad bonds; (d) bonds of county or city school boards in Virginia.

It is common knowledge that bonds of the State, the United States, and railroad first mortgage bonds are never payable on demand, but run for terms of years, while section 643 of the Code provides that literary fund loans to city and county school boards "shall be payable in annual instalments from five to thirty years". Therefore the State Board of Education cannot possibly possess the power to demand payment of any such bonds at its pleasure. A sale of the securities or part of them is therefore the only possible way in which they can be converted into money for reinvestment.
It is, generally speaking, indispensable to the intelligent and successful management of any trust or fund that the managing agency, whether a public or private one, shall have the power to sell the securities therein and reinvest the proceeds in other securities, whenever in the judgment of the managing agency the purposes and interests of the trust or fund will be promoted thereby. If this were not true the agency would be helpless to avoid threatened losses, or to take advantage of the ever changing industrial conditions and fluctuating securities markets.

Obviously, with the purpose and intent of conferring this power on the board, the General Assembly provided in section 633, supra, as follows: “The said board may call in any such investment” (constituting a part of the literary fund) “or any heretofore made, and reinvest the same as aforesaid, whenever deemed proper, for the preservation, security or improvement of the said fund.”

The only possible question which can arise from the provision quoted is as to the meaning of the words “call in any such investment”. Do these words mean sell any such investment. In my opinion there is no doubt that this meaning was intended and should be given effect. The Board cannot “reinvest the same” without obtaining the money represented by the investment “called in”. There are no legal means by which the securities representing the investment can be converted into money for reinvestment other than by a sale of such securities. As heretofore stated the Board has no power, at its pleasure, to require payment by the obligors of bonds of the types eligible for investment of the fund, or to “call in” the money by demanding same of the obligors. If a present investment of any eligible type not due is to be reinvested, this can only be effected through a sale of the present investment. Only in this manner is it possible for the Board to “call in” the money invested and reinvest same.

It follows from the foregoing that I am of the opinion that the State Board of Education possesses full and ample power to sell the aforesaid college certificates “whenever deemed proper, for the preservation, security or improvement of the fund”.

In view of this conclusion, the question then arises whether the Board would be legally justified in concluding that a reinvestment of the proceeds from the proposed sale in bonds of the city and county school boards would come within the provision that the reinvestment should be deemed by the Board of Education to be “for the preservation, security or improvement” of the literary fund.

The meaning of these words quoted must be ascertained from a consideration of all of the Code sections relating to the literary fund, which are sections 632 to 645, both inclusive. These sections are in pari materia, and it is well settled must be considered as a whole when construing any provision contained in any of them, Fox’s Admr. v. Com., 16 Gratt. 10, “because”, as Judge Monroe says in that case, “they are considered as framed under one system, and having one object in view”. (See cases cited in 9 Michie’s Digest of Virginia and West Virginia Reports, p. 37.)

A consideration of the fourteen Code sections enumerated above discloses that one of the primary purposes to be accomplished in the management of the literary fund was to render available for loans to local school boards ample money for the construction of school buildings. The desirability of this appears from section 637, which requires that these loans be granted under an “equitable distribution * * * among the several counties and cities of the State”. The literary fund is essentially one dedicated to the welfare of the public schools. But while the legislature had in view this purpose of facilitating the erection of school buildings, it was also careful to insure that the literary fund should “remain unimpaired and entire” (section 632, supra). To this end the statute provides that the school board’s title to the land on which the building is to be erected is a fee simple one and “free from encumbrance” (section 639); that the school board applying for the loan is not in default, on any other loan, (section 642); and that the loan shall be a lien on the building and grounds, (section 645). In addition to this, section 644 requires the city or county treasurer of any city or county in default on principal or interest to pay such amount in default to the State Treasurer upon notice to that effect “out of any funds in his hands.
belonging to such county or city.” The failure of a board of supervisors or city council to provide the necessary funds to meet the literary fund obligations “shall be cause for removal of the members thereof from office” on motion of the Commonwealth’s Attorney or of the Attorney General.

These drastic provisions for the payment of the literary fund loans and interest by the local school boards render this form of investment as safe as any the State Board can possibly obtain. In actual practice over a long period of years, the effectiveness of these provisions to insure the performance of the obligations to the literary fund of the local school boards has been adequately proven. Because of these drastic provisions, and the distinction recognized by our courts between ordinary bond issues, and the issuance of literary fund loan bonds, by county school boards, Board of Supervisors v. Cox, 155 Va. 687, I have heretofore expressed the opinion that such school board bonds representing loans from the literary fund constitute a transaction between the State and one of its governmental agencies, and occupy such a peculiar status that they may not be sold by the State Board of Education to banks, financial institutions, or other private investors.

This obstacle to such sale by the Board of Education of the bonds of the local school boards does not exist or apply to the sale of the college certificates for two reasons: first, the provisions for enforcing payment of the interest and principal of loans from the literary fund to local school boards, I am of opinion that such school board bonds representing loans from the literary fund constitute a transaction between the State and one of its governmental agencies, and occupy such a peculiar status that they may not be sold by the State Board of Education to banks, financial institutions, or other private investors.

In view of the obvious purpose of the statutes to make available funds for the construction of public school buildings, and of the extraordinarily drastic provisions of the statutes designed to insure the payment of the interest and principal of loans from the literary fund to local school boards, I am of opinion that the State Board of Education, in its discretion, possesses the legal power and authority to sell the said college certificates, or any of them, for the purpose of reinvesting the proceeds in loans to county and city school boards “for the purpose of erecting or enlarging schoolhouses”, as provided in section 636 of the Code of Virginia.

Your third inquiry is directed to the question whether the State Board of Education is legally authorized and empowered to sell the said college certificates hereinbefore referred to, and reinvest the proceeds in the new certificates proposed to be issued by the Virginia Agricultural and Mechanical College and Polytechnic Institute at Blacksburg, pursuant to the provisions contained in section 58 of chapter 428, page 962, of the Acts of 1938. This section of the Act contains this provision:

“ * * * The State Board of Education is hereby authorized in its discretion subject to the approval of the Governor, to sell any bonds of the State held as a part of the literary fund, and is authorized in its discretion, subject to the approval of the Governor, to invest the proceeds derived from the sale of such bonds in the certificates of indebtedness issued under the provisions of this act. The State Board of Education is further authorized in its discretion, subject to the approval of the Governor, to invest any uninvested portion of the literary fund in the certificates of indebtedness issued under the provisions of this act, and all such certificates purchased with funds belonging to the literary fund shall become the property of and a part of that fund. * * * ”

The State Treasurer’s office advises me that at the time of the passage of this 1938 Act, the only bonds in the literary fund possessing any characteristics of “State Bonds” were the college certificates hereinabove referred to. While such certificates are not technically “State Bonds” they were obviously within the intent of the language used; otherwise, such language would have no meaning as applied to the actual situation, and unless construed as so applying would be given no legal effect whatsoever. “In construing a statute every word in it must be given its full effect if that can be done consistently, but if full effect
cannot be given, it must be made effective as far as possible.” Digest of Virginia and West Virginia Reports, Vol. 9, p. 40. “All the surrounding circumstances known to the legislature must be regarded.” Id., page 36.

I am of opinion, however, that it is immaterial whether the statute be construed as embracing the former college certificates within the designation “State Bonds”. So far as the power to sell the certificates for reinvestment is concerned, in my opinion the Board possesses this power, independent of the 1938 Act, for the reasons I have heretofore stated.

From the standpoint of the eligibility of the new college certificates as an investment of the sinking fund, the 1938 Act also provides that “The State Board of Education is further authorized in its discretion, subject to the approval of the Governor, to invest any uninvested portion of the literary fund in the certificates of indebtedness issued under the provisions of this act ***.”

It is my opinion, therefore, that whether the proceeds from the sale of the old certificates be considered as derived from the sale of “State Bonds” or from other sources, after same are sold such proceeds will in any event be and become an “uninvested portion of the literary fund” under the 1938 Act, and as such may, with the approval of the Governor, be invested in the new certificates thereby authorized. The 1938 Act clearly indicates the wishes of the legislature that the proposed new certificates be purchased as a part of the literary fund.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

MARRIAGE AND DIVORCE—Marriage Within Six Months After Foreign Divorce.

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

Hon. George R. Walters, Clerk,
Prince George Circuit Court,
Prince George, Virginia.

Dear Mr. Walters:

In your letter of December 20 you ask if a marriage license should be issued in a case where the male applicant (who is now and always has been a non-resident of this State) has been granted a final decree of divorce, restoring him to the status of a single person, by a court of another State, within six months from the date of such decree.

Section 5113 of the Code of Virginia (Michie 1936) provides:

“On the dissolution of the bond of matrimony for any cause arising subsequent to the date of the marriage, neither party shall be permitted to marry again for six months from the date of such decree, and such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree, or in any prosecution on account thereof, until the expiration of such six months. Provided, however, that nothing herein contained shall be deemed to prohibit divorced persons from remarrying each other at any time.”

It is the general rule that a statute providing, in general terms, that divorced persons shall not marry until a specified time has elapsed after the granting of the divorce applies only to divorces granted within that state. Reger v.
Reger, 293 S. W. (Mo.) 414, at p. 425, and 9 Ruling Case Law 504, and cases cited.

That section 5113 of the Code of Virginia was intended as a limitation upon the effect of a divorce decree granted by the courts of this State is indicated both by the language of the entire section and by the fact that this statute was placed by the Legislature in the Code of 1919 along with the Code sections dealing with the granting of divorces and not along with the Code sections providing who may and who may not marry.

It is my opinion, therefore, that a license should be issued when one of the parties, a nonresident of this State, has been granted an absolute divorce by another state even if six months has not elapsed since the decree.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Oath for Obtaining License.

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

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

My Dear Mr. Ross:

I am in receipt of your letter of September 7, from which I quote as follows:

"I am attaching hereto an application for marriage license with the oath printed thereon and a place for the man and woman to sign which is to be acknowledged by an officer authorized to take acknowledgments.

"Is it necessary that the oath should be also administered orally before issuing the marriage license to applying persons in order to comply with the statutes?"

Section 5074 of the Code, as amended in 1938 (Acts 1938, p. 151), provides in connection with the information to be furnished by applicants for a marriage license that before the clerk issues the license he shall "require the parties contemplating marriage to state, under oath, or by affidavit or affidavits filed by him, made by the parties for whom the application is made, before a person qualified to take acknowledgments and administer oaths, * * * ."

You can see, therefore, that it is necessary that applicants for a marriage license take oath before the clerk, as to the truth of the facts stated in the application, or that proper affidavits be filed and sworn to before a person qualified to take acknowledgments. I do not think that the provisions of the statute are met simply by an application being sent to the clerk, signed by the man and woman proposing to marry. It is the plain intent of the statute that the oath be taken by the applicants.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
MARRIAGE AND DIVORCE—Licenses—Within What Time Ceremony to be Performed.

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

Hon. Lewis Crawley, Clerk,
Circuit Court of Cumberland County,
Cumberland, Virginia.

My Dear Mr. Crawley:
I am in receipt of your letter of May 18, from which I quote as follows:

"On the 10th day of March, 1938, I issued a marriage license to a couple, which said license was returned on the following day without the ceremony being performed. I understand that the same couple expects to be married soon. Can the same license be used, or shall I issue another license and send in old (used wafer) as provided under section 5074, for mutilated wafers?"

I can find nothing in the statutes relating to the issuance of marriage licenses which requires that the ceremony be performed within any specific time after the license is issued.

I am of opinion, therefore, that when the couple to which you refer desires to be married, they may use the license which you issued them. The Bureau of Vital Statistics suggests that a report of the issuance of the license be made to it with the advice that the ceremony has not yet been performed, but giving as near as possible the date when it will be performed.

Very sincerely yours,
Abram P. Staples,
Attorney General.

MARY WASHINGTON COLLEGE—Funds—Financing Certain PWA Project—Legality of Method.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 31, 1939.

Dr. Morgan L. Combs, President,
Mary Washington College,
Fredericksburg, Virginia.

My Dear Doctor Combs:
This is in response to your request for my opinion upon the question whether or not the financing of the administration building and the new dormitory building of your College is in conformity with the provisions and requirements of the laws and statutes of Virginia.

I will set out below two separate statements which I have received from Mr. Edgar Woodward, Treasurer of the Mary Washington College, one of which reflects the cost of construction and the source from which the same is to be paid with respect to the administration building, and the other contains the same information with reference to the dormitory building.
### ADMINISTRATION BUILDING

**Cost of Construction**

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction contract price</td>
<td>$263,459</td>
</tr>
<tr>
<td>Cost of equipment</td>
<td>$20,500</td>
</tr>
<tr>
<td>Cost of land</td>
<td>$3,000</td>
</tr>
<tr>
<td>Architects' fees</td>
<td>$14,199</td>
</tr>
<tr>
<td>Legal expenses</td>
<td>$150</td>
</tr>
<tr>
<td>Advertising of bids</td>
<td>$100</td>
</tr>
<tr>
<td>Interest during construction</td>
<td>$5,500</td>
</tr>
<tr>
<td>Reserve for contingencies</td>
<td>$3,343</td>
</tr>
<tr>
<td><strong>Total cost of project</strong></td>
<td><strong>$310,251</strong></td>
</tr>
</tbody>
</table>

**Sources from Which Cost is Payable**

<table>
<thead>
<tr>
<th>Source</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceeds from sale of bonds</td>
<td>$138,342</td>
</tr>
<tr>
<td>PWA Grant</td>
<td>$112,909</td>
</tr>
<tr>
<td>Supplemental grant</td>
<td>$26,550</td>
</tr>
<tr>
<td>To be transferred when needed from maintenance and operation appropriation pursuant to authorization of the Governor</td>
<td>$32,450</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$310,251</strong></td>
</tr>
</tbody>
</table>

Note: Attached is a copy of a letter from the Governor dated November 10, 1938, authorizing the transfer of $59,000 for the purpose of financing the above project if and when needed. The amount available under this letter was reduced by the sum of $26,550 when the supplemental grant was awarded, leaving now available pursuant to the said authorization the sum of $32,450, as above indicated.

### DORMITORY BUILDING

**Cost of Construction**

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction contract price</td>
<td>$140,478.00</td>
</tr>
<tr>
<td>Advertising bids</td>
<td>$50.00</td>
</tr>
<tr>
<td>Engineering and architect fees</td>
<td>$7,150.00</td>
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<tr>
<td>Legal fees</td>
<td>$100.00</td>
</tr>
<tr>
<td>Contingency reserve</td>
<td>$1,428.25</td>
</tr>
<tr>
<td>Interest and sinking fund requirements</td>
<td>$3,965.00</td>
</tr>
<tr>
<td>Equipment</td>
<td>$1,000.00</td>
</tr>
<tr>
<td><strong>Total cost of project</strong></td>
<td><strong>$154,171.25</strong></td>
</tr>
</tbody>
</table>

**Sources from Which Cost is Payable**

<table>
<thead>
<tr>
<th>Source</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceeds from sale of bonds</td>
<td>$82,706.25</td>
</tr>
<tr>
<td>PWA Grant</td>
<td>$67,500.00</td>
</tr>
<tr>
<td>To be transferred when needed from maintenance and operation appropriation pursuant to authorization of the Governor</td>
<td>$154,171.25</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$154,171.25</strong></td>
</tr>
</tbody>
</table>

Note: The original construction contract price was $143,900. This was in excess of the amount permissible under PWA regulations and by agreement between the College, the contractor, and the PWA authorities, the amount of the contract price was reduced to $140,478, and cer-
tain alterations made in the original plans and specifications to justify such reduction. There is attached hereto a copy of the approved change order showing the consent of the PWA authorities to the reduction in the contract price above mentioned. The item of $3,965, shown on the above statement as being available by transfer from the maintenance and operation fund of the College, has been authorized by two letters from the Governor of Virginia, copies of which are hereto attached.

The attorneys representing the Mutual Benefit Life Insurance Company of Newark, New Jersey, have requested my opinion upon the authority of the Governor to authorize the transfers of funds hereinabove indicated from the operation and maintenance account of the College to be used for the purposes denoted in the above statement.

Section 56 of the Appropriation Act of 1938 (Acts 1938, pp. 960-961) contains the provision hereinafter quoted:

"* * * authority is hereby given to the governing board of any State department, institution or other agency, * * * to transfer, within the respective department, institution or other agency, any such appropriations from the object for which specifically appropriated or set aside to some other object deemed more necessary in view of later developments, subject, however, in every case, to the consent and approval of the Governor, in writing, first obtained; * * * ."

It is further provided, however, "that any State institution may, with the written consent and approval of the Governor first obtained, spend, in addition to the amount herein appropriated, out of the special revenues of such institution, any additional special revenues paid into the State treasury to the credit of such institution, where later developments are believed to make such additional expenditure necessary."

I am advised by your Treasurer, Mr. Woodward, that the revenues which have been received, and which will be received, from the operation of the College during the biennium will be more than sufficient to provide for the operating and maintenance expenses of the College, and also for the transfers authorized by the Governor as hereinabove indicated. In the event that he should be mistaken in his opinion in this matter, however, section 51 of said Appropriation Act of 1938, at page 958, authorizes the institution, with the approval of the Governor, to borrow any additional funds which may be necessary in meeting any deficit which may be incurred.

Some question has been raised also as to whether the item of $1,000 for equipment will be adequate to equip the new dormitory. At page 901 of the 1938 Appropriation Act there appears an appropriation of $5,000 for additional equipment for said College, and at page 940 of said Act another appropriation of $25,000 for the same purpose. I am advised that it is the purpose of the College authorities to utilize so much of this appropriation as may be necessary to supplement the $1,000, already provided for, in order to properly equip the said dormitory. In my opinion, there is no objection to the use of the money thus appropriated for this purpose.

I am further of the opinion that the provisions of the said Appropriation Act hereinabove referred to confer ample authority upon the Governor to authorize the transfer of the funds as hereinabove set out for aiding in the construction of the administration building and the dormitory building.

I do not construe the 1933 Act, pursuant to which the bonds hereinabove referred to are issued (Acts 1933, p. 83), as prohibiting money in the general treasury from being used in the construction of the projects contemplated by said Act, although the Act is clear in its provisions that the General Assembly shall be under no moral or legal obligation to provide funds for this purpose. Furthermore, the provisions of the 1938 Appropriation Act were passed after the 1933 Act, and the authority conferred upon the Governor and institutional
authorities, as contained in the language above quoted from the 1938 Act, is not made subject to any exception with respect to such projects, but, in my opinion, embraces all of the phases of proper institutional activities.

I am advised that prospective purchases of the bonds which have been issued and sold, and from which a part of the moneys set out in the statements hereinabove contained have been derived, have questioned the legality of the use of funds from the State Treasury to aid in the consummation of said projects. It is my opinion, however, that the objection is not well taken, that the use of the funds has been legally and properly authorized, and that same are now available under the laws of Virginia for expenditure by the proper authorities of the institution for the completion of the administration building and dormitory building projects of the Mary Washington College.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MECHANICS—Liens for Work on Personal Property—Possession.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 8, 1938.

HONORABLE W. HOWARD MCCLINTIC,
Trial Justice,
Juvenile and Domestic Relations Court,
Warm Springs, Virginia.

DEAR MR. MCCLINTIC:

In your letter of July 2, you ask if a person loses a mechanic's lien if they allow an automobile to be removed from the garage where it has been repaired, and whether he may file a mechanic's lien under the general mechanic's lien statute for repair and labor furnished.

Section 6443 of the Code of Virginia provides that:

"Every mechanic, who shall alter or repair any article of personal property at the request of the owner of such property, shall have a lien thereon for his just and reasonable charges therefor and may retain possession of such property until such charges are paid."

Such lien may be enforced in accordance with the provisions of section 6449. This section provides that, if the debt be not paid within ten days after it is due and the value of the property affected by the lien does not exceed $20, the person having the lien may sell such property by public auction, after due advertisement and notice to the owner, and apply the proceeds to the satisfaction of the debt and expenses of the sale, and the surplus he shall pay to the owner of the property; if the value of the property is more than $20, he may apply by petition to any justice, or, if the value of the property be over $300, to the circuit or corporation court, to have the debt and lien established and the property sold by the sheriff or constable.

In most of the states there are statutes giving to mechanics, artisans and others who bestow labor on personal property a lien therefor. The purpose of these statutes is, in general, to extend the common law lien in respect to persons who can acquire such a lien and to give an effectual remedy for its enforcement. In a few states the lien is extended so that it may be availed of within a limited time after the property has been delivered to the owner, but, generally, these statutes, in most respects, are merely declaratory of the common law and must be interpreted in accordance with its principles. Especially is that so as respects the necessity of retaining possession of the property in order to retain a lien upon
it. See Jones, Liens, 749; McDearmid v. Foster, 14 Ore. 417, 12 Pac. 813, 8 C. J. Secundum, 296, and cases cited.

There appear to be no Virginia cases construing the statutes mentioned above, but, since the lien under this statute is of the same nature as the common law lien given to those who repair personal property, and merely gives a remedy for its enforcement by sale, after notice, but makes no mention of retention of the lien after loss of possession, it is the opinion of this office that this lien is dependent upon possession and is waived when the lienor voluntarily parts with possession. See Clark Bros. and Company v. Pou (C. C. A. Va.), 20 Fed. (2d) 74, which was decided after these statutes were in effect, and, though making no reference to them, held that possession of the property was essential to the lien.

There is no provision in the statutes for the filing of a mechanic's lien by one repairing personal property similar to the provisions dealing with a perfection of a lien by one furnishing labor and material for the construction or repair of a building.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MEDICAL COLLEGE OF VIRGINIA—Special Obligations—Power to Incur.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., AUGUST 5, 1938.

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

DEAR DOCTOR SANGER:

This is in response to your request for my opinion upon the authority of the Board of Visitors of the Medical College of Virginia to borrow money for the purpose of meeting the requirements of a proposed grant from the Federal Public Works Administration of the United States in connection with the construction and erection of a proposed new hospital under the following circumstances:

It is proposed that the Board of Visitors shall borrow this money from the banks in the city of Richmond, with the understanding that same shall be repaid from donations, devises, bequests and other sources which impose no obligation upon the State.

Section 4 of the Charter of the Medical College of Virginia, which appears in the Acts of the General Assembly of 1916, page 857, contains the following provisions:

"The Board of Visitors shall manage the affairs of the corporation, care for its property, conduct its business, control its finances and shape its policy."

It is my opinion that under the foregoing provisions of the Charter the Board of Visitors has authority to enter into a contract along the lines proposed.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
MOTOR VEHICLE LAW—Chauffeurs' Licenses—Driver of Truck Licensed for Hire Cab but not so Used.

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

HON. W. HOWARD MCCLINTIC,
Trial Justice, Bath County,
Warm Springs, Virginia.

DEAR MR. McCLENTIC:
We are in receipt of your letter dated March 14th requesting the opinion of this office upon a question which you state to be as follows:

"Please give me a ruling upon the following: John Doe owns a truck carrying a CH license, his son is driving his truck, hauling products of John Doe. Is his son required to have chauffeur's license?"

From your statement, we take it that the truck in question although carrying a for-hire license is not as a matter of fact being operated for-hire, but merely for the transportation of the owner's products. This being true, it would not be necessary for the owner's son to procure a chauffeur's license unless he is employed by his father for the principal purpose of operating a motor vehicle.

Section 2154-170, sub-section (a) of the Virginia Code defines the term "chauffeur" as follows:

"(a) 'CHAUFFEUR': 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."

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAW—Driving After License Suspended—"Drunken Driving"—Punishment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 5, 1938.

HON. R. TURNER JONES,
Commonwealth's Attorney,
Highland County,
Monterey, Virginia.

DEAR MR. JONES:
Your letter of June 28, requesting my opinion relative to the penalty proper to be imposed upon persons convicted of operating motor vehicles during a period for which their license stands revoked, has been received.

As stated in your letter, both section 4722 of the Code of Virginia (Michie's Code 1936) and section 2154(198) appear to bear on this subject.

Section 4722, which is an Act of the General Assembly of Virginia of 1934, (chapter 144, Acts of 1934) provides in part:
REPORT OF THE ATTORNEY GENERAL

"... If any person so convicted shall during the time for which he is deprived of his right so to do, drive, or operate any such vehicle, conveyance, engine or train in this State, he shall be guilty of a misdemeanor; ..."

Section 2154(198), which is section 30 of chapter 385 of the Acts of the Assembly of 1932, reads as follows:

"Penalty for driving while license suspended or revoked.—Any person convicted of a violation of section twenty-eight of this act shall be punished by imprisonment in jail for a period not less than two days nor more than six months and there may be imposed in addition thereto a fine of not more than five hundred dollars."

In this connection, I think it necessary to also consider section 2154(196) which is section 28 of chapter 385 of the Acts of the Assembly of 1932, and reads as follows:

"Unlawful to drive while license suspended or revoked.—Any person whose operator's or chauffeur's license has been suspended or revoked, as provided in this act, and who shall drive any motor vehicle upon the highways of this State while such license stands suspended or revoked, shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in section thirty of this act."

Taking together sections 2154(196) and 2154(198), it is provided that any person whose license to operate motor vehicles has been suspended or revoked, "as provided in this act", and who shall drive any motor vehicle upon the highways of this State while such license stands suspended or revoked, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment in jail for a period of not less than two days, etc.

On the other hand, chapter 144 of the Acts of 1934 (section 4722, Michie's Code 1936) commonly known as the drunken driving act, provides in the first place that it shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcoholic beverages or drugs; and, second, that the judgment of conviction for an offense under this act, "shall of itself operate to deprive the person convicted of the right to drive or operate any such vehicle, conveyance, engine or train in this State, etc."

And as quoted above, this act further provides that any person who shall drive while his rights to drive or operate any such vehicle stand revoked under the provisions of this act shall be guilty of a misdemeanor.

It is my opinion that the point under consideration turns upon the question of which of the two acts the accused person's right to drive was revoked under. In the case of a revocation of license for drunken driving, it appears to me that the revocation of license is had as a matter of fact under the provisions of section 4722, for this act provides that a judgment of conviction thereunder "shall of itself" operate to deprive the person convicted of the right to drive. That this is true I think is confirmed by the fact that a revocation for driving while under the influence of liquor, according to the provisions of chapter 385 of the Acts of 1932, which is the Virginia Operators' and Chauffeurs' License Act, is under section 17 of that act (Michie's Code, 2154(186)), and can only be after the Director of the Division of Motor Vehicles has received from the Court the record of conviction, which is necessarily some time subsequent to the actual final disposition of the case. In the meantime, the revocation provided for under section 4722 has taken effect as of the time of conviction.

Therefore, since the actual revocation in cases based upon driving while under the influence of liquor is had under section 4722, and sections 2154(196) and 2154(198) are predicated upon revocations and suspensions as provided for in that act (Virginia Operators' and Chauffeurs' License Act), it is my opinion that any-
one charged with driving while his license is revoked by reason of conviction for driving while under the influence of liquor should be proceeded against under the provisions of section 4722.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAW—"For-Hire" Trucks—Exemptions—Delivering Lime to Farmers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 4, 1939.

HON. A. E. COOLEY,
Trial Justice for Carroll County,
Hillsvile, Virginia.

DEAR MR. COOLEY:

We have your letter of March 30th requesting the opinion of this office with reference to the proper license plates for motor vehicles engaged in transporting time, for compensation, hire and making delivery of the same direct to various farmers in your county.

As we understand your letter, it is admitted that compensation is received by the haulers for this service. That being true, it necessarily follows that the operators should pay a for-hire license fee. The sole remaining question is: should they be issued a permit or warrant card by the State Corporation Commission, or are they entitled to receive from the Commission an exemption card. Section 2, subsection (h) of the Virginia Motor Carriers’ Act (4097y-(2) Michie’s Code 1936), reads as follows:

“Section 2. This act shall not be construed to include: (h) Motor vehicles while used exclusively in carrying livestock, poultry, poultry products, buttermilk, fresh milk and cream, meats, butter and cheese produced on the farm, fish (including shell-fish), slate, horticultural or agricultural commodities (not including manufactured products thereof), and forest products, including lumber and staves (but not including manufactured products thereof), or in the transportation of farm supplies being delivered to a farm or farms;”

If lime is to be considered to be embraced in the term “farm supplies”, it would appear that the last clause from the above quoted statute places the operation in question in the exempted class, and since lime is generally used by the farmers of the State as a fertilizer, it is my opinion that when an operator is engaged exclusively in the delivery of this commodity to farms or farmers, the above wording of the statute applies and the operator is entitled to receive from the Corporation Commission an exemption card. This removes the operator from under the requirements of the Motor Vehicle Carriers’ Act, including the filing of insurance, but does not relieve the operator from the responsibility of procuring the proper for-hire license tags.

Very sincerely yours,

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

MOTOR VEHICLE LAW—Licenses—School Buses—Fictitious Transfer to School Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 27, 1933.

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

MY DEAR GOVERNOR PRICE:

I am in receipt of your letter of September 22, enclosing a letter addressed to you by Colonel Marion S. Battle, Director of the Division of Motor Vehicles, together with a memorandum on the subject of licensing school buses.

The problem which seems to confront Colonel Battle is a case where title to the chassis or body of the bus, or both, is passed to the School Board of the county for a nominal consideration, the real ownership being in the individual private contractor, the passage of title being made to the School Board for the purpose of securing free license tags.

As suggested in Colonel Battle's memorandum, this office had occasion to pass on this practice in a letter to Mr. T. Benton Gayle, Division Superintendent of Schools, Fredericksburg, under date of April 8, 1938. In that opinion I stated as follows:

"In my opinion, the practice of a school board taking title to a bus or truck of an individual contractor for transportation of school pupils for a nominal consideration, without obtaining bona fide ownership of such school bus or truck, is an irregular practice and should not be followed by school boards. This opinion is based upon the assumption that school boards only take nominal title, but no real property title, to the buses or trucks transferred by independent contractors to such school boards for the sole purpose of obtaining free licenses for such buses or trucks when, in fact, the contractors do not convey to the school boards the ownership of such buses or trucks. It is only when ownership passes with title that free tags should be issued to school boards."

This opinion is referred to in Colonel Battle's memorandum, and I am of opinion that the conclusion reached therein, namely, that free license tags should not be issued to the School Board under these circumstances, is correct.

If my opinion is correct, the only thing remaining to do is to determine the method which should be followed in requiring that proper license tags be purchased. This would seem to involve more a question of policy than of law. I presume that Colonel Battle has his own views as to the method that he proposes to follow, but, if he so desires, I shall be only too glad to confer with him on the subject at any time that is mutually convenient.

Yours very sincerely,

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

MOTOR VEHICLE LAWS—Parallel Ordinances—Fairfax County.

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

HON. PAUL E. BROWN,
Attorney for the Commonwealth,
Fairfax, Virginia.

My Dear Mr. Brown:

I am in receipt of your letter of August 17.

The effect of your first question is to ask whether Fairfax county comes within the scope of the following language contained in section 52 of the Motor Vehicle Code of Virginia, as amended in 1936 (Acts 1936, p. 70):

" * * * provided, however, that nothing in this subsection shall apply to the authorities or the ordinances, rules and regulations adopted by the authorities of any county which adjoins a city within or without this State having a population of one hundred and twenty-five thousand or more * * * ."

You state that Fairfax county "at one point touches a corner of the District of Columbia." The city of Washington is the only city outside of this State which has a population of 125,000 or more which a county in this State could possibly adjoin. If it is a fact that Fairfax county touches the District of Columbia, I am of the opinion that it comes within the scope of the language which I have quoted. One of the well recognized definitions of the word "adjoin" is "to be in contact with". See Webster's New International Dictionary, Second Edition, page 33. If Fairfax touches the District of Columbia, it is certainly in contact with it.

You next inquire whether Fairfax county comes within the scope of the following language contained in chapter 55, Acts 1938 (Acts 1938, p. 107), relative to the powers of boards of supervisors in certain counties in connection with regulating the equipment, operation, lighting or speed of motor vehicles:

"The boards of supervisors of counties adjoining and abutting any city, within or without this State, having a population of one hundred and twenty-five thousand or more, as shown by United States census, and the boards of supervisors of counties adjoining any county which adjoins and abuts any such city and has a density of population of five hundred or more to the square mile * * * ."

The quoted language contains two classifications, and I am of opinion that for the reasons above stated Fairfax comes within the first and possibly also comes within the second classification.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Honorabie L. McCarthy Downs,
Auditor of Public Accounts,
Richmond, Virgino.

My Dear Mr. Downs:
I am in receipt of your letter of August 22, which I quote in full:

"I have your letter of August 5, 1937, as follows:

"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.'"

"I have interpreted your opinion to mean that if any person is arrested by a State motor vehicle officer that person shall be tried under the State laws and that where a State officer makes an arrest, whether the case be tried under State law or local ordinance, any fine collected in such case shall be paid into the State treasury.

"In view of our conversation this morning over the telephone, I should like for you to advise me whether or not I have interpreted your opinion correctly and, if not, please advise me as to the correct interpretation."

I beg to advise that, in my opinion, you have not interpreted my letter of August 5, 1937, correctly. It was never intended by this office to express the view that, where a fine is paid following a conviction for violation of a county ordinance, the mere fact that the officer making the arrest happens to be a State officer will entitle the State to receive the amount of the fine from the county, and have the same paid into the State Treasury to the credit of the literary fund.
REPORT OF THE ATTORNEY GENERAL

The test to determine whether the fine shall be paid into the State Treasury or into the county treasury is to be found in the warrant itself. If the warrant charges a violation of the State statute, the fine should be paid to the State. If it charges a violation of a county ordinance, the fine should be paid to the county. If the arrest is made by a State officer and the warrant is not specific as to whether the offense charged was a violation of the State law or the county ordinance, then in my opinion, where the arrest is made by a State officer, the proceedings should be conducted under the State statute.

I have frequently expressed the opinion that it is the duty of a State officer in applying to a justice for the issuance of warrants for violations of traffic laws, where the act complained of is in violation both of a county ordinance and of a State statute, to request the charge in the warrants to be stated for violation of the provisions of the State statute. Where the officer does not do this, however, and the warrant is issued for a violation of the county ordinance, the fine paid pursuant to conviction on such a warrant should be paid to the county.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAWS—Parallel Ordinances—Warrants for Violations of, and Disposition of Fines.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 4, 1938.

HONORABLE L. BROOKS SMITH,
Trial Justice,
Accomac, Virginia.

MY DEAR JUDGE SMITH:

I have your letter of October 31, in which you refer to your previous letter to me under date of September 23, and my reply thereto of September 29, relating to the proper disposition of fines received from convictions for violations of the motor vehicle laws.

You state that there has been an understanding among some of the Trial Justices that this office has ruled that, where an arrest is made by a State motor vehicle officer for violation of the motor vehicle laws, the fine should go to the county in all cases where the county has a local ordinance paralleling the State Law.

This understanding is incorrect. I did rule sometime ago that, in cases which occurred some considerable time in the past, where the State officer had sworn out a warrant for violation of the county ordinance and the records so showed, this would entitle the county to receive the fine, although the State officer was not performing his duty under the provisions of section 2154(169) of Michie's 1936 Code, which I quoted to you in my letter of September 29.

In my opinion, it is the duty of the officer to swear out the warrant for violations of the State law in all such cases, in view of the statute referred to.

It is further my opinion that it is the duty of the Trial Justice, where a warrant for violation of the motor vehicle laws is sworn out by a State officer, to charge in the warrant a violation of the State law and not a violation of the county ordinance, even though there may be in existence a county ordinance which would be violated by the same act.

Generally speaking, of course, where a person is convicted under a warrant charging a violation of the State law, the fine should go to the State, and, where he is convicted under a warrant charging a violation of the county ordinance, the fine should go to the county.
The question at issue is not so much what should be done with the fines in cases of the kind mentioned, but how the original warrant should be issued. Where a sheriff or other local officer makes an arrest, he is at liberty to swear out the warrant for a violation of either the county ordinance or the State statute. On the other hand, where an arrest is made or a person is accused of a violation of the motor vehicle laws by a State police officer, it is the duty both of the officer and of the Trial Justice to see that the warrant charges only a violation of the State law and not a violation of the county ordinance.

You have sent me with your last letter a form of warrant which you state it is proposed to use in the future in connection with cases of this kind. Under this form, the act complained of would be charged as having been committed "against the peace and dignity of the Commonwealth of Virginia and in violation of the laws of Accomack County".

The effect of the foregoing is to charge the accused with violating both the statute and the ordinance. This, I think, cannot be done. If a State officer makes the complaint, then there should be stricken from the form of warrant above mentioned the following: "and in violation of the laws of Accomack County." On the other hand, if a sheriff or other local officer desires to charge a violation of the local ordinance, there should be stricken from the form of warrant you employ the following: "against the peace and dignity of the Commonwealth of Virginia and".

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAW—Reckless Driving—What Constitutes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 14, 1939.

HON. ROBERT D. MORRISON,
Assistant City Attorney,
City Hall,
Lynchburg, Virginia.

DEAR MR. MORRISON:

This is to acknowledge receipt of your letter written under date of February 9th requesting the opinion of this office concerning the construction of Section 2154(108) in regard to its application to violation of the right of way laws.

Section 2154 (108), subsection (a) reads as follows:

"Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly, or at a speed or in a manner so as to endanger or be likely to endanger life, limb or property of any person shall be guilty of reckless driving."

The point raised in your letter is whether this particular part of the statute would apply to a case where a person violated some one or more of the statutory provisions concerning the right of way upon the highway where no other element of recklessness entered into the case.

It is expressly provided in paragraph 8 of subsection b of the same section that a violation of the right of way law set up by this paragraph constitutes reckless driving. With this exception, it is my opinion that under the statute
as at present written, the act of reckless driving would not be complete under the facts of a case as stated in your letter. I think it was the intention of the Legislature to expressly so provide. In other words, a violation of the right of way laws, as a violation of the speed laws, taken alone constitutes now the commission of a plain misdemeanor. If you add to this additional facts showing that someone was endangered or was likely to be endangered, then the accused would be guilty of reckless driving in contemplation of subsection (a).

Under the facts of the case as cited in your letter, it is my opinion that the correct practice would be to proceed under the provisions of 2154(109).

Very truly yours,

ABRAM P. STAPLES.
Attorney General.

MOTOR VEHICLE LAW—School Bus Drivers—Persons Aged Sixteen to Eighteen—Chauffeur’s License.

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

Honorabe A. D. Johnson,
Commonwealth’s Attorney,
Isle of Wight County,
Windsor, Va.

Dear Mr. Johnson:

Pursuant to your request made yesterday by telephone for my opinion in respect to the licensing of school bus drivers between the ages of sixteen and eighteen years, I wish to point out that the statute provides as follows:

Section 2154-175 Michie’s Code 1938. “It shall be unlawful (a) for any person, whether licensed under this act or not, who is under the age of eighteen years to drive a motor vehicle while in use as a school bus for the transportation of pupils to or from school, provided, however, such school bus may be operated by a person between the ages of sixteen and eighteen years, with the approval of the school board served by such bus, *. * *.”

In my opinion we cannot escape the conclusion that the legislature, in incorporating the above language in the statute, intended to create an exception as to drivers between the ages of sixteen and eighteen years when approved by the school board served.

Section 2154-174 provides, without exception, that no chauffeur’s license shall issue to any person under the age of eighteen years.

“* * * and no chauffeur’s license shall be issued to any person under the age of eighteen years.”

Section 2154-170, sub-section (a), defines a chauffeur as being

“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.”

Therefore, taking into consideration the provisions of the statute as above quoted, it is my opinion that in order to give full effect to the intention of the legislature the law should be construed so as to create an exception to the general rule insofar as school bus drivers are concerned. It is further my opinion that
in order to meet the situation, drivers between the ages of sixteen and eighteen years, having the approval of their school board, should be issued an operator's license rather than a chauffeur's license. In so doing there will be no violation of the mandatory provision contained in the statute providing that a chauffeur's license shall not be issued to any person under the age of eighteen years. I do not consider that a person employed merely for the purpose of driving one particular vehicle and then only within the confines of one county should come within the classification of a chauffeur. A chauffeur's license, when issued, entitles the holder to operate every type of motor vehicle throughout the state and for any individual, firm or corporation who desires to secure his services.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAW—Trailers—Portable Sawmill.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 22, 1939.

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

DEAR MR. THOMPSON:

I have your letter of April 18 requesting my opinion with reference to whether the owner of a wood saw, which is transported from place to place attached to the rear of a truck or car, should be required to pay the usual trailer license tax upon the same.

Section 2154-49, sub-section (w) of the Code of Virginia defines a "trailer" to be:

"(w) 'Trailer'—Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle."

Sub-section (x) of the same section also defines a "vehicle" as follows:

"(x) 'Vehicle'—Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

In my opinion, a portable wood saw should not be considered to be a vehicle in contemplation of the statute but as a unit of machinery, and therefore, would not be subject to the tax imposed upon vehicles.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
MUNICIPAL CORPORATIONS—Powers of—Regulations Affecting State Activities—Building Codes and Permits.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., December 16, 1938.

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

My Dear Doctor Sanger:
I have before me your letter of December 15, from which the following facts appear:

The new hospital being built by the Medical College is now in the course of construction, and your architects, as well as the insurance underwriters, have approved as safe and proper a certain type of construction, the details of which it is unnecessary to set out in this letter. You submitted to Honorable H. P. Beck, the city building inspector, these plans approved by the architects and underwriters as aforesaid, and requested his approval thereof. The ordinances of the City of Richmond require that all buildings constructed in the City conform to the Richmond building code and, prior to construction, shall be approved by the building inspector.

You request my opinion upon the question whether or not the State authorities who are charged with the duties and the responsibilities of constructing the new hospital are required, as a matter of law, to conform to the Richmond building code, and the interpretations thereof by the building inspector, or whether said building code, and the ordinances requiring the inspector's approval, are legally applicable to the construction of the new hospital.

You further state in your letter that compliance with the Richmond building code in constructing the clinic building, and other buildings in recent years, has required the expenditure of several thousand dollars more than was considered necessary by the architects for the construction of a perfectly safe, suitable, and proper building.

The City of Richmond is a municipal corporation created by an Act of the General Assembly of Virginia, and derives its powers by virtue of the statute creating it and conferring such powers upon it. The charter of the City of Richmond, which is the statute delegating powers of this nature to the City, is, in my opinion, broad enough to confer the power to prescribe and enforce building regulations and restrictions of the type contained in the Richmond City Building Code.

However, it is a well established rule of the old English common law that the sovereign is not bound by any statute unless the same is in express terms made to extend to the sovereign. This common law rule is equally applicable to our State government, and is founded upon the grounds of expediency and public convenience. It is presumed to be the legislative intent to exclude the state from the operation thereof, unless same is made to apply to the state in express words. (25 R. C. L. 783-5.) This rule has been uniformly applied by the courts in cases involving the construction of buildings by the state, or by a state agency, which in law is regarded as the state itself. The Supreme Court of our State has held that the Medical College of Virginia is a State agency within this legal principle.

The precise question here involved has not been presented to our Supreme Court, but the highest courts of other states have uniformly held that the legislative grant of police power to a municipal corporation will not be deemed a cession of the legislature's prerogative to govern for itself the institutions of the state which may be located within such municipality, unless it may be clearly gathered from the charter granted by the legislature that such effect was intended. (9 Am. Jur. 202, and cases cited.) The courts have accordingly held that in such cases city building codes and regulations have no application whatever to the construction
by the state, or its governmental agencies, of buildings located within the munici-

pality.

The charter of the City of Richmond does not contain any express provision of any kind extending the power of the City of Richmond to regulate building con-

structions to embrace State buildings located within the municipality, nor is there any language from which it can be inferred that any such power was intended to be given to the City in so far as the regulation of the State itself is concerned. The general grant of power must be construed as extending only to the regulation of buildings constructed by others than the State.

It follows from the foregoing that I am of the opinion that the Richmond City Building Code has no application whatever to the construction by the State of build-

ings to be used for State governmental purposes, or to be used in the exercise of governmental functions, and that the city building inspector is without jurisdiction to exercise any control or supervision over the construction of such buildings by the State, or by the Medical College of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MUNICIPAL CORPORATIONS—State Taxation—Writ Taxes—Suits by City.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., November 3, 1938.

HON. LUTHER LIBBY, Clerk,
Law and Equity Court,
Richmond, Virginia.

My Dear Mr. Libby:

I am in receipt of your letter of October 24, in which you ask if the City of Richmond should be assessed with the writ of tax prescribed by section 126 of the Tax Code in the case of a notice of motion for judgment which the City is filing in your court for the collection of certain city taxes.

It is plain, and this office has frequently so held, that the charge imposed by section 126 of the Tax Code is a tax and not a fee. The general rule is that a statute will not be construed to tax the property of a municipality unless such an intention is clearly manifested by the statute. See 61 C. J. at p. 369. This is true although the State unquestionably has power to tax the property of its political subdivisions in the absence of a constitutional provision forbidding such a tax. In Commonwealth v. Richmond, 116 Va. 69, at p. 77, our court said:

"Judge Cooley, in his work on Taxation, (3rd Ed.) pp. 263-4, says: 'Before noticing the exemptions expressly made by law, it will be convenient to speak of some which rest upon implication. Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the State and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless tax. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is, therefore, a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the State and by all its municipalities for
governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact."

In my opinion, the rule as above stated is applicable to such a tax as is here in question. Indeed, the equities would seem to be still more on the side of the city in a case such as this when it is considered that the City of Richmond not only pays a part of the salary of the judge of the Law and Equity Court but furnished the quarters of the court and supports the court in other ways. Under these circumstances, to require the City of Richmond to pay a writ tax on a suit instituted by it in a court in a large measure supported by the City would be quite a departure from the rule that a state statute will not be construed to impose a tax on a municipality unless such intention is clearly manifested.

My conclusion is, therefore, that section 126 of the Tax Code of Virginia should not be construed so as to impose a writ tax upon the City of Richmond in the case of a suit instituted by the City.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

NEGOTIABLE INSTRUMENTS—Endorsements—Form—Payee Making "His Mark".

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 28, 1939.

Dr. William H. Stauffer,
Commissioner of Public Welfare,
Richmond, Virginia.

My Dear Dr. Stauffer:

I am in receipt of your letter of April 14, in which you inquire if under Virginia law it is necessary for an endorsement on a check, where the signature is identified by the "mark" of the payee, to have two subscribing witnesses to the signature in this way.

There is no statute in Virginia prescribing the manner in which the signature of a person endorsing a check may be proved, nor have I been able to find a decision of our Court of Appeals on the subject. However, the question of what constitutes a signature in the case of a holographic will has been passed on by our Supreme Court of Appeals. The test is, whatever symbol is used, that it must appear that it "is intended as a signature". The signature may be proved by any admissible testimony. See Pilcher v. Pilcher, 117 Va. 356.

In my opinion, the proof of signature as an endorsement on a check is analogous to the proof of signature to a holographic will, and I feel no hesitancy in saying that the law in Virginia is that an endorsement on a check may be proved by any competent testimony. It is, therefore, not requisite that two persons subscribe their names as witnesses to the endorsement. Certainly the opinion I am expressing herein is in accordance with long continued banking practices in this State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
NOTARIES—Jurisdiction.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 1, 1938.

HONORABLE OLIVER A. MURRY,
Notary Public,
Glen Allen, Virginia.

MY DEAR MR. MURRY:

This is in reply to your letter of October 28, in which you request my opinion upon whatever your commission as notary public for the county of Henrico confers on you authority to act as a notary in the city of Richmond.

It is my opinion that, under the provisions of section 2850 of the Code, you are authorized to act as a notary in the city of Richmond, since part of said city is located in the county of Henrico.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Notary Public as Member of School Electoral Board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JULY 13, 1938.

SENATOR ROBERT C. VADEN,
Gretna, Virginia.

DEAR SIR:

In your letter of June 11, you ask if the same person can serve as a member of the Electoral School Board and also as a notary public at the same time.

I find that my predecessor, Honorable John R. Saunders, expressed an opinion in a letter to the then Governor, under date of March 4, 1920, and ruled that a person could hold the office of notary public and be a member of the school trustee electoral board. I quote that letter:

"I am just in receipt of a letter from Miss McDougall, your assistant secretary, enclosing a letter from Mr. W. W. Pressley, of Clintwood, Virginia.

"Mr. Pressley states that he has been appointed a member of the electoral school board of Dickenson county, and that he is also a notary public. He desires to know whether or not he can hold both positions.

"I am of the opinion that his being a notary public will not conflict with his duties as a member of the electoral school board, and I know of nothing in the law which prohibits his holding both positions."

Section 653 of the Code of Virginia provides:

"In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or State officers, * * * ."

At the time the opinion quoted above was rendered, the law read as follows:
"In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of the attorney for the Commonwealth, the division superintendent of schools, and a resident qualified voter, who is not a county or State officer, * * * ."

Colonel Saunders was evidently of the opinion that, while a notary public is technically considered an officer of the State for some purposes, he is not such a county or State officer as is referred to by the statute, since he receives no salary from the State and his official duties are chiefly ministerial in nature and in no way conflict with his duties as a member of the electoral school board.

Colonel Saunders' opinion having been rendered about eighteen years ago, and the same having been acquiesced in by the General Assembly in reenacting the statute in substantially the same terms, I am of opinion that this long standing construction should be adhered to.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Compatibility of—County Treasurer as Notary Public.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 8, 1939.

Hon. W. M. Townsend,
City Treasurer,
South Norfolk, Virginia.

My Dear Mr. Townsend:
I am in receipt of your letter of March 6, in which you inquire if you as Treasurer of South Norfolk may also hold the office of notary public.

I call your attention to section 2702 of the Code, which prohibits county treasurers and certain other officers from holding any other office, elective or appointive, at the same time, but an exception is made for the office of notary public. It is clear, therefore, that a county treasurer may also hold the office of notary public, and I know of no State statute prohibiting a city treasurer from also holding the office of notary public.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Compatibility of—Chairman Local Board of Public Welfare as Judge and Commissioner of Election.

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

Hon. Hugh T. Estes,
Attorney for the Commonwealth,
New Castle, Virginia.

My Dear Mr. Estes:
I am in receipt of your letter of December 6, in which you ask if the Chairman of the local Board of Public Welfare, under the Public Assistance Act of 1938, may also be a judge and commissioner of election.
REPORT OF THE ATTORNEY GENERAL

Section 149 of the Code provides that no person shall act as a judge of election "who is a candidate for, or the deputy or employee of any person who is a candidate for, any office to be filled at such election, or who is the deputy of any person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof."

Section 84 of the Code is substantially to the same effect.

The Chairman of the local Board of Public Welfare is not an elective officer and I am, therefore, of opinion that he may also act as judge of election. There seems to be no provision of law which would prohibit the Chairman of the local Board of Public Welfare from acting as commissioner of election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Compatibility of—Member of School Board as Police Boat Captain and Deputy Inspector for Commission of Fisheries.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 24, 1939.

HONORABLE CHARLES B. GODWIN, JR.,
Commonwealth's Attorney for Nansemond County,
Suffolk, Virginia.

MY DEAR MR. GODWIN:

I have before me your letter of January 21. You request my opinion upon the question whether or not a person who holds a position as police boat captain and deputy inspector for the Commission of Fisheries is disqualified to act as a member of the school board of the county in which he resides.

Section 644(1) of Michie's 1936 Code prohibits any State officer, or the deputy of any such officer, from being chosen or allowed to act as a member of a county school board. Several exceptions are made to this prohibition, one of which is that an oyster inspector in Northumberland county may be allowed to act as a member of the county school board of said county. The effect of this exception, of course, is to treat the position of an oyster inspector as being a State officer within the meaning of the statute.

The question then arises as to whether or not a police boat captain or deputy inspector is likewise a State officer.

The positions of inspector and deputy inspector are provided for by section 3149 of the Code. The duties of the deputy inspector are stated to be the same as those of an inspector, and are provided for by the same section and also by section 3150. Each deputy inspector is required to qualify before the clerk of the circuit court of his county, or the clerk thereof in vacation, by taking the oath prescribed by law and entering into a bond of not less than $500 nor more than $5,000. He is authorized and required to collect all licenses, rentals, and other sums due within his district, and any fines assessed by him or placed in his hands for collection resulting from violations of the shellfish or fish laws, and he is invested with all of the powers of a county treasurer to enable him to collect the said rentals and fines; in the event of default, he is given power to remove and sell a sufficient quantity of shellfish from the leased ground to satisfy such rentals or taxes in his hands for collection.

The deputy inspector is further empowered, with or without warrant, to arrest any person or persons found violating any of the fish or shellfish laws, and to seize any vessel, boat, craft, motor vehicle conveyance or other thing used in violating
any of said laws, and is given the same authority as constables have to summon
the posse comitatus to aid in making arrests and seizures.

It will be observed that the powers conferred upon this officer are very broad
indeed, and are such as to leave no doubt that the deputy inspector is a State officer
in any view which may be taken of his powers and duties.

It follows from the foregoing that I am of opinion that a deputy inspector for
the Commission of Fisheries of Virginia, duly appointed and qualified as provided
by section 3149 of the Code, is a State officer within the meaning of the provisions
contained in section 644 (1), and therefore is prohibited from serving as a member
of a county school board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICERS—Oaths of Office—Ministers Authorized to Perform Marriages.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 22, 1938.

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

My Dear Mr. Thoma:
I am in receipt of your letter of September 20, in which you ask the following
question:

"Will you kindly advise me whether ministers of the Gospel who have
been authorized by the court to perform marriage are officers within the mean-
ing of section 34 of the Constitution of Virginia and section 269 of the Code
and are required to take the oath of office?"

Section 5079 of the Code provides that, when a minister of any religious de-
nomination shall present proof of his ordination to the judge of a court, such court
may make an order authorizing him to celebrate the rites of matrimony upon the
execution by the minister of a bond.

Section 34 of the Constitution provides that all officers, executive and judicial,
"elected or appointed", shall take an oath of office. Section 269 of the Code also
refers to "an officer of the State" taking an oath.

Manifestly, neither the judge of a court nor any other State official or body
appoints a minister. It is simply provided under the statute that the judge of a
court may authorize a minister to perform the rites of matrimony, but I do not
understand that this authorization by the judge would constitute a minister as an
officer "elected or appointed".

In my opinion, therefore, it is not necessary for a minister to take an oath of
office, for it does not seem to me that he holds any office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
OPTOMETRY—State Board—Re-examinations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., April 28, 1939.

Senator Gordon Barbour Ambler,
Attorney at Law,
Central National Bank Building,
Richmond, Virginia.

My Dear Senator Ambler:

This is in response to your request for my opinion upon the authority of the Virginia State Board of Examiners in Optometry to give a special examination to an applicant who has satisfactorily passed most of the subjects upon which he was examined, but has failed to pass two of them.

The sections of the Code relating to this subject are sections 1629 and 1630. Section 1630 provides that, if an applicant fails in only one subject, he may have one more examination at the next meeting of the board without any additional fee. Except as to this regulation, the question of examinations and the methods of conducting same, and whether the failure of a person to pass on two subjects should require a new examination on all of the subjects upon which he was previously examined, is one, in my opinion, within the general discretion of the examining board.

It follows, therefore, that I am of opinion that it is within the authority and discretion of the Board to hold a special examination on the particular subjects which the applicant failed to pass satisfactorily in his last examination.

I am further of opinion, however, that under section 1630 of the Code it will be necessary for the applicant to pay an additional fee in order for the Board to examine him on these two subjects.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

OVERSEERS OF THE POOR—Compensation—When Terminated.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 4, 1939.

Hon. C. C. Louderback,
Stanley, Virginia.

My Dear Mr. Louderback:

I am in receipt of your letter of December 29, in which you ask to what date the Board of Supervisors would be justified in paying an Overseer of the Poor. This office was abolished by an Act of the General Assembly of 1938 (Acts 1938, p. 214). The Act provides that the term of office of each Overseer of the Poor in office on the day immediately preceding the effective date of the Act shall expire on the effective date of the Act. The Act became effective on June 21, 1938. In my opinion, therefore, the Board of Supervisors may only pay Overseers of the Poor compensation provided for that officer by law up to the effective date of the Act.

Very sincerely yours,
ABRAM P. STAPLES,
Attorney General.
COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., December 5, 1938.

HONORABLE BENTLEY HITE,
Commonwealth's Attorney Montgomery County,
Christiansburg, Va.

MY DEAR MR. HITE:

I wish to acknowledge receipt of your letter of the 30th ultimo in which it is stated that Mr. P. F. Campbell plead guilty to a charge of operating a motor vehicle while under the influence of intoxicating liquor, that subsequently he was pardoned by the Governor of Virginia for this offense and is now again charged with a similar offense in your county, the question now being whether he should be prosecuted for a first or second offense under chapter 144 of the Acts of the General Assembly of 1934, upon which point you request the opinion of this office.

Chapter 144 of the Acts of 1934, section 2, reads as follows:

"Any person who violates any provision of this act shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars nor more than one thousand dollars or imprisonment for not less than one month nor more than six months, either or both in the discretion of the court or jury trying the same, for a first offense, and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted. Any person convicted of a second, or other subsequent offense under this act shall be punishable by a fine of not less than one hundred dollars nor more than one thousand dollars and by imprisonment for not less than one month nor more than one year, and no court shall suspend the sentence in any such case."

Under this statute the punishment imposed for a second offense is much more severe than for a first offense, this additional punishment not being applicable except for the existence of the previous crime. The necessary conclusion is that the punishment provided for a second offense is partly by reason of the commission of the first offense and partly by reason of the second offense. Unless both offenses had been committed this measure of punishment would not be applicable. The question propounded in your letter therefore, resolved itself into whether, under the Governor's pardon, it can be said the first offense in contemplation of the law is yet existing or whether it has been by pardon wiped out and eliminated.

The pardoning power vested in the state's chief executive is set forth in section 73 of the Constitution of Virginia:

"He shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offences committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment."

The case of Edwards v. The Commonwealth, reported in 78 Virginia, page 39, appears to be the leading Virginia authority. This case was decided in 1883 under similar constitutional provision in this respect as that above quoted. The facts in this case were that Edwards was convicted of a felony in the year 1881 for which he was granted a full pardon in April, 1882. In 1883 he was again convicted of a felony, sentenced to the penitentiary, whereupon information was
filed in the Circuit Court of the City of Richmond to the end that additional punishment might be imposed as provided for under the Code of 1873, chapter 195, section 25, which reads as follows:

“When any person is convicted of an offence, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years, in addition to the time to which he is or would be otherwise sentenced.”

The defendant Edwards entered a plea to this information to the effect that the Governor's pardon relieved him of all of the consequences attached to the first conviction; and the court in its opinion, after referring to the statute, the Constitution of Virginia, and opinions rendered by the Supreme Court of the United States, held that the additional punishment sought to be imposed was by reason of the two convictions but that the Governor's pardon had relieved him of the consequences of the first conviction and therefore, he should be relieved of the additional punishment. The court, in its opinion, said:

“And that additional punishment has been imposed in this case, not by reason of the sentence for the second offence alone, but in consequence of that sentence and the sentence in the former case. Both causes must exist together to produce the effect contemplated by the statute; in the absence of either, no case is made for the imposition of the additional punishment the statute prescribes. But as the first offence was in legal contemplation blotted out, and its consequences removed, by the pardon of the governor, it must be regarded, for the purposes of this case, as though it had never been committed.”

It does not appear that the rule of the Edwards case has ever been departed from in this state, and therefore, in my opinion it is controlling and since the prosecution for a second offense under chapter 144 of the Acts of 1934 must necessarily be based upon a previous conviction, and the previous conviction relied upon in the case under consideration having been blotted out by the governor's unconditional pardon, according to the rule in the Edwards case, it therefore, appears to necessarily follow that Mr. Campbell can only be prosecuted as for a first offense.

This office is advised that the pardon issued in this case was a full unconditional pardon, the pertinent wording in this respect reading as follows:

“Wherefore, I, James H. Price, Governor of the Commonwealth of Virginia, have, by virtue of authority vested in me, pardoned and do hereby pardon the said P. F. Campbell.”

Since it is the established practice of this office not to render any official opinion in connection with any case pending in court you will readily understand that this letter is written only as an effort to be of some assistance to you and is submitted only with the distinct understanding that it will not be quoted either to the Judge of your Court or any other person.

Sincerely yours,

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

PENSIONS—Families of Confederate Veterans—Comptroller's Duties With Respect to.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 9, 1938.

Honorabe James H. Price,
Governor of Virginia,
Richmond, Virginia.

Dear Governor Price:

Pursuant to your request in our recent conference, I have made a careful investigation and study of the statutes relating to the payment of pensions to the widows and daughters of Confederate Veterans. These provisions are contained in sections 2642 to 2672d, inclusive. The specific amounts to be paid to each class of pensioners are provided for in the appropriation bill itself.

The question about which you ask me to write you is whether or not, under these statutory provisions, any discretion is vested in the Comptroller, or other officer or officers administering the pension laws, to determine who shall or who shall not receive the pensions provided for.

I can find nothing in the statutes which vests in any officer any discretion where the application for the pension clearly comes within the prescribed requirements. Of course, the Comptroller is required to determine whether or not the information contained in the application entitles the applicant to a pension under the provisions of the act, and whether or not his application is executed in proper form and brings the applicant within the required qualifications, but neither the Comptroller nor any other officer has any discretion to deny the pension or reduce the amount thereof, as provided for in the act. The statutes clearly provide that each person entitled to a pension shall be paid same, and the only function the Comptroller has is to determine from an examination of the application whether the applicant is entitled to the pension.

The statute does not seem to contemplate that there will be any deficiency in the funds appropriated, nor does it undertake to provide for this contingency.

Where a pensioner has once been listed on the rolls, he can apparently be removed therefrom only in the event he earns or receives an income of $1,000 or more.

Sincerely yours,

Abram P. Staples,
Attorney General.

PHOTOGRAPHY—License—Who Entitled to Without Examination.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 15, 1938.

Mr. W. E. Cheyne, Chairman,
Board of Photographic Examiners,
3128 Cliff Avenue,
Richmond, Virginia.

Dear Mr. Cheyne:

Your letter of July 2, requesting my opinion on certain questions arising under chapter 342 of Acts 1938, has been carefully considered.
Your first question is stated as follows:

"A Mr. Spencer, who is operating a studio in Richmond, was issued his first State and City privilege licenses on January 15, 1938. He wants a certificate of registration without examination on the grounds that he had been 'continuously engaged in the practice of photography in this State for the one year next preceding the effective date of this act * * * '. He claims to have been engaged in photography since 1935, but only as an amateur, and he had never obtained a license until Jan. 15 of this year. We do not feel that he is qualified to receive his certificate of registration under these terms, but his privilege licenses were to have been good until Dec. 31, 1938. We do not know just what to do about this case."

Section 4(f) of the 1938 Act, from which you quote, requires your Board to register, without examination, "any person who had been continuously engaged in the practice of photography in this State for the one year next preceding the effective date of this act". "The practice of photography" is defined, by section 1(k), to mean the business, etc., of performing certain defined photographic work "for compensation or profit".

In view of these provisions of the statute, assuming it to be a fact that Mr. Spencer has been engaged in the business of photography for profit, and not simply as an amateur, only since January 15 of this year, it seems clear that he is not entitled to a certificate of registration under section 4(f).

Your second question is stated as follows:

"Another problem regards the status of two stores in Richmond, each of which have departments for making copies, enlargements, miniatures, and the like by means of photography. These departments only lease this space from these firms and solicit orders for reproducing pictures. The photographic part of this work may be done in the state or out of the state, and often the finishing work such as coloring, etc., is done by the department. In our opinion, under definition, Sec. K seems to class them as doing part of the photographic service. Also under Sec. 5(a) they are effected."

After a careful review of what seems to be the pertinent legal authorities governing such a problem, I find it impossible to express a sound and helpful opinion on the bare facts stated in your letter. I suggest that you collect all the available facts pertaining to the photographic departments of the two stores to which you have reference, and take up with this office the question of the propriety of attempting to enforce the Act in each individual case.

I will be glad to go into these matters with any member of your Board, and to render every possible assistance.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Administrative Costs and Expenses in Localities—How Computed.

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

Dr. William H. Stauffer,
Commissioner of Public Welfare,
Richmond, Virginia.

Dear Doctor Stauffer:
I have before me your letter of July 12, from which I quote as follows:
"In the Virginia Public Assistance Act of 1938 (Chapter 379 of the Acts of General Assembly) provision is made for the reimbursement to counties and cities for administrative costs incurred by them in respect of old age assistance and aid to dependent children. Those sections of the Act dealing with this matter are so worded as to make uncertain just what interpretation should be given. I am, therefore, requesting your assistance in ruling on a workable meaning of these provisions.

The sections involved are Sections 65(a) and (c), Sections 69(c-1), (c-2), (d-1) and (d-2).

Sections 65(a) provides that 'the commissioner shall monthly reimburse each county and city to the extent of sixty-two and one-half per centum of the amount expended during the preceding month for old age assistance and aid to dependent children, including the cost of administration under the provisions of this act.'

Section 69(c-1) provides that of all funds received from the United States 'thirty-seven and one-half per centum of all funds, exclusive of that portion thereof to be used for administrative expenses, shall be apportioned and paid monthly to the several counties and cities of the State on the basis of the total amounts disbursed for old age assistance by such counties and cities during the period for which such grants-in-aid and gifts are made; the remaining portion of such funds, exclusive of that portion thereof to be used for administrative expenses, shall be used to assist in reimbursing in accordance with the provisions of section sixty-five of this act, counties and cities for the amounts expended by such counties and cities for old age assistance, exclusive of costs of administration, during the period for which such grants-in-aid and gifts are made.'

Section 69(d-1) reads the same as Section 69(c-1) except that it refers to funds received from the United States for 'Aid to Dependent Children.'

Insofar as these sections refer to the payment of the assistances as distinguished from administrative costs incident thereto, the interpretation is clear. These sections are tied up, however, in the formula for determining the administrative reimbursements, and are for that reason here cited.

Please note that the localities incur in the first instance the expenditures for the total costs of the assistances and administrative costs, and are subsequently reimbursed by the State out of funds appropriated from State general fund revenues and funds received from the United States.

Section 65(c) qualifies 65(a) in that 'the total amount which may be allowed counties and cities to reimburse them for expenditures for administration during any fiscal year shall in no case exceed ten per centum of the amount allowed to reimburse such counties and cities for amounts expended by them for old age assistance and aid to dependent children during the same period.'

The Public Assistance Act of 1938 requires the localities to pay for all assistance and administrative costs for Old Age Assistance and Aid to Dependent Children. The State, by virtue of Section 65(a), reimburses the locality 62.5% of its total expenditures.

The State further sends to the locality out of federal funds 37.5% of the amount the State receives for assistance and administration from the Federal Government by virtue of Section 69(c-1), (c-2), (d-1), and (d-2).

Section 65, sub-section (c), however, limits the amount the State may reimburse the locality for administrative costs to 10% of the reimbursement for assistance.

Your opinion is requested as to whether the 10% limitation for administration in section 65(c) may be applied to the money the locality gets for assistances by apportionment under Section 69(c-1) and (d-1), as well as for reimbursements for assistance under Section 65(a).

"Or, stated another way:"

"Is the language, 'the total amount which may be allowed counties and
Cities to reimburse them for expenditures for administration during any fiscal year shall in no case exceed ten per centum of the amount allowed to reimburse such counties and cities for amounts expended by them for old age assistance and aid to dependent children during the same period, as found in Section 65(c), broad enough to include the money the locality gets by apportionment under Section 69(c-1) and (d-1), as well as the money reimbursed under Section 65(a)?

"I, therefore, kindly request your opinion as to what construction shall be placed on these apparently conflicting provisions. Until some decision is reached we cannot submit the plan of operations to the Social Security Board for its approval."

Considering the foregoing statutes as a whole, while the language is not entirely clear it is my opinion that it is the intention of the General Assembly to allow to the counties and cities ten per cent. of the total amount received by said counties and cities for old age assistance and aid to dependent children, whether the amounts are sent to the said counties and cities from the office of the Department of Public Welfare under the technical title "reimbursements" or as "apportionment." In other words, I am of the opinion that the sum total of the amounts received by each locality from the Department for reimbursement, and as apportioned, is the basis upon which the ten per cent. is to be calculated and that this total is the limitation placed upon the amount the said locality may receive for administration expenses.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Appropriations by Localities—Budgets.

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

Hon. C. C. Collins,
Attorney for the Commonwealth,
Covington, Virginia.

My Dear Mr. Collins:

I am in receipt of your letter of September 26, in which you ask several questions relating to the duty and authority of the board of supervisors of a county in connection with local appropriations to be administered under the provisions of the Virginia Public Assistance Act of 1938.

You state that the board of supervisors in its budget for the fiscal year ending June 30, 1939, made appropriations for the salary and traveling expenses of the supervisor of public welfare and for the salary and traveling expenses of the case worker. It appears that these salaries and expenses included in the budget were less than the salaries and expenses set up in the budget adopted by the local board of public welfare under section 7, subsection (d), of the Virginia Public Assistance Act, and you desire to know whether the board of supervisors has a right to increase these items in the budget which has been duly adopted by the said board.

I am of opinion that the board has this power. The Public Assistance Act provides that the salary of the superintendent of public welfare and other employees of the Act shall be fixed by the local board of public welfare, and, in accordance therewith, I think the board has the authority now to appropriate money sufficient to pay the salaries so fixed by the local board of public welfare. In fact, I think that the board of supervisors has authority to make any appropriation that is necessary so that such appropriation "shall be sufficient to
provide for the payment of public assistance, including cost of administration" under the Act. See section 64 of the Act.

It is generally true, as stated in the opinion of this office to which you refer, that the board of supervisors may not change its budget once it has been adopted, but so far as appropriations to be made as required by the Public Assistance Act are concerned, I am of opinion that section 64 of the Act clearly authorizes the board of supervisors to make such additional appropriation as may be necessary to provide "sufficient" funds.

Your next question is as follows:

"Whether or not the board of public welfare of Alleghany county has any right to increase items in the budget of the board of supervisors, which budget has been legally adopted and passed on by the board of supervisors."

Of course, the board of public welfare of Alleghany county has no right to increase items in the budget of the board of supervisors. However, as I have indicated above, section 64 of the Public Assistance Act makes it mandatory upon the board of supervisors to appropriate a sum sufficient to provide for the payment of public assistance, including the cost of administration, under the Act. Section 7 of the Act authorizes the local board of public welfare to submit to the board of supervisors a budget approved by the Commissioner of Public Welfare. Unquestionably, as I have also stated above, the local board of public welfare may fix the salary of the superintendent of public welfare and other employees of the board. I have had occasion to write a letter to Dr. William H. Stauffer, Commissioner of Public Welfare, today in connection with local appropriations by the boards of supervisors, and I enclose a copy of that letter for your information.

Your last question is whether the board of supervisors may use funds appropriated for the district home for the poor for the payment of administrative costs of the local board of public welfare. If the funds appropriated for the district home for the poor are not to be used for any reason, then I am of opinion that these funds or any other available funds may be appropriated for paying the county's share of the administrative costs of the local board of public welfare. In other words, the board of supervisors may appropriate any available funds to meet the obligations imposed upon the county by section 64 of the Virginia Public Assistance Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Appropriations by Localities—When to be Made.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 30, 1938.

Dr. William H. Stauffer,
Commissioner of Public Welfare,
Richmond, Virginia.

My Dear Dr. Stauffer:

I am in receipt of your letter of September 29, in which you ask my opinion concerning the duty of the board of supervisors of a county to appropriate funds sufficient to provide for the payment of public assistance as contemplated in the Virginia Public Assistance Act of 1938. The effect of your question is to
ask whether it is obligatory upon the board of supervisors to make annually one lump sum appropriation of local funds sufficient to meet the budget prepared by the local board of public welfare under subsection (d) of section 7 of the Act.

Subsection (d) of section 7 of the Act provides that the local board of public welfare shall "submit quarterly and annually to the boards of supervisors, councils, and other governing bodies of their respective counties and cities a budget, approved by the commissioner, containing an estimate and supporting data setting forth the amount of money needed to carry out the provisions of this act."

Section 64 of the Act is as follows:

"The board of supervisors or other governing body of each county and the council or other governing body of each city in the State shall each year, appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance including cost of administration. under the provisions of this act within such county or city."

In my opinion, the Act does not make it mandatory upon the board of supervisors to appropriate at one time such local funds as may be called for by the budget prepared by the local board of public welfare. It is true that section 64 makes it mandatory upon the board of supervisors to appropriate such sums "as shall be sufficient to provide for the payment of public assistance, including cost of administration." But I do not think that this means that the board of supervisors is required to accept as a finality, for the purpose of making an appropriation, the budget submitted by the local board of public welfare. By way of illustration, let us suppose that the local board adopts a budget calling for an appropriation of $10,000 from county A. The board of supervisors of county A is perfectly willing to appropriate sufficient funds to meet the requirements of the Act, but think that possibly the amount of money provided for in the budget of the local board of public welfare will not be necessary or, for other reasons, does not deem it advisable to make the full appropriation at one time. I am of the opinion that the board of supervisors may make an appropriation of a less sum than $10,000. Until this lesser sum has been exhausted, I do not think that the board has failed to comply with the provisions of section 64 of the Act.

If, however, the board does not appropriate the amount required by the budget of the local board of public welfare, and the amount which it does appropriate becomes exhausted so as to result in the board of supervisors not providing a "sufficient" sum as required by the Act, then I am of opinion that the board should make an additional appropriation to provide this "sufficient" sum and, if it does not do so, it will result in a non-compliance with the requirements of the Act such as to authorize invoking of the provisions of sections 25, 35 and 55 of the Act.

Summarizing, I do not think that the board of supervisors can be charged with non-compliance with the Act until in any year the funds appropriated by the board for expenditure under the Act have become exhausted and there is need for the expenditure of additional funds.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HON. JOSEPH WHITEHEAD, JR.,
Attorney for the Commonwealth,
Chatham, Virginia.

My Dear Mr. Whitehead:

I am in receipt of your letter of March 14, in which you state that it is the desire of the local Board of Public Welfare to know whether or not the Board of Supervisors of Pittsylvania County may provide in the budget of the local Board of Public Welfare, submitted under the provisions of the Virginia Public Assistance Act of 1938, that no employee of a local Board can be allowed more than 5 cents per mile for actual miles traveled in the performance of his duties.

As you know, the financing of the assistances provided for under the Act is a joint matter, part of the funds coming from the State, part from the Federal Government, and part from the localities. The Act contemplates that the annual budget shall be made up by the local Board of Public Welfare and approved by the Commissioner of Public Welfare. This budget is then submitted to the Board of Supervisors, in order that the Board may appropriate its part of the required funds. Indeed, section 64 of the Act makes it mandatory upon the Board of Supervisors to appropriate such sums of money “as shall be sufficient to provide for the payment of public assistance, including costs of administration, under the provisions of this Act within such county or city.”

I think unquestionably that the local Board of Supervisors, if it thought that the budget submitted by the local Board of Public Welfare called for a greater amount of money than was necessary to provide public assistance in the county, could raise this question. Whether or not the appropriation made by the Board of Supervisors would be sufficient to carry out the provisions of the Act would be a question of fact which could doubtless be determined between the Board of Supervisors and the local Welfare Board and the State Commissioner of Public Welfare. However, it does not seem to me that the Act contemplates that the Board of Supervisors shall have authority to change specific items in the budget submitted by the local Board of Public Welfare. As I have stated, by no means are all of the funds furnished by the locality.

The fixing of a limit to the mileage allowance for workers would seem to be a commendable matter of policy, and I am sure that the local Board of Public Welfare would be glad to consider these suggestions, or even the State Board of Public Welfare might by regulation impose such a limit, but, as a matter of law, it seems to me that this responsibility is upon those charged with the administration of the Virginia Public Assistance Act. The Board of Supervisors undoubtedly has a right to question the total amount which the Board shall appropriate, but it does not seem to me that it is the responsibility of the Board of Supervisors to make up the individual items of the welfare budget.

Very sincerely yours,

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

PUBLIC ASSISTANCE ACT—Counties—Amount to be Spent on Administrative Costs.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1938.

HONORABLE PHILLIP KOHEN,
Attorney for the Commonwealth,
Fincastle, Virginia.

DEAR MR. KOHEN:

This is in reply to your letter of July 19, in which you request my opinion upon the question whether or not the board of supervisors may appropriate from the general county funds a sum in addition to the ten per centum of the funds provided by the State under section 4 of chapter 223 of the Acts of 1936, including a like amount of local funds set aside to match said State funds.

It is my opinion that the Board of Supervisors does possess this authority, but that any funds so expended may not be taken into account for matching purposes by the officers of the State in calculating the amount of relief fund which the county would be entitled to receive. In other words, the State officials would be required to disregard all sums expended for administrative costs in excess of the said ten per centum provided for in section 4 of the said Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Counties—Appropriations for, Not in Budget.

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

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

DEAR MR. DOWNS:

This is in reply to your letter of August 18, in which you request my opinion upon a certain question relating to the financing by counties of the Public Assistance program provided for in chapter 379 of the Acts of 1938.

Under the provisions of the Act referred to, the counties are required to contribute a certain proportion varying from 18½% in the case of old age assistance to 25% in the case of aid to dependent children.

The Act further contemplates that counties shall expend at least one month’s outlay, and are required to provide these payments before receiving any reimbursement from Federal and State funds. You inquire whether or not in my opinion the board of supervisors may, out of any funds available in the county treasury, make these payments provided for by the Act aforesaid even though the budget for the current year has not been framed with that in view.

Section 64 of said Act imposes upon the board of supervisors the duty to “appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance including cost of administration, under the provisions of this act within such county or city.”

In view of this mandatory provision of the statute, it is my opinion that it is the duty of the board of supervisors to pay out the money necessary to comply...
with said Act out of any funds in the general fund of the county treasury, and, if sufficient funds are not available in the general fund of the county treasury, then the board of supervisors has authority to borrow, in anticipation of the reimbursement thereof, the additional funds necessary for that purpose.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Failure of Locality to Provide Funds—Recourse of State Commissioner.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 17, 1939.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond, Virginia.

My Dear Dr. Stauffer:
I am in receipt of your letter of April 12, from which I quote as follows:

"A local governing body has failed to put up local funds in an amount sufficient to meet the local costs, including administration, of the categorical assistances and general relief as set forth in a budget prepared by the local Board of Public Welfare and approved by the Commissioner of Public Welfare. Having appropriated a lesser amount than that set forth in the budget, the program has been conducted by the local Welfare Board in conformity with the approved budget, using such local funds as were appropriated up to the point where they have become exhausted (see the last paragraph of your ruling made to this Department under date of September 30, 1938, wherein you state 'I do not think that the Board of Supervisors can be charged with non-compliance with the Act until in any year the funds appropriated by the Board for expenditure under the Act have become exhausted and there is need for the expenditure of additional funds.').

"A governing body is apprised of the inadequacy of the local funds which they have appropriated and are requested to make available additional funds within the original budget, as approved by the Board of Public Welfare and the Commissioner of Public Welfare. The governing body refuses to appropriate any additional funds.

"Now, insofar as categorical assistances are concerned; that is, Old Age Assistance and Aid to Dependent Children, responsibility for which is rested with the State Department of Public Welfare, provision is made in Section 25 and Section 35 of the Public Assistance Act of 1938 empowering the Commissioner of Public Welfare 'to provide for the payment of assistance in such county or city out of funds appropriated for the purpose of carrying out the provisions of this act' and the procedures continue to detail that after paying such costs the Commissioner shall instruct the State Comptroller to deduct from other funds, which would otherwise go to the locality, such amounts as have been paid for such assistances on behalf of the county failing to meet its obligation in this respect.

* * * * * * *

"The opinion which is requested would answer the question—Has the State Board or the Commissioner of Public Welfare authority to provide for the payment of General Relief under the circumstances above set forth, and if it has such authority may provisions similar to those detailed in Sections 25 and 35 for Old Age Assistance and Aid to Dependent Children respectively
be applied in recovering for the State such share of the local costs as would otherwise have been met had the local governing body made an adequate appropriation within the budget as approved by the local Board of Public Welfare and the State Commissioner of Public Welfare?"

As you state, the Virginia Public Assistance Act of 1938 (Acts 1938, page 638) very clearly provides the procedure to be followed under the circumstances you describe insofar as the categorical assistances are concerned, such as old age assistance and aid to dependent children. See section 25 and 35 of the Act. These sections in effect authorize the Commissioner to go ahead with the relief program, advancing the necessary funds for the purpose. Where it is necessary to advance State funds in the absence of local funds, the State is to be reimbursed on account of such advances made in behalf of the localities by the following procedure:

"* * * in such event the Commissioner shall at the end of each month file with the State Comptroller and with the board of supervisors, council or other governing body of such county or city a statement showing all disbursements and expenditures made for and on behalf of such county or city, and the said Comptroller shall from time to time as such funds become available deduct from funds appropriated by the State, in excess of requirements of the Constitution of Virginia for distribution to such county or city such amount or amounts as shall be required to reimburse the State for expenditures incurred under the provisions of this section; all such funds so deducted and transferred are hereby appropriated for the purposes set forth in subsection (a) of section sixty-nine of this act and shall be expended and disbursed as provided in section sixty-nine of this act."

However, in the case of general relief, the Act contains no provision similar to that I have quoted above relating to the categorical assistances. Indeed the sections of the Act relating to general relief (sections 57, 58, 59 and 60) expressly prohibit the distribution of funds for this purpose to the localities unless the localities "shall provide and have available for like purposes, local funds in an amount equal to sixty per centum of the amount to be received under title 6 of this Act."

The procedure prescribed for the reimbursement of the State in the case of the categorical assistances is drastic and, since such procedure is not prescribed in the case of general relief, I am of the opinion that it is not applicable. The effect of this construction of the Act insofar as general relief is concerned is that, if any locality fails to meet the condition precedent to receiving the State funds available for this purpose, then no State funds can be spent in that locality until such time as the requirements of the Act are met.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Federal Funds—Proper State Officer to Receive.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., SEPTEMBER 30, 1938.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond, Virginia.

MY DEAR DR. STAUFFER:
I am in receipt of your letter of recent date, in which you ask for an official
opinion as to the name and title of the proper State official to receive Federal funds for aid to the aged and aid to dependent children, administered pursuant to the Virginia Public Assistance Act of 1938.

In reply, you are advised that, in my opinion, the statutes of Virginia contemplate that these funds should be received by Edwin B. Jones, Treasurer of Virginia. See section 585 (69) of the Code of Virginia (Michie, 1936) and also section 69 of the Virginia Public Assistance Act of 1938.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Independent Relief by Counties in Certain Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 30, 1938.

Dr. William H. Stauffer,
Commissioner of Public Welfare,
Richmond, Virginia.

My Dear Dr. Stauffer:

I am in receipt of your letter of September 21, in which you ask for my opinion on two questions, both of which involve the Virginia Public Assistance Act of 1938 (Acts 1938, pp. 638-669). The first is:

“A resident of a county is over sixty-five years of age. She is in need of public assistance, and would be entitled to same under the provisions of the Act and the regulations of the State Board. She refuses to accept old age assistance on the grounds that her ownership of property would subject such property to a lien after her death to recover for the State and Federal governments the amount of assistance paid to her. The Welfare Board, being authorized to determine who shall receive aid and the class of aid which shall be awarded, is precluded from awarding her old age assistance because of her unwillingness to involve her property. The question is whether the board of supervisors of that county may independently appropriate purely local moneys to award her relief.”

It is noted that the individual is entitled to old age assistance as provided in the Act. However, she refuses to accept this assistance because of section 20 of the Act, which provides that the amount of such assistance paid shall be allowed "as a claim against the estate of such recipient" prior to all other claims with certain exceptions. I assume, of course, that there are available funds out of which this assistance can be paid under the Act. Under these circumstances, I am of opinion that the board of supervisors may not "independently appropriate purely local moneys to award her relief."

The Virginia Public Assistance Act represents a comprehensive, State-wide plan for assistance to the aged, the blind, dependent children and the destitute. It is clear from a reading of the whole Act that it is a joint enterprise on the part of the State and its political subdivisions. Both the means and the methods are provided. It represents the deliberately considered policy of the General Assembly in connection with the relief of those who come within its scope. The State appropriates large sums for the purpose and the political subdivisions must provide matching funds. See section 64. In the cases of the aged, the blind, and dependent children, the Federal government also contributes. It is my opinion that so long as there are funds available in any county under the Act in any of the designated classes for relief, they must be distributed as provided in the Act and that the local legislative body has no authority to make an independent ap-
propriation to any individual who is eligible under the Act. Such action would be entirely inconsistent with the spirit, if not the letter, of the Act. In other words, the Act supersedes any authority the board of supervisors and other county agencies might otherwise have to make direct contributions for relief so long as funds are available for expenditure under the Act. To hold otherwise would to a large extent nullify this carefully considered system of relief, and conceivably might result in such a lack of uniformity throughout the State as to jeopardize the grants from the Federal government.

The view I am taking is strengthened by subsection 3 of section 72 of the Act repealing all Acts and parts of Acts, general and special, inconsistent with the Act to the extent of such inconsistency. Certainly for contributions for relief to be handled by direct appropriation by the board of supervisors to specific individuals is inconsistent with the whole plan established by the Act.

This office, of course, has no jurisdiction to pass on questions of policy. However, it is difficult to conceive of a situation where the local authorities would feel justified in making a direct appropriation to an individual who can get relief under the Act from joint Federal, State and local funds, when there would be no matching funds either from the State or the United States, in the case of a direct appropriation which would not be administered under the Act.

I am not passing on the power of the board of supervisors in cases where the funds available under the Public Assistance Act have been exhausted. Since relief has just begun under the Act, this situation has not arisen and probably will not arise for a long time, if ever.

Your second question is as follows:

"The second question is somewhat allied to the first question. An applicant for general relief in a locality is, after investigation by the local welfare agency and after consideration of the findings of the superintendent of public welfare, by the local board of public welfare, is declared ineligible for such general relief. The question is whether the board of supervisors may independently and out of purely local funds proceed to award to such person a grant of county funds for the relief of the destitution of that person. In this case also, it is my personal belief that it is not the intention of the General Assembly to enable the board of supervisors to carry on a separate relief function independently of the local board of public welfare."

The authority of the board of supervisors to make direct appropriations to the indigent is contained in section 2805 of the Code. There it is provided that:

"The overseer (of the poor) of any district, by and with the consent of the board of supervisors of the county, may provide assistance for any person or the family of any person who is unable to support himself or family at his place of residence when it would be injudicious that such person or family should be moved to the place of general reception. Evidence of the consent of said board of supervisors shall be an order of record made at its regular or called meeting setting forth the extent of such assistance."

Section 1902-o of the Code (Michie, 1936) provides that the superintendent of public welfare in a county under the supervision and control of the local board of public welfare shall, among other things, "have the care and supervision of the poor and to administer the funds now administered by the overseers of the poor." The local board of public welfare of a county here mentioned is the same local board of public welfare which functions under the Virginia Public Assistance Act. Therefore, reading these two sections together, I take it that the board of supervisors of the county can only make an appropriation to a person who is recommended by the superintendent of public welfare under the supervision of the local board of public welfare. You state in your question that the local board of public welfare has already denied relief under the Public As-
DISTANCE ACT in the case you have in mind, because the individual is ineligible under the Act. Therefore, I do not presume the local board would recommend this person to the board of supervisors for direct relief and, without this recommendation, I am of opinion that the said board may not make a direct appropriation.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—City of Hampton and Elizabeth City County—Single Local Board for.

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

Dr. WILLIAM H. STAUFFER, Commissioner,
Department of Public Welfare,
Richmond, Virginia.

DEAR DR. STAUFFER:
I have your letter of August 25, requesting the opinion of this office as to whether a single Board of Public Welfare can function for the city of Hampton and the county of Elizabeth City under the Public Assistance Act of 1938.

The city of Hampton was incorporated, by chapter 230 of the Acts of Assembly of 1920, as a city of the second class. By this charter a rather unusual relationship between the city and the county was established, the general effect of the charter being to provide for the election or appointment of certain city officials and the delegation of certain specific functions to them and the reservation of all other municipal powers to the county just as though the city had remained a town. Section 28 of the charter makes this legislative intent particularly clear:

"The provisions of this act shall be so interpreted, applied and construed as to organize and govern the city of Hampton in the same manner as towns in this Commonwealth are organized and governed, except so far as the provisions of the Constitution and the provisions of this act prohibit such interpretations, application and construction * * *.

The charter does not provide for the appointment of a board or other body to perform for the city the functions of a local Board of Public Welfare. On the contrary, section 22 expressly provides that:

"The poor of said city shall continue to be supported and maintained in the same way, and in the same manner, and with the same class of funds, as before the town of Hampton became a city."

Section 6 of the 1938 Public Assistance Act, being section 1904(6) of the Code of Virginia, as amended, after providing that all existing provisions of law in relation to Boards of Public Welfare of counties and cities of the second class shall continue in effect except where otherwise provided under the new Act, requires that "There shall be a local board in each county and city of the State."

Your problem, therefore, resolves itself to the question whether this provision in the 1938 Act has the effect of repealing the Hampton charter insofar as the latter reserves to county officials and agencies the functions of a local Welfare Board.

It is axiomatic that a general law cannot be construed to repeal a special Act unless the general law expressly so provides, or unless an intention to re-
REPORT OF THE ATTORNEY GENERAL

peal such special Act is entirely manifest. Upon a careful review of the entire Public Assistance Act, and a consideration of the policies and legislative intent underlying such Act, I am of the opinion that the provision quoted above, requiring the establishment of local boards in all cities of the State, should not be construed to repeal the charter provisions and thus to upset the very peculiar relationship established by the charter, presumably in order to meet a unique local situation.

It is the opinion of this office, therefore, that under the Public Assistance Act of 1938, a single Board of Public Welfare for the county of Elizabeth City may serve for the county and for the city of Hampton, and that a separate board for the city need not be appointed.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Claim Against Estate of Recipient—Conveyance by Recipient to Defeat.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 28, 1938.

HON. W. M. MINTER,
Attorney for the Commonwealth,
Mathews, Virginia.

MY DEAR MR. MINTER:

I am in receipt of your letter of October 27, in which you call attention to section 20 of the Public Assistance Act of 1938 (Acts 1938, pp. 638-648), which section provides:

"On the death of any recipient of assistance, the total amount paid as such assistance under this Act shall be allowed as a claim against the estate of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of one hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars."

You desire my opinion on the following question:

"In the event that a recipient of assistance, after receiving payments under the Act, disposes of his or her property, is or not the lien above mentioned enforceable against such property, and if so, how?"

I have heretofore had occasion to consider the nature of the "claim" given by this section and have expressed the view that it does not constitute a lien within the ordinary meaning of that term. The Act simply does what it purports to do and no more, namely, gives a claim upon the death of the recipient of assistance prior to certain other claims. I think the section is analogous to the statutes providing for the distribution of a bankrupt's estate, for example. Under this interpretation of the section, I am of opinion that a recipient of assistance may dispose of his or her property during lifetime and that no lien attaches to said property by virtue of assistance received under the Act. Of course, I do not mean to suggest that a fraudulent conveyance could be made in order to defeat the claim given by the statute. This question would have to be determined upon the basis of the facts in any particular case.

You next ask if there is "any way to make the payments made by way of assistance under the Act a record lien, and if so, how."
Since, as I have indicated above, I do not think that the claim given by the section can be said to be a lien against the property, I know of no way by which the assistance rendered can be made a "record lien". Certainly the statute makes no such provision.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Claim Against Estate of Recipient—Recordation in Clerk's Office.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 3, 1938.

HONORABLE M. A. COGBILL,
Attorney for the Commonwealth,
Chesterfield C. H., Virginia.

MY DEAR MR. COGBILL:

I am in receipt of your letter of September 30, in which you call my attention to sections 20 and 50 of the Virginia Public Assistance Act of 1938, providing for a claim against the estates of persons who receive old age assistance and blind assistance under the Act.

You ask if the State Board of Public Welfare can, if it deems proper, file in the clerk's office of a county a list of the names of the persons who receive this assistance, so that the public will have notice.

I call your attention to the fact that these sections do not give a lien as such against the estates of persons receiving assistance. The statute simply provides that there shall be a "claim" against the estate of the person "prior to all other claims except prior liens" and except certain funeral expenses and doctors' and hospital bills. The sections are somewhat analogous to the provisions of law for the distribution of an estate of a bankrupt and, as I have indicated, I do not think that it gives such a "lien" as may be recorded in the clerk's office. I call your attention also to the fact that nowhere in the Virginia Public Assistance Act is there any authority or machinery provided for recording these claims in the clerk's office. The Act does not seem to contemplate such recordation, and I am of the opinion that the State Board of Public Welfare could not require the clerks to record a list of the names of persons receiving assistance, nor are the clerks authorized to record such a list, even if requested to do so by the Board.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

PUBLIC ASSISTANCE ACT—Old Age Pensions—State's Claim Against Pensioner's Estate—Security for.

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

HON. C. CARTER LEE,
Attorney for the Commonwealth,
Rocky Mount, Virginia.

MY DEAR MR. LEE:

I am in receipt of your letter of September 8, in which you call my at-
REPORT OF THE ATTORNEY GENERAL

attention to sub-section 18 of section 1904 of the 1938 Supplement to Michie's Code, which relates to a claim being given against the estate of a recipient of old age assistance under the Public Assistance Act of 1938 for the total amount of such assistance paid. You desire to know if in the case of a person receiving old age assistance it would be proper to require a deed of trust to be given to secure the amount which is paid.

I do not think that this is proper. The statute simply gives a "claim against the estate of such recipient prior to all other claims except prior liens * * *." You will observe that prior liens are protected. The effect of the statute, therefore, is simply to put the State ahead of general creditors. From a careful consideration of the statute I do not think that in the administration of the law it is contemplated that anything should be added to the claim of the State by such a procedure as taking a deed of trust on the property of the recipient. Nor does the statute provide any method of giving notice of this claim of the State in the clerk's office. If a record of all payments made to those receiving old age assistance and aid to the blind were filed in the clerk's office, a great volume of clerical work would be involved which is apparently unnecessary in view of the language of the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Persons Eligible for Relief but Incompetent to Handle Cash.

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

Hon. B. P. Harrison,
Attorney for the Commonwealth,
Winchester, Virginia.

My Dear Mr. Harrison:

I am in receipt of your letter of September 9, in which you request my opinion "as to what should be done as to payments of benefits under the Public Assistance Act of 1938 to one over the age of 21 and not insane, but mentally or physically incompetent to handle cash."

I presume that when you say that the person is "not insane" you mean that it has been so judicially determined. If there is any substantial question as to the sanity of the person involved and there has been no judicial determination thereof, I am of opinion that the first thing to do would be to proceed as provided in section 1017, et seq., of the Code.

However, I presume that the person you have in mind is one who would not be judicially determined to be insane, but a person such as a spendthrift or an alcoholic or one who is in such condition, due to age or other cause, that he cannot physically attend to supplying his wants from the assistance that he receives.

If the person is one entitled to general relief under sections 57-60 of the Public Assistance Act (Acts 1938, p. 661), the State Board of Public Welfare has taken cognizance of the situation and has provided that the payments, if in cash, shall be made to some other person for the benefit of the one to whom relief is to be given, or for payments to be made in kind. As to the details of handling this class of cases, I suggest that you confer with the local Superintendent of Public Welfare, who has doubtless received instructions from the State Board of Public Welfare. If the local Superintendent has not received these instructions, I shall be glad to ask the Commissioner of Public Welfare to write you.
As to those entitled to receive old age assistance or aid to the blind, the statute contemplates that the payment shall be made direct to the recipient or his legally appointed guardian. I am also informed that the Federal Social Security Board stipulates that to obtain the benefits under the Social Security Act the payment in these cases must be made to the recipient or his guardian. However, I call your attention to section 16, subsection (b), and section 46, subsection (b), of the Act, which provide in cases of aid to the aged and to the blind that:

"The local board may at any time cancel and revoke aid * * * for cause, and it may for cause suspend aid for such period as it may deem proper."

Invoking these provisions, if it should come to the attention of the local Board that one belonging to either of these two classes receiving aid is in fact "mentally or physically incompetent to handle cash" for one of the reasons indicated or for other cause, then I am of opinion that the local Board may revoke the payments for the reason that the assistance is not being used so as to carry out the true intent of the Act. When the aid has been revoked, then, if the local Board is of opinion that the person who has heretofore been receiving aid as an aged individual or a blind person still should have relief, then such a person could be given this relief under the "general relief" provisions of the Act to which I have heretofore referred and over which I have indicated the local Board of Public Welfare can exercise control as to how the money is spent.

I am of opinion that the above solution to the problems presented is a practical one, that it is supported by the Act itself, and that it will certainly tend to carry out the true intent of the Act, which is to give actual relief to those entitled thereto.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Supplementing Regular Fund in Counties—Medical, etc., Expenses.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 4, 1938.

Hon. Valentine W. Southall,
Attorney for the Commonwealth,
Amelia Court House, Virginia.

My Dear Mr. Southall:
I have your letter of October 1, from which I quote as follows:

"The Board of Supervisors has before it several bills for medical services rendered by doctors to paupers and for medicine furnished paupers.

"At present there is not enough money in the public assistance funds of the county to meet these bills and the Board wishes to ascertain if it can pay these bills out of the general operating fund of the county and would like this information before it by the next meeting."

If these obligations were incurred prior to the time the Virginia Public Assistance Act of 1938 commenced to function, it seems to me entirely proper for the Board of Supervisors to pay them out of any funds available in the general operating fund of the county. If they were incurred after the functioning of the Virginia Public Assistance Act, I am of opinion that the Board would be authorized to transfer sufficient available funds from the general operating fund
to the public assistance fund. In this connection I call your attention to para-
graph 5-a of Bulletin No. 9 issued by the Commissioner of Public Welfare under
date of August 27, 1938, to the local Boards of Public Welfare, reading as
follows:

"5-a. The local superintendent of public welfare after investigation of
eligibility for general relief, may authorize emergency or temporary medical
or hospital care or burial costs subject to the approval of the local board
for a period of time not to exceed thirty (30) days in the counties or cities
of the second class, and seven (7) days in cities of the first class, or until
the next succeeding meeting of the local board. Inasmuch as the State
Board of Public Welfare recognizes that funds made available for general
relief are primarily intended for home relief, the Board recommends that
local governing bodies appropriate separate funds for burial, medical and
hospital costs."

In my opinion, this practice recommended by the State Board may be fol-
lowed by the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

HONORABLE P. E. KETRON, Director,
Division of Purchase and Printing,
Richmond, Virginia.

DEAR MR. KETRON:

I have your letter of August 18, enclosing certain correspondence between
your office and the Old Dominion Paper Company of Norfolk, Virginia, rela-
tive to the bond which that company has submitted as security for the perform-
ance of its contract to furnish certain paper for use in State printing. You re-
quest the opinion of this office as to whether the bond meets the statutory re-
quirement governing the same.

The bond which has been submitted is executed by the Old Dominion Paper
Company as principal, and by two of the officers of that company as sureties.
Sections 383 and 384 of the Virginia Code (Michie 1936), as amended by chapter
168 of the Acts of 1938, expressly require the posting of a performance bond in
such cases, and in section 383 it is provided that:

"*** The bond shall be with security approved by the Director and
a penalty equal to the contract price for the work to be done, if a bonding
or surety company be given as surety, and double the amount of such con-
tract price in other cases. The form of the bond shall be approved by the
Attorney General. No person shall be accepted as such surety who is di-
rectly or indirectly interested in any contract with the Commonwealth.
***"

In view of this express provision of the statute, it seems clear that the bond
in question cannot legally be accepted.

In the event that this contractor should submit another bond with individual
sureties who are not interested in any contract with the Commonwealth, your
attention is further called to that portion of the statutory provision just quoted,
which requires that bonds executed other than by a surety company shall be in a penalty of double the contract price of the work.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC CONTRACTS—Construction, etc.—Bond—Check in Lieu of.

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

Dr. J. S. DeJarnette, Superintendent,
Western State Hospital,
Staunton, Virginia.

Dear Dr. DeJarnette:

This will acknowledge your letter of August 20, enclosing for my information a copy of a proposed contract with Carpenter, Major Brothers and Company, Incorporated, for the construction of a trestle and coal tipple at the Western State Hospital. You request the opinion of this office as to the propriety of providing in said contract for the deposit of a certified check as security for the contractor's obligation to perform his contract, in lieu of a performance bond.

Section 585 (4)a of the Code of Virginia (Michie 1936), which governs contracts of this kind, specifically requires that the contractor shall post a surety bond. While it is manifest that the certified check is equally good if not better security, the statute makes no provision therefor, and I cannot say that the acceptance of such a check, in lieu of a bond, would amount to compliance with the statute.

For your information I enclose a copy of the statute to which I have referred, and I return herewith your copy of the proposed contract.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC CONTRACTS—Construction, etc.—Competitive Bids—Contract Involving Less Than $2,500.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 4, 1938.

Major R. M. Youell, Superintendent,
The Penitentiary, 
Richmond, Virginia.

Dear Major Youell:

This is in response to your request for my opinion as to whether or not, under the provisions of Acts of 1932, page 446, carried into Michie's 1936 Code as section 585 (4)a, it is necessary for the State Prison Board to award, only after competitive bidding, a contract for the construction of a power line con-
necting the buildings at the State Prison Farm in Southampton County with the lines of the power company from which it is desired to procure power, where the cost of the construction of said power line is not in excess of $2,500.

I beg to advise that under the provisions of said section the requirement that the contract be let to bid is applicable only where the amount involved is in excess of $2,500, and in my opinion it is not necessary for the State Prison Board to let the contract to competitive bidding when the cost is not in excess of that amount.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC CONTRACTS—Officers Interested in—Insurance on Town Property.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 18, 1939.

Hon. John H. Downing,
Attorney for the Commonwealth,
Front Royal, Virginia.

My Dear Mr. Downing:

I am in receipt of your letter of March 15, in which you request my interpretation of section 2708 of the Code of Virginia as applied to insurance contracts on town property.

I call your especial attention to the following sentence in this section:

"*** 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. ***."

It seems reasonably clear to me that the quoted provision would cover a member of a Town Council who is directly or indirectly interested in the premium on an insurance contract on town property. Certainly the Town Council has to provide funds for the payment of insurance premiums, and such premiums represent claims against the town.

The question of whether a particular individual is directly or indirectly interested in any claim against the town is one of fact which could only be determined by a full presentation of all of the facts and circumstances. In a case of dispute as to the facts, the matter could only be finally determined judicially. I do not think, therefore, that it would be proper for me to express an opinion on the facts in any particular case.

Very sincerely yours,

ABRAM P. STAPLES
Attorney General.
PUBLIC CONTRACTS—Officers Interested in—What Constitutes “Interest”.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 25, 1939.

Hon. M. A. Cogbill,
Commonwealth’s Attorney for Chesterfield County,
Mutual Building,
Richmond, Virginia.

My Dear Mr. Cogbill:
I am in receipt of your letter of recent date, from which I quote as follows:

"Will you please give me your opinion as to whether or not the following would be a violation of section 2707 of the Code:

"An employee of a supply company (stationery, etc.) is a member of a board of supervisors and from time to time purchases are made by that board from said supply company. The board member is not an officer or stockholder in the supply company, but is compensated through commissions. The sale of the supplies to the board is not made through or by the board member, but by some other salesman of the supply company."

Section 2707, as you know, prohibits, among other things, a member of the board of supervisors being interested “directly or indirectly in any contract or in the profits of any contract” made by anyone on behalf of the board of supervisors “in the sale or furnishing of supplies or materials” to the county.

In the case you put, since the board member is not an officer or a stockholder in the supply company and receives no compensation whatsoever in connection with the sale of supplies to the county, I am of opinion that such a sale as you describe is not prohibited by section 2707 of the Code.

The phrase “directly or indirectly” is a very broad one, and I realize that there may be differences of opinion in connection with particular transactions, but it seems to me that the interest of the board member in this particular case, if indeed he has any interest, is too remote to come within the prohibitions of the section.

Very sincerely yours,

Abram P. Staples,
Attorney General.

PUBLIC FUNDS—Depositaries—Collateral—County Finance Board—Subsisting Deposits.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 3, 1939.

Hon. W. L. Painter,
Treasurer of Tazewell County,
Tazewell, Virginia.

My Dear Mr. Painter:
I refer to your letter of December 29, 1938, and my letter of January 12, 1939, in reply thereto. In your letter of December 29 you advised me that the Farmers Bank of Clinch Valley, Tazewell, Virginia, in which you have on de-
POSIT public funds in the name of Tazewell County, desires to take advantage of
the last proviso of subsection (d) of section 350 of the Tax Code, and has passed
the resolution prescribed by that proviso. You state in effect that the Bank is
under the impression that, if the County Finance Board continues to approve it
as a depository of public funds, then the Bank may withdraw the $150,000 of
bonds which it has deposited pursuant to the preceding portion of sub-section
(d) of section 350 for the protection of public funds on deposit. You desire my
opinion as to whether this $150,000 of bonds may be withdrawn.

I call your attention to the fact that the proviso in question and the resolu-
tion of the Board of Directors of the Bank refer to deposits “hereafter made”. In
view of this language, it is my opinion that until such time as all money on
deposit as of the date of the approval of the County Finance Board of the new
arrangement has been withdrawn the bonds now put up for the protection of
deposits should not be withdrawn by the Bank. When these deposits have been
withdrawn, however, and should the County Finance Board continue to approve
the Bank as a depository, I am of opinion that, if an appropriate resolution is
passed by the Board of Directors of the Bank pursuant to the proviso referred
to in subsection (d) of section 350 of the Tax Code, the bonds may be taken up
by the Bank.

As I advised you in my letter of January 12, I desire to make further study
and investigation, and have reached the conclusion as above set out. In addition,
I have wanted to get the opinion of the General Counsel of the Federal De-
posit Insurance Corporation to ascertain whether there was anything in subsec-
tion (d) of section 350 of the Tax Code which in his opinion conflicted with
the statute creating the Federal Deposit Insurance Corporation or any regula-
tion adopted pursuant thereto. I have just received an opinion from the Gen-
eral Counsel of this Corporation, from which I quote as follows:

“It is the opinion of this office that the proviso quoted above is not in
conflict with anything in the statute creating this Corporation, or in the regu-
lations of the Corporation.

“This expression of opinion, of course, is pertinent with reference to
the application of said proviso to state banking institutions as distinguished
from national banks.”

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 5, 1939.

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

MY DEAR MR. WHITEHEAD:
I am in receipt of your letter of January 4, in which you say:

“The County Treasurer and the Board of Supervisors would like to
know whether or not the County Treasurer has the right to deposit $5,000
in any of the local banks without the said bank making the county a pre-
ferred creditor, or placing additional security or collateral in said bank to
protect the said $5,000.”

I call your attention to subsection (f) of section 350 of the Tax Code, read-
ing in part as follows:
"The amount of bond given or the value of securities pledged by any de-
pository as aforesaid shall at all times be at least equal in amount to the
amount of money on deposit with the depository, less such amount thereof
as shall be insured by the Federal Deposit Insurance Corporation, a cor-
poration created by an act of Congress of the United States, approved June
16, nineteen hundred and thirty-three, and known as the Banking Act of
Nineteen Hundred and Thirty three. * * * ."

While in the case you put the provisions of section 350 are still applicable,
yet the effect of the quoted language is, in my opinion, to allow the County
Finance Board to deposit in a depository selected by it county funds up to $5,000,
without requiring of the depository a bond or the placing of securities in escrow.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Proceeds of Articles Manufactured at Schools for Deaf
and Blind.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 6, 1939.

MR. STAHL BUTLER, Superintendent,
Virginia State School for Colored
Deaf and Blind Children,
Newport News, Virginia.

MY DEAR SIR:

I have your letter of February 3, in which you request information as to
the provisions of the statute which requires money collected from the sale of
products of your Institution to be deposited in the State treasury and to be paid
into the general fund of said treasury so as not to be available for use by your
Institution without an appropriation made by the General Assembly.

The statute you refer to is section 32 of the 1938 Appropriation Act con-

I will state, however, that this provision does not apply to articles made
by students where the article after it is made belongs to the student and is sold
by him or for his benefit. In such case the money should be paid to the student
who owns the property which was sold.

The statute provides that moneys, fees and revenues which are required by
law to be paid into the State treasury shall be handled in the manner above in-
dicated. It might be that there are some revenues of your Institution of such a
nature as not to be required to be paid into the State treasury, although I do not
know of any such. If you have any doubt in mind as to any specific item, I will
be very glad to advise you upon request.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC PURCHASING—Game Birds and Animals for Restocking.

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

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

DEAR Mr. NOLTING:

This will acknowledge receipt of your letter of August 4, requesting the opinion of this office as to whether you should purchase through the Director of the Division of Purchase and Printing the game birds and wild animals which your Commission acquires for purposes of restocking.

The centralized purchasing law, as amended and reenacted by chapter 168 of the Acts 1938, provides, in section 401-b, that State agencies, officers, etc., shall purchase through the Director of 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."

Upon a careful examination of this entire Act, and especially upon consideration of the obvious legislative purpose and intent, it is the opinion of this office that game birds and wild animals cannot be considered "materials", "equipment", or "supplies" within the meaning of the centralized purchasing law, and that therefore purchases of such birds and animals may be made directly.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Hospitals for Insane—Functions with Reference to.

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

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond, Virginia.

MY DEAR DR. STAUFFER:

I am in receipt of your letter of December 12, in which you refer to section 1902-f of the Code of Virginia (Michie, 1936) and ask to be advised whether or not the State Board of Public Welfare may still perform "the inspectional and visitorial powers" conferred by that section upon the Board insofar as such powers are conferred in connection with the State hospitals for the insane. You refer to chapter 3 of the Acts of General Assembly of the Special Session of 1936-37, relating to the powers and duties of the State Hospital Board, as it is reorganized by that Act, and ask if the Act in effect repeals the provisions of section 1902-f of the Code, so far as that section is applicable to the State hospitals for the insane.

I think it is unquestionably true that section 1006 of the Code, as it is amended by chapter 3 of the Acts of the Special Session of 1936-37, gives to the State Hospital Board complete supervision, management and control of the State hospitals. However, I do not understand that section 1902-f attempts to give to the State Board of Public Welfare either supervision, management or control of the State hospitals. The section, so far as these institutions are concerned, simply provides for inspection and reports by the State Board of Public Welfare. These reports, or at least such portions of them as may be helpful,
would be sent to the State Hospital Board for such action as that Board may care to take. I do not think the State Board of Public Welfare, under section 1902-f, could require a State Hospital Board to act upon its recommendations. In other words, in my opinion, there is no conflict between the duties of the State Hospital Board in its supervision, management and control of the State hospitals, as set out in section 1006 of the Code, and the inspectional and visitatorial powers of the State Board of Public Welfare, as contained in section 1902-f of the Code.

My conclusion, therefore, is that section 1902-f of the Code, insofar as it may affect inspection and visitation of State hospitals for the insane by the State Board of Public Welfare, is not repealed by section 1006 of the Code, as amended by chapter 3 of the Acts of 1936-37.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC HEALTH—Compulsory Treatment for Venereal Disease.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 7, 1939.

HON. B. D. PEACHY,
Attorney for the Commonwealth,
Williamsburg, Virginia.

My dear Mr. Peachy:

I am in receipt of your letter of March 4, in which you state that a question has arisen as to the authority of the local Health Department to compel persons known to have venereal diseases to submit themselves for treatment.

As you state, section 1554-e gives the local health authorities the power to examine persons reasonably suspected of having such diseases. Under this section, I do not think there can be any serious question about the right to examine for these diseases where there is reasonable ground for believing that the diseases exist.

However, I do not find that the sections of the Code relating to venereal diseases make treatment therefor compulsory, and I, therefore, do not think that the local health authorities can require such persons to submit themselves for treatment; certainly there is no punishment provided if they do not submit to treatment.

Section 1554-f of the Code provides for quarantine under prescribed circumstances, and the local health authorities, therefore, have a certain amount of control by the use of the quarantine provisions.

I have conferred with Dr. Riggin, State Health Commissioner, and he advises me that the construction the State Health Department places upon the statutes is in accord with the views I am expressing herein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICERS—Compatibility of Offices—County Supervisor as Soil Conservation Supervisor.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 6, 1930.

Mr. James A. Waller, Jr., Secretary,
State Soil Conservation Committee,
Blacksburg, Virginia.

My Dear Mr. Waller:

I am in receipt of your letter of April 4, in which you inquire if a member of a Board of Supervisors is eligible to the office of Supervisor of a Soil Conservation District.

The office of Supervisor of Soil Conservation Districts is provided for by section 6 of the Soil Conservation Districts Law (Acts 1938, pp. 725, 733). This officer is elected by a vote of the people of his district.

Section 2702 of the Code prohibits certain officers, including a member of the Board of Supervisors of a county, from holding "any other office, elective or appointive, at the same time," There are certain exceptions made in the statute, but a Supervisor of a Soil Conservation District is not included in the exceptions.

In view of the plain provisions of section 2702, I am of opinion that a member of the Board of Supervisors may not hold the office of Supervisor of a Soil Conservation District.

Very sincerely yours,

Abram P. Staples,
Attorney General.

PUBLIC OFFICERS—Interest in Public Contracts—Employment of Soil Conservation Committeeman by Committee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 5, 1939.

Mr. James A. Waller, Jr., Secretary,
State Soil Conservation Committee,
Blacksburg, Virginia.

My Dear Mr. Waller:

I am in receipt of your letter of March 28, in which you quote the following resolution passed by the State Soil Conservation Committee on March 15:

"Whereas, the present employees of the State Soil Conservation Committee can not handle expeditiously all of the field work necessary in connection with the setting up of Soil Conservation Districts in the State, and they have frequently called upon Mr. J. R. Horsley to spend two to four days at a time assisting with this field work; and"

"Whereas, such field work is in addition to and not a part of Mr. Horsley's official duties as a member of the State Soil Conservation Committee; and"

"Whereas, he can ill afford to leave his private farm business for several days at a time without compensation;"

"Therefore, be it resolved that Mr. Horsley be employed to assist with
the field work when his services are needed at a per diem of $8.00 plus expenses of travel and subsistence with the distinct understanding that he is not to receive any compensation for his services as a member of the State Soil Conservation Committee, as stipulated in the law.”

You desire my opinion as to whether Mr. Horsley, as Chairman of the State Soil Conservation Committee, may be employed and compensated by the Committee as set out in the resolution.

Section 16 of the Soil Conservation Districts Law (Acts 1938, pp. 725, 744) makes an appropriation from the State treasury to enable the Committee to administer the Act of $25,000 for the biennium beginning July 1, 1938. The payments out of this appropriation are to be made on warrants of the State Comptroller “issued upon vouchers signed by the Chairman of the Committee, or by such other person or persons as shall be designated by the Committee.”

Even in the absence of any statutory provision dealing with the question you present, I should say that such employment, as a matter of general law, would be of doubtful legality. I call your attention to section 4706 of the Code of Virginia, reading as follows:

“If any member of the board of visitors or directors of any State institution, or employee or agent thereof, or any trustee of any public trust or fund, or any salaried officer of any such State institution, or of any such public trust or fund, contract or be interested in any contract with such institution or with the governing authority of such public trust or fund in any manner for furnishing supplies or performing any work for said institution, or for the governing authority of said trust or fund, he shall be fined not exceeding five hundred dollars.”

Construing this section, it seems to me reasonably plain that the members of the State Soil Conservation Committee are trustees of a public fund and that, therefore, it would be unlawful for any one of the members of the Committee to be employed by the Committee in the capacity set out in the resolution.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Compatibility of Offices—Town Councilman as Building Inspector.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 20, 1939.

HONORABLE GEORGE WALKER,
Member House of Delegates,
Oldhams, Virginia.

MY DEAR MR. WALKER:

This is in reply to your request for my opinion upon the following question: Is a member of the town council of Colonial Beach eligible to be elected or appointed by said council as building inspector of said town?

Section 2982 of the Code of Virginia provides as follows:

“No member of any council shall be eligible, during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council—by election or by appointment.”

It is my opinion that this provision is applicable both to cities and towns, and that therefore no member of the council is eligible to be appointed or elected
by the council to any position to be filled by such council. It follows, therefore, that, in my opinion, a member of the town council of Colonial Beach, Virginia, is not eligible to be appointed or elected by the council of said town to the position of building inspector of said town.

The foregoing opinion, however, is subject to this possible qualification—that there may be some inconsistent provision in the charter of the town which might operate as a repeal of this general section of the Code. I do not have available the references to the Acts of the General Assembly in which the town charter may be found. If you desire me to examine the charter for the purpose of ascertaining its provisions on this subject and will give me references to the legislative acts in which same appears, I shall be very glad indeed to let you hear from me on that subject also.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Oaths—Members State Board of Health.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 8, 1938.

Dr. I. C. Riggin, Commissioner,
Department of Health,
Richmond, Virginia.

Dear Dr. Riggin:

This will acknowledge your letter of July 6, in which you ask if members of the State Board of Health should qualify under sections 269 and 273 of the Code of Virginia.

Section 269 provides that every person before entering upon the discharge of any function as an officer of this State shall take and subscribe to the oath set out therein. Generally speaking, a public office is a position created by law; with duties cast upon the incumbent which involve an exercise of some portion of sovereign power and in which the public is concerned, and the duration and term of office of which is fixed by law.

In view of the fact that sections 1486, 1487 and 1491 of the Code of Virginia, creating the State Board of Health, provide for the appointment of the seven members by the Governor for a definite term and prescribe the duties, powers and functions of the Board, which are clearly of a public nature, it is my opinion that members of the State Board of Health are officers of the State and should qualify under sections 269 and 273.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

REGISTRARS—Applications, Printed Forms.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 8, 1939.

Mr. Ayers Friend, Registrar,
Clintwood, Virginia.

My Dear Mr. Friend:

I am in receipt of your letter of May 1, in which you inquire as to the legality of a form which you are using in the registration of persons.
REPORT OF THE ATTORNEY GENERAL

I quote below from an opinion of this office under date of September 16, 1935, to Mr. G. B. Sanders, Registrar, Max Meadows, Virginia:

"I am in receipt of your letter of December 12, enclosing a printed slip for use of persons applying for registration. The use of this slip by a person applying for registration would mean that such person would only have to fill in a few blanks. You inquire whether such a slip may be legally used.

"Section 93 of the Code provides that, unless physically unable to do so, the person shall make application to the registrar in his own handwriting, without aid, suggestion or memorandum, in the presence of the registrar, stating therein his name, age, date and place of birth, residence, etc. I am of opinion that the use of such a slip as you enclose would not comply with the provision that the person shall apply 'in his own handwriting, without aid, suggestion or memorandum'."

You will see from the above that this office is of opinion that a form such as you enclosed, where it is only necessary for a person applying for registration to fill in a few blanks, does not comply with the statutory provision that a person must apply for registration "in his own handwriting, without aid, suggestion or memorandum."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

REGISTRARS—Eligibility for Elective Office.

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

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

MY DEAR GOVERNOR PRICE:

I have your letter of August 27, with which you enclose a letter addressed to you by the Commissioner of Revenue of Alexandria, Virginia, in which an opinion from this office is sought upon the question of the eligibility of a registrar, who apparently resigned after the general election of June 8, to hold the office of tax collector of the City of Alexandria should he be elected thereto in the coming November election.

I find that my predecessor in office, Honorable John R. Saunders, had occasion to pass upon this identical question and I am enclosing you herewith a copy of his opinion, which is found at pages 49 and 50 of the printed annual report of the Attorney General of Virginia for the year 1930-1931.

I will supplement the opinion of Colonel Saunders by stating that section 97 of the statute, in the language which refers to the election to be held next after a person has acted as registrar, means general election and not primary election. The fact, therefore, that the prospective candidate did not act as registrar in the August primary would not, in my opinion, have any bearing upon the question.

Section 221 of the Code gives to the word election the following meaning:

"The word 'election,' a general or municipal election as distinguished from a primary election."
Whether or not the prospective candidate in this case has acted as registrar within the prohibition of section 97 of the Code presents a question of fact upon which, of course, this office cannot undertake to pass.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 10, 1939.

Honorable W. T. YANCEY,
Member House of Delegates,
Woodville, Virginia.

My Dear Mr. YANCEY:

In your letter of January 7 you request my opinion concerning the construction of sections 5159 and 5160 of the Code of Virginia as affecting the following question:

When stock is issued in the name of two persons "as joint tenants with the right of survivorship and not as tenants in common" and one of the joint tenants dies, does the survivor become entitled to the whole or to a moiety?

There can be no doubt that §5160 excepting certain situations from the provisions of §5159, which changes the common law rule as to survivorship in the case of joint tenants, applies to personal property as well as to real estate. §5159 expressly applies to both personal property and real estate, and §5160 provides in general terms for certain exceptions without specifically stating that the exceptions apply only to real estate.

It has been suggested that since §5160 uses the words "conveyed or devised", which are generally used in connection with real estate, the exceptions deal only with real estate. However, it is to be noted that §5159 contains this language "and if hereafter any estate, real or personal, be conveyed or devised to * * *". Since these words are used in §5159 in connection with personal property, it seems clear that they also refer to personal property when used in §5160.

It has been expressly held by the Supreme Court of Appeals of Virginia in the case of Wallace v. Wallace, 168 Va. 216, 190 S. E. 293, that §5160 applies to personal property and that the right of survivorship exists when it is clear from the tenor of the instrument that it was intended that the part of the joint tenant dying should then belong to the others. See also Rady v. Staiars, 160 Va. 373, 168 S. E. 452.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Hon. S. Bernard Coleman,
Attorney for the Commonwealth,
Fredericksburg, Virginia.

My Dear Mr. Coleman:

I am in receipt of your letter of April 13, in which you refer to the Appropriation Act of 1938 (Acts 1938, at page 820) and to the following provision relating to the payment of State funds to the localities for school purposes:

"It is provided further that no county or city shall receive any State funds beyond the constitutional appropriation if it shall have reduced its annual appropriation or local levies for the operation and maintenance of public schools below the amounts appropriated or levied for the school year 1936-1937."

You further say:

"For the year of 1936 and 1937 the Board of Supervisors of Spotsylvania approved the levy for school purposes which included all school expenses of eighty-five cents.

"In 1938 there was a reassessment of property in Spotsylvania County which resulted in a much higher total assessed valuation, also there is in process of construction school buildings which necessitated the borrowing of considerable money from the literary funds, the approximate amount, I believe, to be around $100,000.00. In view of this condition the Board of Supervisors desire to know whether from the amount derived from the levy of eighty-five cents a portion thereof may be used for carrying interest on this indebtedness, or whether all interest and capitalization charges must, by reason of the Appropriation Bill of 1938, be carried by a levy in addition to the eighty-five cents levy."

I take it that, even though a part of the school levy may be used for interest on capital school indebtedness, on account of the higher assessed valuations, there still will be as large an amount available for operation and maintenance of schools as there was for the school year 1936-1937. If my assumption is correct, I am of the opinion that the Board of Supervisors will be substantially complying with the quoted provision in the Appropriation Act if the funds available for the operation and maintenance of the public schools is not less than similar funds for the school year 1936-1937.

It seems to me that the purpose of the provision to which you refer was to insure that the localities would not decrease the funds available for operation and maintenance of schools.

Very sincerely yours,

Abram P. Staples,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Contracts—Interest of Board Members in.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,

Hon. W. H. Brown, Jr.,
Attorney for the Commonwealth,
Manassas, Virginia.

My Dear Mr. Brown:

I am in receipt of your letter of September 28, in which you ask several questions relating to the construction of section 708 of the Code of Virginia, as amended in 1938 (Acts 1938, page 36) in so far as this section is applicable to members of the County School Board who are also merchants and sell to the School Board "certain minor articles such as brooms, oil and other incidental supplies" including gasoline for school buses.

This section, as you know, makes it unlawful for a member of the County School Board, without the consent of the State Board of Education evidenced by resolution of the said Board, among other things, to be interested in any contract with the School Board or in selling books and other supplies to the Board or to the schools.

The last sentence of this section reads as follows:

"But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board of Education, or supplies used in the schools and by the pupils."

In the case you put I understand that members of the School Board are regularly engaged in the mercantile business and are not especially soliciting the purchase by the Board or the schools of the supplies you describe. I am of the opinion, therefore, that sales of these supplies in the regular course of trade by a member of the School Board who is a merchant are not prohibited by the section. However, I may say that I do not think any contract should be entered into by the Board with one of its members who is a merchant for such sales unless such a contract is approved by the State Board of Education, as provided in the statute.

Your other question relates to the same character of transaction where a member of the School Board owns stock in a corporation which is engaged in the mercantile business. For the reasons already stated, I am of opinion that such transactions are not prohibited by the section when approved by the State Board of Education.

Very sincerely yours,

Abram P. Staples,
Attorney General.

SCHOOLS—County Levies—Maximum Limit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 10, 1939.

Hon. W. E. Neblett,
Attorney for the Commonwealth,
Lunenburg, Virginia.

My Dear Mr. Neblett:

I am in receipt of your letter of March 9, in which you inquire if the Board
of Supervisors of Lunenburg County may lay a school levy in that county in excess of $1. You refer in this connection to Chapter 377 of the Acts of 1938 insofar as it relates to the requirement that the school boards of the school divisions of the State are "hereby empowered and required to maintain the public free schools of such division for a period of at least nine months or one hundred and eighty teaching days in each school year." Under certain circumstances the length of term of any school may be reduced to not less than eight months. I assume, of course, that your letter has no reference to the levy that the Board of Supervisors may make for debt service.

Section 698-a of the Code, as enacted in 1938 (Acts 1938, p. 197) provides in part as follows:

"Each county and each city is authorized to raise sums by a tax on all property, subject to local taxation, of not less than fifty cents nor more than one dollar on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in such counties and cities in establishing, maintaining and operating such schools as in their judgment the public welfare may require."

The section also provides that the levy in certain designated counties may be in excess of $1.

In my opinion, and this office has heretofore so held so I shall not go into detail as to my reasons, in view of the quoted provision of section 698-a of the Code, the school levy in Lunenburg county for establishing, maintaining and operating the schools may not be in excess of $1. It is true that Chapter 377 of the Acts of 1938, to which I have referred, requires the local school authorities of a county to operate the public free schools for a nine months session, or under certain circumstances for eight months. It has been argued that, where the $1 levy will not raise sufficient money to enable the particular county to meet this requirement, this 1938 Act in effect repeals the limit of the levy fixed by section 698-a of the Code, so that the levy in a particular county may be in excess of $1 to enable the county to operate the schools for the prescribed time. In my opinion, this argument is not sound. It is fundamental that, where there are two statutes relating to the same general subject, neither one of which is repealed in terms, one of the statutes is not to be construed to repeal the other unless the statutes cannot be reconciled.

Section 698-a, in addition to the part I have quoted, further provides that the Board of Supervisors, in lieu of making a levy, may make a cash appropriation from the general county funds for the support of the schools. And further the section provides that, in addition to this, the Board of Supervisors of any county may appropriate from any funds available such sums as in the judgment of the Board may be necessary for the establishment, maintenance and operation of the schools. This provision for an additional appropriation, in my opinion, clearly authorizes the Board of Supervisors to appropriate such sums for school purposes as may be available, in order that the county may be able to comply with the requirements of the Act relating to the length of the school term.

It appears, therefore, that not only may the two Acts be reconciled, but that the Board of Supervisors has specific authority to appropriate sufficient money to operate the schools for the period required by law. My conclusion is, therefore, that the original school levy in Lunenburg may not be in excess of $1. If the funds derived from this levy will not operate the schools for a sufficient length of time, then the Board of Supervisors may make an additional appropriation from any funds available.

Of course, in preparing the budget for the coming year and determining the amount, if any, which it will be necessary to expend from the general fund of the county treasury to supplement monies raised from the school levy in order to operate the schools the desired time, the board of supervisors must necessarily consider in conjunction therewith the rate of the general levy which will be necessary to provide the requisite funds. I know of no statute which limits the
rate at which this general levy may be made. In this manner the whole situation can be adequately taken care of in the future.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.

SCHOOLS—County Levies—Use of, for Acquisition of New Plant.

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

Honorable C. C. Collins,
Attorney for the Commonwealth,
Covington, Virginia.

My Dear Mr. Collins:

This is in reply to your letter of December 15, in which you request my opinion upon the question whether or not the board of supervisors of Alleghany County has authority, out of the revenue derived from a levy of one dollar made pursuant to section 698 of the Code to be used "in establishing, maintaining and operating" the schools in the county, to purchase lands for the purpose of building thereon a new school building.

This office has had occasion in the past to consider this question, and has expressed the opinion that the word "establishing" used in the section referred to includes the acquisition of property for a new school building, as well as the actual construction of said building; provided, however, that such use of the revenue derived from the levy does not interfere with the actual proper operation and conduct of the schools.

I doubt very much if the board of supervisors would have the authority to use the money for establishing new schools, unless this amount remained after payment of the expenses of the operation of the schools already established.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—District Bonds—Sinking Fund—How Created.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 28, 1939.

Mr. T. D. Foster,
Superintendent of Public Schools,
Waverly, Virginia.

My Dear Mr. Foster:

I am in receipt of your letter of March 23, from which I quote as follows:

"The enclosed notice of a bond issue election in Stony Creek District, Sussex County, provides, among other things, that the ‘bonds will run for a period of fifteen (15) years with One Thousand Dollars ($1,000.00) thereof payable annually after 1947, and the said bonds are to bear interest from date of issuance at three per cent per annum, payable semi-annually.’

"Section 2741 of the Code provides, among other things, that the Board of Supervisors shall lay a levy ‘to pay the interest on said bonds, and in such
manner as they may deem best create a sinking fund sufficient to pay the
said bonds at or before maturity.'

"Since the bonds are serial bonds, the first falling due in 1947, we would
like to know if it is mandatory upon the Board of Supervisors to begin
creating a sinking fund at once. In other words, would we be complying
with the law if we paid the interest semi-annually as provided on the bonds
and laid a sufficient levy annually beginning in 1947 to retire a bond each
year?"

Section 2741 of the Code, stipulating how interest shall be paid and provid-
ing for the creation of a sinking fund, reads as follows:

"The board of supervisors shall annually include in the levy upon the
property and lawful subjects of taxation in said county, as a part of the
annual county levy, a sum and tax sufficient to pay the interest on said
bonds, and in such manner as they may deem best create a sinking fund
sufficient to pay said bonds at or before maturity."

Construing the above quoted section of the Code, I am of the opinion that
it is not mandatory upon the Board of Supervisors to lay a levy so as to begin
to provide for a sinking fund immediately after the issuance of the bonds. The
section provides that the Board may create the sinking fund in such manner as
it deems best and, in my opinion, this language plainly gives to the Board dis-
cretion as to how this sinking fund shall be created. Of course, it is unneces-
sary to state that under the statute the Board has to provide such a sinking fund
as will enable it to pay the bonds as they mature; and arrangements also have
to be made so that the bondholders may exercise their option to have their
bonds redeemed at any interest period in 1950 or thereafter.

I call your attention to the fact that the provision giving the bondholders
the right to demand payment of their bonds in full at any interest period in 1950
or thereafter is an unusual one. Is it not possible that the notice of the election
is incorrect in this particular and that it was the intention to give to the district
the right to call the bonds in 1950 or thereafter? The word "redeemed" in the
notice is more applicable to the right of the authority issuing the bond than it
is to the bondholder.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Employing Relatives of Board Members—Persons Previously
Employed at Occasional Jobs.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 26, 1938.

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

MY DEAR MR. WILLIAMS:
I am in receipt of your letter of September 23, from which I quote as fol-
lows:

"Mr. A. is a brother-in-law of Mr. B. who is a member of the Clarke
County School Board. Mr. A. has been employed by the School Board oc-
casionally by the day during the last six or eight years, but never on a
contractual basis. The School Board has now made provision for a full
time repair man on a year-around contract. Mr. A. is an applicant for this job.

"Under section 660 of the 1938 Supplement to Michie's 1936 Code of Virginia, is Mr. A. eligible for appointment while his brother-in-law is on the School Board?"

Section 660 of the Code of Virginia, as amended in 1938 (Acts 1938, p. 637), provides in part as follows:

" * * * it shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee, from the public funds if 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. * * * ."

In my opinion, the employment of Mr. A. would violate the spirit, if not the letter, of this provision. It is true that the relative employed by the School Board prior to the effective date of this Act is exempted from the application of the statute. However, in my opinion, this provision refers to one who has been employed by the Board under a contractual arrangement, or certainly one who has been regularly employed by the Board. I do not believe that it could be fairly argued that one who has merely done occasional work, such as you describe in your letter, is exempted from this provision.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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SCHOOLS—"Entrance Fees" for Students.

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

Mr. C. H. Boyer, Clerk,
Fries School Board,
Fries, Virginia.

My Dear Mr. Boyer:

I am in receipt of your letter of September 7, in which you ask if special town school districts are "permitted to charge high school students tuition or entrance fees under the existing Virginia laws."

I am of opinion that, under section 672 of the Code, as amended in 1938 (Acts 1938, p. 356), no such special school district may charge tuition to residents of the District. I presume that you are using the term "entrance fees" as synonymous with tuition.

Very sincerely yours,

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

SCHOOLS—Immunity in Tort—Injuries to Students in Laboratories, etc.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 30, 1938.

Honorable T. D. Foster, Superintendent,
Sussex County School Board,
Waverly, Virginia.

Dear Mr. Foster:

I have your letter of September 30, requesting the opinion of this office concerning the liability of the Sussex County School Board for injuries to pupils received while working in an industrial art shop or science laboratory, or while playing on the grounds during recess.

This office has consistently ruled that county school boards would not be legally liable for such injuries. The following statement found in 9 A. L. R. 911 is a clear statement of the legal principles involved:

"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;
66 A. L. R. 1282;
Maia v. Eastern State Hospital, 97 Va. 507,
34 S. E. 617.

There are no statutory provisions in Virginia imposing liability in such cases upon school boards.

Sincerely yours,

Abram P. Staples,
Attorney General.

SCHOOLS—Local Boards—Borrowing Money—Endorsing Notes.

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

Mr. Dennis D. Forrest,
Division Superintendent of Schools,
Mathews, Virginia.

My dear Mr. Forrest:

I am in receipt of your letter of December 6, from which I quote as follows:

"I have this situation that I would like you to pass upon. According to the law, the school board cannot borrow money without the consent of the board of supervisors. In one of my counties I am building a new school for which the people promised to pay $4,000.00 as their contribution. This $4,000.00 is being raised by notes. The bank has requested the school board
to endorse these notes. We have no objection to endorsing them. The question that is in my mind is this. Can the school board endorse these notes without the consent of the board of supervisors?"

I know of no authority for the School Board to endorse these notes so as to impose any liability on the Board. I see no objection to the Board endorsing the notes without recourse so as to pass title without imposing any liability on the Board or the members thereof.

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

SCHOOLS—Local Boards—Budgets—Division of Items.

COMMONWEALTH OF VIRGINIA;
Office of the Attorney General,
RICHMOND, VA., January 6, 1939.

HON. C. W. CARTER,
Attorney for the Commonwealth,
Warrenton, Virginia.

My Dear Mr. Carter:
I am in receipt of your letter of January 3, from which I quote as follows:

"In the last budget submitted by the County School Board there were certain items included therein for the repair of certain school buildings. The question has arisen as to whether or not the School Board would be required out of the lump sum appropriated by the Board of Supervisors to make these repairs or whether or not they would be permitted to divert this money included in their budget to other school purposes."

I call your attention to section 656 of the Code, dealing with the duties of a County School Board including the expenditure of funds by the Board, and especially to the following language:

"* * * in general, to incur such costs and expenses, but only such costs and expenses as are provided for in its budget without the consent of the tax levying body; * * * ."

In view of this provision, it is my opinion that without the consent of the Board of Supervisors the County School Board may not divert funds specifically appropriated for the repair of buildings to some other purpose.

As to the power of the Board of Supervisors generally over the school budget, I refer you to the recent case of Scott County School Board v. Scott County Board of Supervisors, 169 Va. 213.

Very sincerely yours,
ABRAM P. STAPLES,
Attorney General.
COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 31, 1939.

HONORABLE PAUL E. BROWN,
Commonwealth's Attorney,
Fairfax, Virginia.

MY DEAR MR. BROWN:

I have your letter of January 27, in which you request my opinion upon the question whether or not an employee of the District of Columbia, resident in the County of Fairfax and engaged in rendering services at the District of Columbia Penal Institution located at Lorton, Fairfax County, is disqualified from acting as a member of the county school board.

You refer to section 644(1) of the Code which renders Federal officers and their deputies ineligible to hold such a position. The same ineligibility is extended to apply to State and county officers but this clearly means officers of the State of Virginia or any county in the State. While the District of Columbia is, of course, a part of the Federal government, the same is likewise true to some extent insofar as the states themselves are concerned. Generally speaking, I believe the District of Columbia is regarded as having substantially the same status as a state, although, of course, there are quite a number of differences.

The statute in this case being in the nature of a restriction upon the rights and privileges of individuals, I think must be strictly construed under the well established rule. In applying this rule I do not believe that the statute renders the person to whom you refer ineligible to act as a member of the school board.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 27, 1939.

HON. B. W. LEIGH,
Clerk of School Board,
Halifax, Virginia.

MY DEAR MR. LEIGH:

I am in receipt of your letter of January 11, in which you ask if a county school board has the authority to adopt a resolution to the effect that no married woman will be employed as a teacher in the public schools of the county and that, if any woman teacher marries during a school term, her contract will immediately become void and her position vacated.

I find, as you suggest, that the Circuit Court of Bedford County passed on a similar question in 1935, the court holding that such a resolution was ultra vires and repugnant to the Fourteenth Amendment to the Constitution of the United States.

Without attempting to go into the constitutional question, I must advise that I concur in the opinion of the court that a school board has no authority to adopt such a resolution. I have not been able to find any provision of the statutes
relating to public schools which gives a county school board the authority to take this action.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local Boards—Regular Annual Meeting Falling on Holiday.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 28, 1939.

HONORABLE C. V. SHOEMAKER,
Division Superintendent of Schools;
Woodstock, Virginia.

MY DEAR Mr. SHOEMAKER:

This is in response to your request for my opinion upon the following question:

Section 655 of the Code contains this provision: "The school board shall meet annually on the first Tuesday in July at which time the board shall fix the time for holding regular meetings for the ensuing year, and may adjourn from day to day, or time to time; * * * " The first Tuesday in July, 1939, falls on the 4th day of July, which is a public holiday, and my opinion is desired upon the question whether or not the provisions of the statute should be construed as directing the meeting to be held on the day following the 4th, which would be Wednesday, the 5th of July.

I can find no provision in the statute which would authorize this construction. However, if a quorum is not present on the 4th of July, I see no reason why the chairman of the school board should not adjourn the meeting until the following day.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local Boards—Sale of Property Located in Another County.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 28, 1938.

HONORABLE ROBERT W. ARNOLD,
Attorney for Sussex County School Board,
Waverly, Virginia.

MY DEAR MR. ARNOLD:

This is in reply to your letter of October 21, 1938, in which, on behalf of the school board of Sussex County, you request my opinion upon a question which has arisen in connection with the sale of school property. It appears from your letter that the property is located in Sussex County, but a one-half interest therein is owned by the school board of Greenville County. The school board of the latter county desires to sell its one-half interest in the property, which consists of a school building, to the Sussex County school board. The question you ask is whether or not the sale should be approved and ratified by an order of the Circuit Court of Greenville County or the Circuit Court of Sussex County, in which the land is situated.
Section 678 of the Code confers upon the school board the same power to sell school property as the board of supervisors has with reference to the sale of other county property under section 2723 of the Code.

Referring to the latter section, it is found that the sale must be approved and ratified by an order of the circuit court of said county, or by the judge thereof in vacation entered of record. The early part of this section confers on the board power to sell and convey the corporate property of the county.

It is my opinion, therefore, that the use of the words "circuit court of said county" is intended to refer to the county over which the board of supervisors exercises jurisdiction. I believe it is clear that the statute contemplates that the circuit court of the county owning the property and proposing to sell same, or the judge thereof in vacation, shall approve and ratify the sale.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local Boards—Employment of Member for Extra Work.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 26, 1938.

Mr. M. O. Smith, Chairman,
Shenandoah County School Board,
Woodstock, Virginia.

My Dear Mr. Smith:

I am in receipt of your letter of September 21, in which you inquire if the School Board of your county may pay you compensation in the amount of $6 for services rendered by you other than attending the meetings of the Board.

Section 708 of the Code of Virginia provides in part that the School Board may not "employ any of its members in any capacity."

It seems to me clear that this statutory provision precludes the Board from employing you or paying you the compensation in question.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local Levies—Amount of.

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

Hon. Paul E. Brown,
Attorney for the Commonwealth,
Fairfax, Virginia.

My Dear Mr. Brown:

Your letter of December 15 was duly received, but my reply has been delayed on account of pressure of work in connection with litigation and also the desire on my part to confer with Dr. Sidney B. Hall, Superintendent of Public Instruction.

"Section 698-a of the Code fixes the amount of the levy for school pur-
REPORT OF THE ATTORNEY GENERAL

poses, and in Fairfax County this amount is not less than 50 cents nor more than $1.00 on the $100.00 of assessed valuation of property for maintaining and operating such schools, and for capital expenditures and the payment of indebtedness, a levy may be laid not exceeding 25 cents on the $100.00 taxable value. For the past few years, instead of laying a separate levy for the establishment, maintenance and operation of schools and a separate levy for capital expenditures and the payment of indebtedness, the Board of Supervisors has been laying one levy covering all school purposes. In other words, if the levy for the establishment, maintenance and operation of schools was set at 90 cents and the levy for capital expenditures and the payment of indebtedness was set at 25 cents, then the levy laid by the Board of Supervisors for school purposes was but one levy of the amount of $1.15. This was done in order to simplify matters, and the Board of Supervisors used as their authority for so doing the provisions of chapter 416 of the Acts of 1932, which is cited above.”

You also refer to chapter 416 of the Acts of 1932.

Section 657 of the Code provides among other things for the preparation of estimates of money needed for schools. These estimates are provided on forms furnished by the State Board of Education, and it is prescribed that they shall set up the amount of money “necessary for overhead charges, for instruction, for operation, for maintenance, for auxiliary agencies, for miscellaneous, and for permanent capitalization and such other headings or items as may be necessary.” This information is required “in order that the board of supervisors and the taxpayers of the county * * * may be well informed as to every item of the estimate.”

If, therefore, after reviewing the estimate of funds needed for schools, the board of supervisors determines to make a 90 cent levy for the establishment, maintenance and operation of schools and a levy of 25 cents for capital expenditures and debt service, I know of nothing to prohibit the board of supervisors from incorporating the two levies into one and making a general school levy of $1.15. I think it proper, however, to call your attention to section 698-a of the Code, as enacted in 1938 (Acts 1938, p. 197), which provides for a levy of not more than $1 on the $100 of the assessed value for “establishing, maintaining and operating” the schools in a county. The section further provides that, in addition, the board of supervisors “for capital expenditures and for the payment of indebtedness” may make a levy of 25 cents on each $100 of taxable value. Construing this section 698-a and especially the portions to which I have referred, I think it is reasonably clear that the $1 levy may be used for capital expenditures, but that the additional 25 cents levied is restricted to capital expenditures and debt service. In other words, so far as the 25 cents levy is concerned, I do not think the board could, for example, make a levy of 25 cents for capital expenditures and debt service when only a 10 cents levy was necessary for these purposes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Pupils from One County or City Attending Schools of Another.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., April 20, 1939.

DR. SIDNEY B. HALL,
Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR DR. HALL:
I am in receipt of your letter of April 17, enclosing one from Mr. Joseph H. Saunders, Superintendent of Schools of Newport News, Virginia. Mr. Saun-
ders quotes from Regulation No. 18 of the State Board of Education, adopted pursuant to section 682 of the Code, which Regulation reads as follows:

“Children within the legal school age residing in one county may attend the public schools of an adjoining county or city either on the prepayment of an amount not exceeding the total per capita cost of tuition and maintenance in the division to which pupils are sent, or upon the conditions of any mutual agreement reached between the two county school boards or the county and city school boards concerned.”

He further states that a local attorney in Newport News has advised a member of the City Council that under this Regulation only those non-resident pupils who have been sent by the County School Board of the County can be admitted into the schools of the city.

I do not so construe this Regulation and, from my conversation with you, I gather that such was not the intent of the State Board of Education in adopting the Regulation. It seems to me that the Regulation means just what it says, namely, that children residing in a county may attend the schools of an adjoining city on the prepayment of the tuition charge, or pursuant to mutual agreement reached between the School Boards of the County and City involved. I do not see anything in the Regulation which could be construed, in the absence of an agreement between the County and City to that effect, to require the permission of the County School Board before the child may attend the schools of the City. It seems to me that Mr. Saunders correctly construes the Regulation when he states that: “the intention being that the School Board of the City shall admit any non-resident on the payment of tuition if the Board so desires, and that the Board may admit pupils sent by the County School Board upon any special agreement that the two Boards may make.”

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Regional Boards for Joint High Schools in Counties.

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

DR. SIDNEY B. HALL,
Superintendent Public Instruction,
Richmond, Virginia.

DEAR DOCTOR HALL:
This is in reply to your letter of July 5, in which you request me to advise you with respect to the question contained in a letter from Mr. W. T. Woodson, Division Superintendent of Schools of Fairfax County, addressed to you under date of June 30, 1938, which you enclose to me with your letter.

Mr. Woodson presents the question whether or not the county school boards of Fairfax, Prince William, and Fauquier, may create a regional school board, the membership of which is to consist of the Division Superintendent of each of the counties, together with one member of each board of the respective counties to be designated by the several boards. He then inquires whether or not it will be permissible to pay out of the school funds per diem and traveling expenses for these members of the said newly created regional high school board. This board is created for the purpose of operating the new colored high school which has taken over the Manassas Industrial School. Incorporated.

I can find no authority in the statutes for the creation of this regional high school board. I have heretofore held that the establishment of a joint high school for these counties is authorized by the provisions of sections 667 and 670
of the Code. However, it is very clearly provided in section 667 that in case of such joint operation "all questions arising with reference to said school, shall be voted on by the county school boards of said counties jointly, and the majority vote of the combined boards shall be final, unless appealed from as provided in this section".

In view of this express provision of section 667, and in the absence of any other statutory authority, it is my opinion that the three local school boards do not have the power to create a regional school board, but that the operation of the new high school must be carried on under the control of said several county school boards acting jointly. This being true, there can be no question as to the per diem and traveling expenses for the members of a regional school board.

If it is deemed desirable that a regional school board should function in a case of this kind, it would be necessary to secure additional legislation from the General Assembly.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Town Lying in Two Counties—Right of Students from One County to Attend School in Other.

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

HONORABLE WALTER G. HOWLETT,
Treasurer of Carroll County,
Hillsville, Virginia.

My Dear Mr. Howlett:

This is in reply to your letter of November 14, in which, as I interpret your letter, you request my opinion upon the question whether or not the children residing in that part of the town of Galax which is situated in Carroll County are entitled to attend, upon the same basis as children residing in that part of the said town located in Grayson County, the Galax high school which is located in the Grayson County part of said town and is under the supervision of the Grayson County school authorities.

Your reason for asking this question seems to be that, if these children in the Carroll County part of said town do not have the privilege of attending said school, you were fearful it would not be lawful for you to pay over to the town authorities the proportion of the funds derived from the school levy collected by you in the Carroll County portion of said town. With reference to this payment, you refer to chapters 278 and 318, respectively, of the Acts of 1938.

It is my opinion that all of the children residing in or whose parents reside in the town of Galax, irrespective of whether or not they reside in the portion of said town which is in Carroll County, are entitled to equal rights and privileges in attending all public schools conducted and operated in the town of Galax school district.

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

SENTENCE AND PUNISHMENT—Suspension—Fines in General.
Id.—Imprisonment for Non-Payment—Effect of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 20, 1939.

HONORABLE C. E. REAMS, JR.,
Trial Justice,
Culpeper, Virginia.

MY DEAR MR. REAMS:

This office is in receipt of your letter of February 7, in which you ask four questions. For purposes of reply, I am quoting each followed by the opinion of the office.

"First: Just what does the word 'sentence' mean in section 1922b? Does this word mean a jail term only or does it include a fine as well?"

I am of the opinion that the word "sentence" in section 1922b of the Code includes both a fine and a jail term.

"Second: Does a trial justice court have the authority to suspend payment of a fine as well as suspend service of a sentence?"

A trial justice is authorized to suspend an entire sentence, including both a flat prison term and a fine.

"Third: What would be the effect of a fine suspended on condition after the condition had been complied with? That is, would compliance serve to satisfy the fine or should the same be filed as a judgment with the clerk to be collected at a future date?"

Section 1922b, as amended in 1938 (Acts 1938, p. 189) gives to a court or justice very broad powers in suspending the imposition or the execution of a sentence. Obviously, in suspending the execution of a sentence, where the sentence consists of a fine, the court or justice will attach conditions upon which the sentence is suspended. In my opinion, if the defendant complies with these conditions, then it is the sense of the statute that the fine does not have to be paid. I am well aware of the fact that only the Governor has power to remit a fine. However, where a court suspends on condition a sentence where a fine is imposed, the effect of the action of the court is to impose the fine conditionally and, therefore, where the defendant complies with the condition or conditions, the legal result is as if the fine never had been imposed.

"Fourth: What is the effect on the fine when a person is committed to jail for non-payment of same?"

This is entirely a matter of statutory provisions. I know of no statute which provides that, where a person is committed to jail for non-payment of fine, the fine is satisfied by confinement in jail. Therefore, I am of opinion that in such a case the fine is still collectible. However, I call your attention to section 2095 of the Code, under which persons who are convicted and held to labor in the State convict road force, or in a chain gang, or at the State farm or State industrial farm for women, for the non-payment of fine and costs, or costs alone, are entitled to a monetary credit for each day such person shall work and for each other day of confinement, with a limitation of six months confinement. This section also provides that upon discharge from custody the fine and costs, or costs alone, of every prisoner shall be discharged in full, although his credits for days of work and other days of confinement are not sufficient to pay the fine and
REPORT OF THEAttorney General

costs, or costs alone, in full. I take it, however, that your question relates to
simply confinement in jail in default of the payment of the fine. As stated, in
such a case I know of no statute which provides that such confinement shall
operate to release the defendant from the payment of the fine.

You are, of course, aware that section 1922b provides not only for the sus-
pension of sentence, but suspension of the imposition of sentence. Where the
imposition of sentence is suspended, the court, upon violation of the condition
of suspension, may within the period prescribed by the statute cause the defendant
to be arrested and brought before him, at which time the court may impose such
a sentence as it originally might have imposed.

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

SENTENCE AND PUNISHMENT—Concurrent Sentences—One Imposed
While Another Being Served—How Total Term Computed.

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

MAJOR RICE M. YOUELL, Superintendent,
The Penitentiary,
Richmond, Virginia.

DEAR MAJOR YOUELL:
I am in receipt of your letter of November 23, in which you recite in detail
numerous convictions of Karl Von Barkoff and in which you ask my opinion as
to this man's term of confinement.

Boiled down, Von Barkoff was, on February 18, 1936, serving a term of
confinement in the penitentiary on account of convictions in the Hustings Court
of the city of Richmond on November 20, 1935, aggregating six years, to which
term of confinement was added two years, five months and twenty-one days on
account of the unserved balance of certain other convictions remaining at the
time of a conditional pardon granted him on November 3, 1933. Adding the
unserved part of his sentences imposed prior to the sentence imposed November
20, 1935, Von Barkoff began serving a total of eight years, five months and
twenty-one days on November 20, 1935.

On February 18, 1936, Von Barkoff plead guilty to burglary and larceny
in the Circuit Court of Chesterfield county, and was sentenced to ten years' con-
finement in the penitentiary. It was provided in the sentence that his term of
confined was to run concurrently with the term of confinement he was then
serving in the penitentiary.

You ask my opinion as to the date upon which the ten-year sentence of con-
finement, imposed by the Circuit Court of Chesterfield county, begins to run,
whether from October 20, 1924, the date of Von Barkoff's first sentence of con-
finement in the penitentiary by the Corporation Court of the city of Norfolk or
from November 20, 1935, the date of his conviction in the Hustings Court of the
city of Richmond.

In my opinion, Von Barkoff's sentence upon his conviction in the Circuit
Court of Chesterfield county begins to run from February 18, 1936, and runs
concurrently from that date with his sentence of November 20, 1935, plus his
unserved time because of his violation of the conditional pardon.

The running of concurrent sentences is to the effect that such sentences,
whether two or more, run during the same period of confinement, and no one
sentence interferes with, influences or controls the running of another.

Taking this as the law, a prisoner is to be kept in confinement for the term
which last expires, dating each term of confinement from the date of final judg-
ment in each case. As Von Barkoff's term of confinement of February 18, 1936,
was for ten years, and his sentence of November 20, 1935, was for only six years, to which has been added the unserved balance of a former term of two years, five months and twenty-one days, aggregating, under the latter sentence, eight years, five months and twenty-one days, I am of the opinion that his term of confinement should be calculated upon his term of confinement of ten years, commencing February 18, 1936.

Thus my opinion is to the effect that, irrespective of the number of sentences under which a convict is being held, where all his sentences run concurrently he should be held under the term of confinement last expiring.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Suspension of Sentence—Code Section 1922b.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 9, 1938.

HONORABLE RALPH L. LINCOLN,
Attorney for the Commonwealth,
Marion, Virginia.

MY DEAR SIR:

I have before me your letter of December 7, in which you request my opinion upon the question whether or not chapter 122 of the Acts of the General Assembly of 1938, pages 188-189, should be restricted in its application to juvenile or domestic relations cases, or whether same would be applicable to any criminal proceedings in any court regardless of the nature of the crime or of the age of the person accused or convicted.

This Act, which is an amendment of section 2 of an original act passed in 1918 (Acts 1918, page 528), has been classified in the Michie Code, and the 1938 supplement of said Code, as section 1922b. Section 1 of the 1918 Act has been classified and enumerated as section 1922a.

By this arbitrary classification made by the publishers of this Code, which is not an official Code, the legislation is given the appearance of relating only to the subject matter covered by chapter 78 of the Code, which is "Delinquent, Dependent and Destitute Children". An examination of the 1918 Act, however, shows that same was not intended to have any such restricted application. On the contrary, the original act was intended primarily to set up a probation system in all criminal matters, regardless of the age of the accused, and to provide for the suspension of sentences in certain cases as an aid in the general operation of the probation system.

In my opinion, it is very clear that the legislation is general in character, and applies to all criminal matters in all courts of the State having jurisdiction to hear and determine the offenses charged.

Sincerely yours,

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

SEN TENCE AND PUNISHMENT—Time Of f or Good Behavior—Pe r sons Committed for Non-Payment of Fine and Costs.

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

HONORABLE C. G. ROWELL,
Trial Justice,
Surry, Virginia.

Dear Mr. Rowell:

I am in receipt of your letter of November 30, in further reference to the question contained in your former letter as to whether a person serving time in jail for the non-payment of fine and costs, or costs alone, under the provisions of section 4953 of the Code, is entitled to time off for good behavior under the provisions of section 2860 of the Code.

Section 2860 provides that the jailor shall keep a record of every person committed to jail, including “the terms of confinement, for what offense or cause he was committed, and when received into jail.” Following this, the section provides for a record of behavior of each person in jail and for a good time allowance, with the consent of the judge of the court, of ten days per month for good behavior.

Section 4953 provides a schedule of confinement in jail for the non-payment of fine and costs, or costs alone, based upon the amount of such fine and costs, with a further provision that in no case shall a person be confined in jail exceeding two months. This is to be distinguished from a case where the punishment imposed is a sentence of confinement in jail for a definite term. This section (4953) does not provide for time off for good behavior, but does provide for the discharge of the prisoner, without further order of the court, at the expiration of the applicable stated maximum period of confinement. Unlike the straight jail sentence, the prisoner may be discharged at any time upon payment of the fine.

In my opinion, section 2860 is confined to the case of persons serving a definite jail sentence and provides an allowance of time off for good behavior, while section 4953 provides a schedule of times of actual confinement, based upon the amount of fine and costs, or costs, and does not provide for an allowance of time off for good behavior.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHELLFISH AND OYSTERS—Licenses—Crabbing With Dip Net.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 6, 1938.

Mr. C. S. Towles,
Trial Justice,
Reedville, Virginia.

My Dear Mr. Towles:

I am in receipt of your letter of September 2, in which you refer to subsection 1 of section 3265 of the Code as amended in 1938 (Acts 1938, p. 546), which reads as follows:

“For each person taking or catching soft crabs otherwise than by dip nets or hard crabs, or peelers, with net, ordinary trot line, hand rake, or
hand scrape, pushed or pulled, or with any device other than dip net or hand line, two dollars and fifty cents; provided that no boat shall be used to pull or push any rake or scrape except as provided for in subsections three and four of this section."

You desire my opinion as to whether or not a license is required under this subsection "of a person catching or taking hard crabs and peelers with a dip net."

It seems to me that the language of this section is plain in that it requires a license of a person taking or catching hard crabs or peelers "with any device other than dip net or hand line." I am of opinion that this language clearly means that a license is not required of a person taking hard crabs or peelers with a dip net or hand line.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation—Commissions in Certain Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 7, 1939.

Honorable J. Segar Gravatt,
Trial Justice,
Nottoway, Virginia.

Dear Judge Gravatt:

I have your letter of June 1, requesting my opinion as to the allowance of commissions to sheriffs in certain cases upon the collection or settlement of claims for which executions have been issued. You cite the Code sections which, in my opinion, are controlling.

Specifically, you wish to know whether commissions are allowable in three types of cases.

First, where execution is issued and placed in the hands of the sheriff, but before a levy is made the defendant settles the claim directly with the plaintiff without making any payment on account of commissions. In such a case, I know of no authority for the allowance of a commission. Under Virginia Code (Michie 1936) section 3488, even if a levy is made and the property actually advertised for sale, it is expressly provided that the sheriff shall not receive a commission.

Second, where the defendant, after execution has been placed in the hands of the sheriff, pays the amount of the judgment with costs to the sheriff. In my opinion this constitutes "receiving payment under an execution" within the meaning of Code section 3487, and hence the officer is entitled to the commission prescribed by that section.

Third, where, subsequent to the issuance of execution, a summons in garnishment is sued out and the person summoned makes payment to the sheriff. In such a case, it is my opinion that the sheriff is entitled to the commission prescribed by Code section 6515.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
SHERIFFS—Compensation—Carrying Prisoners—Mileage.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 1, 1939.

HONORABLE LORING C. KACKLEY,
Trial Justice,
Berryville, Virginia.

DEAR MR. KACKLEY:

This will acknowledge your letter of May 26, requesting my opinion as to the proper construction of Virginia Code (Michie 1936) section 3508 in so far as that section relates to the compensation of sheriffs for carrying prisoners to jail under the order of a justice.

This office has frequently had occasion to consider this question and has uniformly expressed the opinion that a sheriff, who is sent out with a warrant to make an arrest and return the prisoner, is entitled to the mileage allowance prescribed by this section for "carrying a prisoner to jail under the order of a justice."

It follows, therefore, that such mileage allowance is properly allowable and taxable in the costs of the proceedings.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Fees—Serving Copy of Order Entering Judgment by Confession.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 26, 1938.

MR. CHAS. C. CURTIS,
Sheriff of Elizabeth City County,
Hampton, Virginia.

MY DEAR MR. CURTIS:

I am in receipt of your letter of August 9, from which I quote as follows:

"In re Acts 1936, Chapter 338, Sec. 3487:

"Question having been raised as to what a sheriff's fee for serving a notice of copy of order on a debtor when the holder of a confessed judgment places same on record in a clerk's office.

"We have been referred to section 6130a of the Code of 1936 as providing a fee of fifty cents. Sheriff's contention is that a fee of seventy-five cents is a proper and lawful fee in this matter.

"We would appreciate your ruling in this matter at an early date."

Section 3487 of the Code is the section dealing with sheriffs' fees generally in civil cases. This section was amended in 1936 (Acts 1936, p. 545) so as to increase the fee for service of "a declaration of ejectment, order, notice, summons, or any other civil process," from fifty to seventy-five cents.

It is true that section 6130a of the Code (Michie, 1936), dealing generally with confession of judgments in clerks' offices, provides a fee of fifty cents to the sheriff for serving a copy of the order entering judgment. However, when this section was originally enacted, the fee of the sheriff for serving civil process
generally was fifty cents, and I assume that the Legislature simply intended to
make the fee correspond with the general law relating to sheriffs' fees.
Therefore, I think the better view is that when the General Assembly in-
creased the sheriffs' fee for serving civil process from fifty to seventy-five cents
it was intended that this should apply to all cases. I am of opinion, therefore,
that, inasmuch as there is conflict between section 3487, the general law on the
subject, and section 6130-a, the fee of seventy-five cents prescribed in section
3487 should prevail. This would also appear to be the logic of the matter, for
I can think of no valid reason why there should be a fee of fifty cents in the
case of this particular civil process and seventy-five cents in cases of civil process
generally.
I am further strengthened in my view by the fact that section 3487 of the
Code was amended in 1938, retaining the fee of seventy-five cents, while section
6130-a was not amended in 1938.
Very sincerely yours,
ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Levying Execution—
Security for Property Seized.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
_Richmond, Va., February 15, 1939._

Mr. George H. Stevens,
_High Constable,
Norfolk, Virginia._

My Dear Mr. Stevens:
I am in receipt of your letter of February 14, from which I quote as fol-
lows:

"In the case of a levy upon an automobile this office has allowed the
automobile to remain in the actual possession of the owner or execution
debtor unless indemnifying bond is given by the plaintiff.
"In a pending case the plaintiff contends that we should take actual
possession of the automobile without bond. He also states that, if we do
not take actual possession of an automobile levied upon, we will be respon-
sible for any damage to said automobile."

Section 6154 of the Code provides that, where an officer levies or is
required to levy a _fiery facies_ "and a doubt shall arise whether the said
property is liable to such levy", he may give the plaintiff or his attorney notice
that an indemnifying bond is required. You are doubtless familiar with the
provisions of this section. In my opinion, therefore, where you are called upon
to levy upon an automobile, if there is doubt as to whether the automobile is
liable to such levy, you may before seizing the car require an indemnifying bond
under the provisions of this section.

As to whether you should, pursuant to section 17 of the Motor Vehicle Code,
as amended in 1938 (Acts 1938, p. 327), make a report to the Division of Motor
Vehicles as required by this section, where you do not actually seize the car, I
am of opinion that both the form of the report which you enclose and the section
itself contemplate the seizure of the car before the report should be made.

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

SHERIFFS AND CONSTABLES—Compensation Computation of $250 Limit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 11, 1938.

Colonel LeRoy Hodges,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:

This is in reply to your letter of June 20.

After quoting the provisions of section 3504 of the Code, you refer to the specific provision therein to the effect that sheriffs and constables shall receive out of the State Treasury in certain cases the full fees provided by law for certain services until such officer receives as much as $250. Thereafter, such officer is to receive only one-half of the fee so provided for by law. You request my opinion as to the period of time to which the limitation of $250 applies.

The general statutes of the State relating to compensation of these officers and the maximum amount of fees which may be retained by them as their net compensation are all based on an annual period. While no express period is provided for in section 3504 of the Code, I am advised by Mr. Sidney C. Day, of your office, that ever since the enactment of this provision in 1924 it has been construed by the former auditors and the present Comptroller's Office as applying to one year's compensation.

In view of this long administrative construction which has prevailed, and of the usual basis employed in other statutes relating to the compensation of sheriffs and constables, it is my opinion that this construction should be adhered to, and that the period of time covered by said section of the Code quoted by you shall be deemed to be one year.

Yours sincerely,

Abram P. Staples,
Attorney General.

SHERIFFS AND SERGEANTS—Compensation—Profits from Care of County and City Prisoners—Disregarding, in Fixing Maximum.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 15, 1938.

Honorable LeRoy Hodges, Chairman,
State Compensation Board,
Richmond, Virginia.

My Dear Colonel Hodges:

I refer to my letter to you of June 20, 1938, and especially to the last portion of it from which I quote as follows:

"You also ask the following question:

"There is also another question before us concerning the offices of sheriffs and city sergeants. What amounts paid by the county or city to those officers are applicable to the amount required by law to be disregarded? (3516-8.) Is the "profit from care of county or city prisoners in jail" to be combined with the salary against the county or city exemption? That is, if the salary paid by the county or city is $1,200.00, profit on board of prisoners $300.00, and the exemption $1,500.00, is the amount applicable to
the exemption $1,200.00 or $1,500.00? Would there be any fees or allowances other than actual salary to be applied against this exemption?"

"In my opinion, in the light of subsection 8 of section 3516, only the actual salary paid by the county or city should be disregarded in computing the maximum compensation of the sheriff or sergeant. The compensation of a sheriff or sergeant for boarding a prisoner is covered by the fees allowed by section 3510 of the Code. If by the receipt of these fees the sheriff makes a profit on the board of these prisoners, I do not see how this profit could be treated as compensation which may be disregarded in computing the maximum under section 3516."

It has been brought to my attention that the conclusion reached in this particular is misleading. It is obvious that I was under the impression that the fees in question were paid to the sheriff under section 3510 of the Code for State prisoners and were, therefore, State compensation. If this had been the question asked by you, the answer given would be the correct one, but I now see, which apparently I did not observe when the letter was written, that your question relates to "profit from care of county or city prisoners in jail." I did not, when I read your letter, realize the distinction between State and City or Town prisoners.

Now, answering specifically your question as to the latter, it appears to me that section 3510 of the Code should be construed as fixing the fees payable to the sheriff or sergeant out of the State treasury, and as having no application to prisoners held for violation of town or city ordinances. Said section, you will note, contains this provision:

"But no payment shall be made out of the treasury for receiving, keeping and supporting any prisoner, committed to jail for a violation of the ordinance of any city or town * * * ."

I am advised that for many years the scale of compensation contained in section 3510 for keeping and supporting prisoners in jail has been construed as having no binding application to town and city prisoners. As to this, it has been customary for the town or city to enter into an agreement with the officer as to the compensation to be paid. Of course, the agreed basis of compensation might be the same or different, but this would not change the legal effect.

That portion of section 3516 pertinent to your question reads as follows:

"* * * 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, board 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."

The duty of feeding and caring for prisoners convicted of violating local ordinances is not imposed upon the sheriff or sergeant by state law.

In my opinion, the plain intent of this proviso is that, to the extent above provided, all local compensation allowed and paid by the councils or boards of supervisors for such service shall be excluded in determining the maximum of the officer, whether received in the form of a salary or profit from the care
and board of local prisoners. The section throughout seems to use the word "compensation" as embracing compensation that the officer receives from all sources in his official capacity. My conclusion, therefore, is that the local compensation to be excluded in determining the maximum of the officer is such compensation, whether received in the form of profit or commissions. Therefore, if the population of the locality is such as to authorize an exemption of $1,500, I am of opinion that the exemption may be made up of either salary or profit or other method by which the officer may be compensated or by a combination of all of the methods. Necessarily the total exemption will not exceed the amount prescribed by the statute, that is to say $2,500 in cities or counties having a population of 50,000 or more, and $1,500 in cities or counties having a population of between 25,000 and 50,000, etc.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Rewards for Apprehending Criminals—Fugitive Wanted in Another Bailiwick.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 7, 1939.

HONORABLE M. B. BOOKER,
Commonwealth's Attorney,
Halifax, Virginia.

MY DEAR MR. BOOKER:

You have asked if a deputy sheriff of Chesterfield County, a constable thereof, an employee of the State Farm of Chesterfield County, and a trusty thereof, who have captured in Chesterfield County a person who has committed a felony in Halifax County, are entitled to a reward offered by the Board of Supervisors of Halifax County.

The right of the deputy and the constable to any portion of this reward depends upon whether their actions in apprehending the criminal consisted of the performance of official duties imposed upon them by virtue of their office. It is well established generally, and in this state, upon considerations of public policy, that an officer cannot lawfully receive or recover a reward for the performance of a service which it is his duty to discharge. See Buck v. Nance, 112 Va. 28. I am unable to say from the meager facts in my possession whether the apprehension of the criminal by these two officers consisted of the performance of an official duty by them. If they acted by virtue of a warrant in their possession, then they were performing an official duty. If, however, they acted without a warrant, then the question of whether or not they were performing an official duty may well depend upon all of the facts and circumstances in the case.

In the case of Warner v. Grace, 14 Minn. 47, it was recognized that a sheriff or other peace officer may properly perform services in the detection and punishment of crimes which it is not his official duty to perform, and for such services may receive an award. It was held in that case that, if a sheriff was requested to arrest in his county a person who had committed a crime elsewhere and the sheriff was informed of the whereabouts of the criminal, he was performing an official duty in making the arrest even if he did so without a warrant. However, in the case of Davis v. Munson, 43 Vt. 676, while recognizing the duty of an officer under such facts set out above, the court held that a sheriff, having no process in his hand, was under no specific official duty to undertake on his own initiative an extensive search or act as a detective to find a criminal whose whereabouts are unknown. It was held that under such circumstances the sheriff was entitled to a reward offered for the capture and arrest of the criminal.
REPORT OF THE ATTORNEY GENERAL

The right of the deputy sheriff and constable to the reward in this case is a matter depending upon all of the facts and circumstances and is therefore a matter upon which since I am not informed of such facts, I am attempting to express no opinion. There appears to be no principle forbidding the claiming and receiving of the reward by the employee and trusty.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SOCIAL SECURITY ACT—State Institution Engaged in Construction Work—Deductions from Payroll.
Unemployment Compensation Act—Id.—Id.

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

HONORABLE FRANK E. HARTMAN,
Superintendent,
University of Virginia.
Department of Buildings and Grounds,
University, Virginia.

MY DEAR MR. HARTMAN:

I am in receipt of your letter of October 14, 1938, in which you state that through the financial aid of the Federal Public Works Administration the University of Virginia, on a force account basis, is making certain improvements to one of its buildings. I understand from this letter that the University is acting in the capacity of contractor and employs all the workmen engaged in the project. You state that in making up your payroll you have deducted the Social Security tax. I assume that the tax referred to is the one per cent tax provided for under Title VIII of the Federal Social Security Act and that you expect to supplement this amount with a like contribution from the fund furnished by the Public Works Administration.

You make no reference to the unemployment compensation tax which is a tax on employers of eight or more under Title IX of the Social Security Act and is likewise a tax on the same class of employers under the Virginia Unemployment Compensation Act, approved December 18, 1936. You request an opinion as to whether or not the University of Virginia has the right to make the social security tax deduction referred to above.

In reply, I wish to state that there is no provision in the Virginia law with respect to the tax imposed under Title VIII of the Social Security Act. That tax is exclusively a Federal tax imposed upon the wages of all individuals in "employment" as defined in Section 811 of the Social Security Act, which section expressly states, among other things, that

"The term ‘employment’ means any service, of whatever nature, performed within the United States by an employee for his employer, except service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions."

It is my conclusion, therefore, that, since the University of Virginia is owned by the State, the workmen employed by it are not in employment as defined in the above section and for that reason, the University is without the right to deduct said tax from the wages earned by its employees engaged in this project.

With respect to the unemployment compensation tax imposed by Title IX of the Social Security and the Virginia Unemployment Compensation tax, the Federal law defines employment under said Title in the same language as set forth above and the Virginia Act, with respect to the term "employment", is as follows:
"The term 'employment' shall not include service performed in the employ of this State, or of any political subdivision thereof, or of any instrumentality of this State or its political subdivisions."

Therefore, it is my opinion that the University of Virginia is not liable for the payment of the unemployment compensation tax imposed by Title IX of the Federal Social Security Act and the Virginia unemployment compensation tax. While it is true that the State Unemployment Compensation Act does provide for employers who are not required to pay the tax to voluntarily come under the provisions of the act and pay same, there is no provision which would permit an employer to bring part of his employees under the act and leave part of them out. Thus, if the University of Virginia should become a voluntary taxpayer under the provisions of this statute, the effect would be that the University would be required to pay the payroll tax on all of its employees, including professors and others engaged in the work of the University.

I am further of opinion that even if the authorities at the University of Virginia should be of opinion that it is wise to voluntarily submit to a tax of this kind, there is no law which would authorize the University Board or its officers to take any such action. In my opinion, this would require an act of the General Assembly to authorize it.

Alluding further to your suggestion that the University of Virginia is acting in the capacity of a contractor, I will state that from a legal standpoint this is inconsistent with the general rules pertaining to a case where an owner employs carpenters, laborers, etc., and purchases material for the construction of his building. In order to acquire the status of a contractor, the latter must be under a contract with the owner. The owner cannot, in point of law, be a contractor with himself.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SOIL CONSERVATION LAW—Elections Under—Officials—Use of Regular Election Officials;
Id.—Id.—Id.—Waiving Compensation.
Id.—Id.—Id.—Amount of Compensation.
Id.—Id.—Holding Contemporaneously With Regular General Elections or Primaries.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 9, 1938.

HONORABLE J. R. HORSLEY, Chairman,
State Soil Conservation Committee,
Appomattox, Virginia.

MY DEAR MR. HORSLEY:

I have before me your letter of December 6, 1938, in which you request my opinion upon certain questions which have arisen in connection with the holding of elections under section 6 of chapter 394 of the Acts of 1938, pages 733-734.

1. Your first question is whether the election of supervisors of a Soil Conservation District must be held and conducted by election officials appointed by the electoral board or boards of the county or counties in which the district is situated in the same manner and by such election officials as are appointed for the conduct of regular elections for county officers or members of the General Assembly.
Section 6 of said Act contains the following provision:

" * * * The names of such nominees shall be printed upon ballots, which ballots shall be printed, voted, counted and canvassed in conformity with the provisions of general law relating to elections, except as herein otherwise provided. * * * ."

It is my opinion, therefore, that, if the electoral board of a county has appointed judges and clerks of elections to serve during the year, these same officials and no other should conduct the special election of the supervisors referred to.

2. Your second question is whether the election officials may waive the payment of their compensation for the conduct of such an election.

I know of no provision of law which would prevent this, and, in my opinion, this compensation may be waived.

3. Your third question is whether or not the soil conservation committee which is charged with the payment of the costs of holding such an election is authorized to fix a different rate of compensation for election officials from that prescribed by law.

I can find no provision in the statutes giving the committee any such authority, and, in my opinion, the compensation provided by law must control for the payment of these election officials for their services.

4. Your fourth question is as follows:

"Will it be lawful for the election to be held by these county election officials coincident with a primary election, the cost of such election to be borne as in a primary or general November election? In other words, will it be lawful for the election officials of a primary to conduct at the same time the election for these District Supervisors?"

In my opinion, the soil conservation committee has the power to fix the day for the election of the supervisors on the same day on which a primary election will be held. However, the provisions of law relating to the holding of a primary election to nominate candidates of a political party are entirely different from those relating to a general election in which public officers are actually elected as distinguished from being nominated.

In a primary election only members of the party act as election judges and clerks, while in general elections the minority party is entitled to have representation. For this reason, it is my opinion that the same election officials who conduct a primary election would not be eligible to conduct the special election for the supervisors.

In addition to this, there would be quite a number of difficulties encountered. Only Democrats may vote in a primary, whereas both Democrats and Republicans may vote in a special election. This would necessitate the printing of separate ballots, and very probably the use of separate ballot boxes.

On the whole, I am of opinion that your third question must be answered in the negative.

Sincerely yours,

ABRAM P. STAPLES.

Attorney General.
REPORT OF THE ATTORNEY GENERAL

SPECIAL COUNSEL FOR STATE AGENCIES—Appearing Before Legislature.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 7, 1938.

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

DEAR GOVERNOR PRICE:

I have before me your letter of June 24, in which you quote certain excerpts from the report of State Auditor L. McCarthy Downs showing the result of his examination of the books, accounts and records of the Commission of Fisheries, and you request my opinion upon the three questions hereinafter set out.

1. The quotations from the Auditor's report show that by letter dated December 1, 1934, I, as Attorney General, authorized the Commission of Fisheries to employ Mr. George L. Doughty as special counsel in such matters as might arise from time to time requiring immediate attention, which the Attorney General's office, by reason of its inaccessibility to the Fisheries territory, would not be able to attend to with the required dispatch. In that letter I approved a proposed agreement limiting the fees for such service to the sum of $100.00 per month, and stated that this should not be considered a salary, but a limitation upon the aggregate of fees for separate items of employment, as to which I contemplated that itemized statements would be rendered to and approved by the Commission, showing each separate service rendered and the fee charged or paid therefor.

It appears from the report that the Commission paid Mr. Doughty the maximum permissible amount of $100.00 without requiring the itemized statements.

You request my opinion whether these payments "could legally be made" and, if not, "what action should be taken, in your opinion, to restore such funds to the State treasury."

While it is clear that the Commission did not comply with my understanding that itemized statements of services rendered by Mr. Doughty should be required, yet I feel, in justice to all parties, that I should point out that the statute permitting the employment of special counsel does not itself require any such itemized statements. I cannot say, therefore, that the failure of the Commission to require Mr. Doughty to itemize his services would render the payment thereof illegal. These services were rendered over a period of about four years. No question has been raised that the services rendered were of less value than the compensation paid therefor, and, in the absence of such question, I am of opinion that the State cannot at this late date, and after accepting the benefit of the services, complain that the request of the Attorney General respecting itemized statements was not complied with, since the statute itself does not require such statements.

2. Your quotations from the Auditor further show that the Commission paid to Mr. Doughty as legislative representative in connection with the presentation to the General Assembly of the seafood code, the sum of $800.00 plus expenses at the 1936 session, and the further sum of $600.00 plus expenses, for his services at the 1938 session.

The Auditor has questioned the legality of these payments on the ground that they are for legal services and are in excess of the $100.00 per month permitted under the authorization of this office heretofore referred to.

With due deference to the views of the very able Auditor, and without in anywise questioning the propriety of his raising this question, I am unable to concur in his conclusion that the services in question were legal services within the contemplation of the statute relating to the Attorney General's office. (Sec-
tion 374-a of the Code.) In fact, prior to the employment of Mr. Doughty as legislative representative in 1936, I was consulted about the matter and expressed the opinion that services of this kind were not legal services, and that the fact that a lawyer should be employed would not alter the essential nature or character of the service itself, or bring it within the terms of the statute requiring the approval of the Attorney General. This is clearly demonstrated from the fact that the present Commissioner and one of the past Commissioners were lawyers, but the services rendered by them have not been "legal services".

In a letter addressed to the present Commissioner on April 19, 1938, I again expressed this opinion with respect to contemplated services of a legislative representative in the future. In that letter I said:

"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."

The question of the authority of the Commission to employ a legislative representative to appear before legislative committees is one not dealt with in the statutes. Such employment is neither prohibited, nor is it expressly permitted. Generally speaking it has never been the policy of the General Assembly to undertake to point out specific expenditures which a department of government or state institution, agency, or commission is authorized to incur. In fact, it would be practically impossible to do so. The usual test of such authority is that the particular expenditure must be directly and reasonably related to the general purposes and powers of the agency making same. Thus, the statute relating to the Commission of Fisheries provides as follows: "The Commissioner shall employ such agencies and employees as the good of the service may, in the opinion of the Commission, require." (Code section 3146.) Other state agencies usually possess general authority of like nature.

Section 1098 of the Code does prohibit the boards of hospitals and educational institutions from expending money to send representatives to the General Assembly to advocate appropriations, but does not provide against advocating other measures relating to such institutions. This would imply that employment of representatives for such other purposes is permissible.

I am unable, therefore, to conclude that it was unlawful for the Commission of Fisheries to employ a representative to explain to legislative committees the complex problems arising out of the oyster, crab, clam and fisheries industries. In my opinion the question of such employment was one within the discretion of the Commission.

The good faith neither of Mr. Doughty nor of the Commission has been questioned by the Auditor, his comments being based upon his conception that services as legislative representative are to be considered as "legal services", and require the approval of the Attorney General. It appears that the Commission employed Mr. Doughty to render the services in question at the two last sessions of the General Assembly to aid in securing a recodification and revision of the very complicated seafood statutes. The services were rendered and the compensation therefor paid by the Commission with the approval of the State Comptroller.

Under these circumstances, I am of opinion that the State cannot now reopen these matters, there being no law prohibiting such employment and no charge or intimation of fraud, collusion or bad faith in the transactions.

3. Your letter quotes the following from the Auditor's report:

Towles in connection with the work he was performing, but we do question period covered by the audit of $80.00 and traveling expenses of $53.56 or a total of $133.56. We do not question the value of the services of Mr.

"Mr. C. S. Towles, a member of the Commission, was employed in connection with a proposed repletion project and drew compensation during the the authority of the Commission to employ one of its own members and to
compensate him for services rendered other than for attending meetings of the Commission."

Section 3146(5) of the Code provides, with respect to compensation of associate members of the Commission that they "shall receive a per diem of ten dollars when actually serving and actual traveling expenses incurred in attending the meetings of the Commission."

The report states that Mr. Towles' services were rendered in connection with a proposed repletion project, but does not furnish any detailed information as to the character of work done. It is, therefore, impossible for me, from the facts presented, to express an opinion on the question whether Mr. Towles was paid a per diem for actually serving in his capacity as an associate member of the Commission as provided by the statute quoted, or whether he was employed in a different capacity under contract with the Commission. Section 4706 of the Code has been repeatedly construed by this office to prohibit the making of such contracts between the Commission and one of its members.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF CANVASSERS—When to Act—Special Election for Sanitation District.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., OCTOBER 22, 1938.

HONORABLE R. L. JACKSON,
Secretary of the Commonwealth,
Richmond, Virginia.

MY DEAR MR. JACKSON:

This is in reply to your letter of October 15, in which you request my opinion upon the question whether or not the State Board of Canvassers should canvass and report upon the results of an election to be held on November 8, 1938, in certain Tidewater counties, cities and towns to determine whether or not a Sanitation District shall be created in said area. This election is provided for by chapter 334 of the Acts of 1938.

The Act requires that the returns shall be made and canvassed as in other elections and the results certified by the Commissioner of Election to the Secretary of the Commonwealth. It then provides that the Secretary of the Commonwealth shall record and tabulate the reports of the Commissioner and certify the results to the Governor and the governing bodies of the several counties, cities and towns in the manner provided for in said Act. The Act contains no provision either requiring or authorizing the State Board of Canvassers to exercise any jurisdiction over the certifying of the results.

Section 191 of the Code of Virginia deals with the elections in which returns shall be canvassed by the State Board of Canvassers. This section does not authorize or require the Board of State Canvassers to act except in cases of election for members of the General Assembly, members of the Senate and House of Representatives in Congress, and electors of President and Vice-President of the United States. The returns for the election of the Governor, Lieutenant Governor and Attorney General are canvassed under the direction of the General Assembly.

In view of these various statutory provisions, and the fact that the 1938 Act imposes no duty and confers no power upon the State Board of Canvassers, it is my opinion that they have no authority or jurisdiction to canvass the vote of the election with reference to the Sanitation District.

Yours very truly,

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

STATE BOARD OF EDUCATION—Literary Fund—Transactions in Certain Public Securities.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 22, 1938.

Dr. Sidney B. Hall,
Superintendent of Public Instructions,
Richmond, Virginia.

DEAR DOCTOR HALL:

I have before me your request for my opinion upon the authority of the State Board of Education to sell Noell Act certificates now constituting a part of the literary fund, and use the proceeds thereof for the purchase of certificates of indebtedness authorized by the second paragraph of section 58 of the Appropriation Act of 1938 (Acts 1938, pages 962-964).

This Act expressly authorizes the Board of Visitors of the Virginia Polytechnic Institute to issue certificates of indebtedness not in excess of $750,000 to be used for the construction and equipment of dormitories and dining halls. The certificates are to be used as self-liquidating bonds and are to be retired from the proceeds of the operation of the buildings contemplated.

The said Act further authorizes the State Board of Education in its discretion, subject to the approval of the Governor, to invest in such certificates any uninvested monies belonging to the literary fund. The State Board is further authorized, with the approval of the Governor, to sell any bonds of the State held as a part of the literary fund and invest the proceeds from such sale in said certificates.

It is my opinion that the authorization to sell bonds of the State is intended to cover any securities held in the literary fund, other than literary fund loans made to counties, cities and towns for the construction of school buildings. I am advised that at the time this Act was passed there were no obligations of the State itself held in such funds, and that the only obligations of this character were at that time, and are now, Noell Act certificates. In order to make effective the language of the Act it is necessary, therefore, to construe same as applicable to the Noell Act certificates. Otherwise these provisions of the Act would be totally without effect.

The said Act contains further provisions authorizing the sinking fund commissioners to sell the proposed certificates. Some question has been raised as to the validity of this provision, upon the ground that the same is not within the proper limits of an appropriation act. It is unnecessary at this time for me to express any opinion upon this question. It is sufficient to say that I am of opinion that, insofar as the Act authorizes the use of literary fund assets for the purpose of purchasing these certificates, the provision to that effect is in the nature of an appropriation of the assets or money of the State constituting the literary fund, and that this provision is valid.

I am of opinion, therefore, that the effect of said section 58 of the Appropriation Act is to authorize and empower the State Board of Education, with the approval of the Governor, to sell Noell Act certificates not in excess of a sufficient amount to raise the sum of $750,000, and to use the proceeds from the sale of such certificates for the purchase of the proposed certificates of the Virginia Agricultural and Mechanical College and Polytechnic Institute at Blacksburg.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.
STATE BOARD OF HEALTH—Catawba Sanitorium Property—Granting Easement Over.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 1, 1938.

Dr. I. C. Riggin,
State Health Commissioner,
Department of Health,
Richmond, Virginia.

DEAR DOCTOR RIGGIN:

This is in reply to your letter of October 31, in which you request my opinion upon the question of the authority of the State Board of Health to grant to an electric power company an easement or right of way over the lands of the Commonwealth which are being used in connection with the operation of Catawba Sanitorium.

I am of opinion that the State Board of Health does not possess the authority to grant a permanent easement of this kind, nor an easement extending for a period of time greater than six months following the adjournment of the next General Assembly.

It is my opinion that the Board possesses authority of an implied nature to manage the property, and that this carries with it authority to grant such a temporary permit or easement limited to the time as above indicated. In the meantime, should the General Assembly approve of the granting of a permanent easement, an act would no doubt be passed authorizing the State Board of Health to grant same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES—Rules and Regulations—Requiring Parents' Consent to Marriage of Students.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 14, 1939.

Dr. John M. Gandy, President,
Virginia State College for Negroes,
Petersburg, Virginia.

MY DEAR DR. GANDY:

This is in reply to your recent request for my opinion on the question hereinafter stated.

You enclosed with your letter a regulation which the administration of the college desires to adopt, the effect of which is to require students in the institution under 25 years of age who contemplate marriage to present to the president of the college the written consent of the parents or guardian at least one week before the marriage takes place. You desire my opinion as to the validity of such a regulation.

Without going into unnecessary detail, I may say that, in my opinion, the regulation is a reasonable one. However, I call your attention to the fact that the State Board of Education is the governing body of the Virginia State College for Negroes and in section 951 of the Code it is provided that this Board "shall be free to exercise rules, by-laws, resolutions, orders, instructions, or otherwise." I do not know whether the Board has approved the regulation which
you propose to adopt, but I am of the opinion that such a regulation should be first approved and adopted by the State Board of Education.

Very sincerely yours,

ABRAM P. STAPLES.

Attorney General.

STATE BOARD OF HEALTH—Certain Sanitary Regulations in Counties Adjoining Incorporated Communities—Necessity for Action by Local Board of Health.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 20, 1939.

Dr. I. C. Riggin,
State Health Commissioner,
Richmond, Virginia.

Dear Dr. Riggin:
I have your letter of June 19, requesting my opinion as to the proper construction of Chapter 55, Acts 1926.

The statute imposes certain sanitary restrictions which are in terms made applicable

"In any city or incorporated town in the State and for a radius of one-half mile beyond the corporate limits thereof and elsewhere in the State whenever the local board of health shall deem it necessary, * * * ."

You wish to know whether, under the language just quoted, these requirements are applicable in cities and incorporated towns regardless of any action of the local board of health.

This statute was amendatory to and a reenactment of Chapter 465 of the Acts of 1924. The amendment consisted of inserting the words "elsewhere in the State whenever the local board of health shall deem it necessary." In view of this history of the statute, it seems clear that the action of the local board of health is important only with reference to portions of the State lying outside of cities and incorporated towns, and more than one-half mile distant therefrom.

You next wish to know whether it is "mandatory that the cities and towns enforce this Act."
I know of nothing in the law which would vest in city and town authorities any discretionary powers to determine whether or not such a law should be enforced.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES—State Students—Minor Child of Non-Resident Having Permanent Home with Virginia Relatives.

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

Mr. H. K. Gibbons, Business Manager,
Madison College,
Harrisonburg, Virginia.

My Dear Mr. Gibbons:
I am in receipt of your letter of August 20, in which you ask whether a niece of Dr. and Mrs. J. E. Wine, of Harrisonburg, should be admitted to your institution as a State student under the following circumstances:
"This young lady lost her mother and seven years ago, at the age of
11 she was brought from North Carolina to Harrisonburg, Virginia, by Dr.
and Mrs. Wine. She has been supported by them since that time. She
stays with them except for an occasional visit to her father's home in North
Carolina. Her father has married again in recent years and still resides in
North Carolina."

It appears that this young woman has been actually a physical resident of
Virginia since she was eleven years old, and that she is supported by her uncle
and aunt, with whom she lives in this State.

Under this state of facts, I am of opinion that she substantially complies
with the conditions laid down for admission as a State student and should be
admitted as such.

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

STATE COLLEGES—State Students—Residence—Family of U. S. Army,
etc., Officers in Virginia.

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

Mr. Edgar E. Woodward, Treasurer,
Mary Washington College,
Fredericksburg, Virginia.

My Dear Mr. Woodward:
I am in receipt of your letter of December 16, with regard to the residence
of Mr. S. S. Halliburton, an officer in the United States Navy.
I think it possible that you may have misconstrued the previous ruling of
this office relative to the residence of officers of the Army and Navy.

Section 24 of the Constitution of Virginia reads as follows:

"No officer, soldier, seaman, or marine of the United States army or
navy shall be deemed to have gained a residence as to the right of suffrage,
in the State, or in any county, city or town thereof by reason of being sta-
tioned therein; 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."

Pursuant to this section, I have simply ruled that the mere fact that an officer
of the Army or Navy of the United States is stationed in Virginia in line of
duty does not establish his legal residence in Virginia. However, I have never
held and obviously could not hold that because a person was an officer in the
Army or Navy of the United States he could not be a resident of Virginia. The
question of whether such a person is a legal resident of Virginia must be deter-
minded by the facts in each particular case.

With specific reference to the case of Mr. Halliburton, it appears from his
statement that he has established an actual residence in Virginia and has been
here for three years, paying his property and capitation taxes, and that he has
registered to vote. He further states that he will retire from active service in
the Navy during the coming year and will continue to reside in Virginia. While
his letter does not so state, I assume from the address shown thereon that he
has his residence in Norfolks, Virginia, and is not living on a naval reservation.
The facts stated by him certainly seem to make out a prima facie case of resi-
dence and, unless you are disposed to question the facts or desire to make a
further investigation thereof, I should say that his daughter should be admitted
to your institution as a Virginia student. If, however, you desire to submit
further facts as to Mr. Halliburton's residence, I shall be glad to consider them
and give you an official opinion.

Mr. Halliburton's letter is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES—State Students—Non-Resident Niece Sent to School
by Resident Uncle.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 20, 1939.

MR. EDGAR E. WOODWARD, Treasurer,
Mary Washington College,
Fredericksburg, Virginia.

MY DEAR MR. WOODWARD:

I am in receipt of your letter of March 15, in which you present the case
of a young lady, presumably a resident of and living with her parents in Ten-
nessee, who is contemplating entering your institution the coming fall. You
state that this young lady has an uncle who is a resident of Virginia and, since
her parents are financially unable to send her to college, the uncle is willing
to pay his niece's expenses at your institution. You desire to know whether
under these circumstances the young lady is entitled to the reduced tuition charges
provided for a Virginia student.

I call your attention to Chapter 331 of the Acts of 1936 (Acts 1936, page
535), which provides 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 citi-
zen or resident of Virginia for a period of at least one year prior to ad-
mission to said institution, * * * ."

It seems to me obvious that the young lady to whom you refer does not
meet the requirements of this section, and I am, therefore, of the opinion that she
is not entitled to the reduced tuition charges.

Very sincerely yours,

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

STATE COLLEGES—State Students—Children of Non-Residents Sent to School by Resident Relatives.
Id.—Id.—Children of Resident but Unnaturalized Aliens.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 13, 1939.

MR. EDGAR E. WOODWARD, Treasurer,
Mary Washington College,
Fredericksburg, Virginia.

My Dear Mr. Woodward:
I am in receipt of your letter of January 11, in which you raise the following question:

"We have several students enrolled in the college whose status as to the payment of the non-resident fee is in question. The parents of these students live in another state and do not claim residence or citizenship in Virginia; however, close relatives of these students are bearing the financial expenses. These relatives are unquestionably bona fide legal residents of the State of Virginia. The question which confronts me is whether a resident of a foreign state is exempt from the payment of the out-of-state tuition by virtue of the fact that a bona fide resident or citizen of Virginia is bearing the financial expenses of this non-resident student."

I assume from your letter that the students you have in mind do not claim residence in Virginia, but are residents of the States in which their parents live. If my assumption is correct, I do not think that these students should be admitted to your institution as State students. I call your attention to the Acts of 1936, page 535, which provides in effect that no person shall be entitled to the reduced tuition charges 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 resident of Virginia for at least one year prior to admission to the institution.

The next case you present is as follows:

"I have another case of Mr. H. J. Cory Peerson of 369 North Glebe Road, Arlington, Virginia. Mr. Peerson is a citizen of the Dominion of Canada and has made application to the Federal Courts in Virginia for United States citizenship. Mr. Peerson was granted citizenship in the latter part of December by the courts. He has resided in Virginia for approximately 15 years. At the beginning of the fall term in September, Mr. Peerson had not received his citizenship to the United States. I have him charged with the out-of-state tuition. He contends that due to his long residence in Virginia this bona fide residence exempts him from the payment of the tuition fee."

The statute to which I have referred speaks of "residents or citizens of Virginia". Assuming that the gentleman's daughter is living with him in Virginia, I am of opinion that the reduced tuition charges are unquestionably in order. A person may well be a resident of Virginia without being a citizen of the United States, and the statute refers to both residents and citizens.

Very sincerely yours,

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

STATE HOSPITAL BOARD—Trusts for Particular Hospitals—Administration of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 1, 1938.

HONORABLE MORTON G. GOODE, Chairman,
State Hospital Board,
Clinic Building, Medical College of Virginia,
Richmond, Virginia.

My Dear Senator:

In reply to your request for my opinion upon the question whether or not the State Hospital Board is authorized to administer as a trust securities which have been given or devised to the Western State Hospital, or any of the other hospitals under the jurisdiction of the State Hospital Board, it is my opinion that the recent statute under which the said Board supersedes the old special boards and general board would operate as a matter of law to confer such authority upon the present State Hospital Board.

The foregoing statement, however, is subject to this qualification—that, if the gift or bequest is made upon condition that same be administered by trustees designated in the instrument creating same, the authority of the Board, if any, would be controlled by the terms and provisions of such instrument.

With reference to the resolution which was passed, I believe that it is technically incorrect to state that the State Hospital Board is the real owner of such securities as have been given to one of the hospitals. In my opinion, the authority of the Board is that of the trustee to manage and control the securities, but that the institution for whose benefit the gift was made is in fact the equitable and real owner of same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HOSPITAL BOARD—Unexpended Balance of Certain Trust Funds—Use of, for Certain Purposes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 26, 1938.

HONORABLE C. G. QUESENBERY,
Waynesboro, Virginia.

My Dear Mr. Quesenbery:

This is in reply to your letter of November 22, requesting my opinion upon a certain matter which has arisen in connection with your duties as chairman of the Finance Committee of the Hospital Board. It appears that there have been some losses and consequent depreciation in several of the trust funds which are being administered for the benefit of the Western State Hospital. The Hospital Board takes the view that these depreciations should be restored so as to bring the trust funds up to the original principal amount of same.

By Acts of 1938, page 195, it is provided that the Hospital Board may authorize the use for the benefit of all or any part of the patients now in the hospital of any funds remaining on hand as an unexpended balance of money previously deposited with the hospital by or for the benefit of former patients who have departed and have not been heard from for three years. You inquire whether or not, in my opinion, the Hospital Board has authority to use these unexpended balances for the purpose of restoring the depleted trust funds.

From the language in the statute, it appears that the original deposits were made "for the purpose of supplying extra comforts, conveniences or services to
any patients therein". In view of this original purpose for which the funds were deposited and the language of the statute which authorizes the use of unexpended balances, "for the benefit of all or any part of the patients in such hospitals", I am very doubtful whether the Board would have authority to set aside these funds as part of a permanent endowment or trust fund. The Act seems to contemplate that the monies may be expended to supply extra comforts, conveniences or services to some or all of the patients.

I would suggest, however, that, if the Board is of opinion that this is the wisest purpose to which these funds can be devoted, the same, or such part thereof as is desired to be used for this purpose, should be held intact and an effort made to secure authority from the General Assembly to authorize the use of the money to restore the endowment or trust funds. I have no doubt that the General Assembly will authorize such use.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HOSPITALS—Residence of Patients—Child of Resident Aliens.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., MAY 17, 1939.

W. J. AUSTIN, ESQ.,
Justice of the Peace,
Roanoke, Virginia.

DEAR JUDGE AUSTIN:

I have your letter of May 12, presenting a question as to the citizenship of a child born in Roanoke of alien parents, who has been brought before you for commitment to a State hospital.

So far as I can discover, our statutes governing the operation of State hospitals contain no provision which makes the question of citizenship important, but deal only in terms of residence. Be this as it may, it is clear that the child in question is a citizen of the United States and of the State of Virginia by virtue of her birth here. Constitution of the United States, Amendment XIV; Virginia Code (Michie 1936) section 62.

Assuming, therefore, that the child is a resident of Roanoke, the fact that her parents are aliens would not affect the propriety of committing her to a State hospital as a resident under the provisions of Code chapter 46.

Very truly yours,

ABRAM P. STAPLES.
Attorney General.

STATE HOSPITALS—State Hospital Board—Receiving Legacy Made to Particular Hospital.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
RICHMOND, VA., JULY 28, 1938.

HONORABLE MORTON G. GOODE, CHAIRMAN,
State Hospital Board,
Clinic Building, Medical College of Virginia,
Richmond, Virginia.

DEAR MR. GOODE:

This will acknowledge your letter of July 27, enclosing one under date of July 19, from Mr. Joseph M. Hurt, and requesting the opinion of this office on the question raised by Mr. Hurt's letter.
Mr. Hurt refers to a certain legacy under the will of Jean R. Stirling, deceased, by the terms of which the sum of $5,000 is bequeathed to the Southwestern State Hospital, in trust for the purchase of Christmas gifts for patients who do not otherwise receive such gifts. Mr. Hurt raises the question whether this legacy is valid under existing law.

Section 1005 of the Virginia Code (Michie 1936), prescribing the powers of the special boards of directors under which the various State hospitals were operated prior to 1937, provides that:

"* * * The special boards of the respective hospitals and colonies, may receive gifts, bequests and endowments to or for the respective hospitals or colonies in their names or to or for any person or persons committed to or in the custody of such hospitals or colonies, and when such gifts, bequests and endowments are accepted by the special board of any of the said institutions the said special board and its successors shall well and faithfully administer such trusts."

Chapter 3 of Acts Extra Session 1936-1937 vests in a single State agency, designated the "State Hospital Board", the control and management of all State hospitals for the insane. This Act, however, expressly preserves all the powers which were severally possessed by the respective special boards of directors before the Act was passed, providing that:

"* * * All the rights, powers and duties vested in and conferred and imposed upon the special boards of directors of the said State hospitals and the general board of directors thereof by law are hereby transferred to, vested in, and conferred and imposed upon the State Hospital Board * * * "

It is the opinion of this office, therefore, that the legacy in question remains a valid one, payable to the State Hospital Board for expenditure at the Southwestern State Hospital pursuant to the terms of the bequest.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
same section certain types of vessels are designated which are not to be included under the term of "seagoing vessel."

I agree with your construction of subsections (e) and (f) that subsection (e) is meant to apply to seagoing vessels in the common understanding of the term, and with your view that the boats of the Commission would be considered "non-descript self-propelled vessels" and, therefore, exempt from the provisions of subsection (e).

However, it is my opinion that the general principle that the State cannot be sued for a tort would be applicable to any action based upon the negligence of the Commission's boats. That this principle is applicable to an admiralty suit *in personam* or to a libel *in rem* against a vessel has been held by the cases of *In re State of New York* [Petition of Walsh], 41 Supreme Court 588, and *In re State of New York* [the Queen City], 41 Supreme Court 992. See also 2 C. J. 3, page 82.

This general principle, of course, does not relieve from liability the individuals whose negligence was the cause of the damage or injury. I also call your attention to section 187, Title 46, U. S. C. A., which provides that the five preceding sections do not affect the remedy to which any party may be entitled against the master, officers, or seamen.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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**STATE IMMUNITY IN TORT—Medical College of Virginia—Construction Work.**

**COMMONWEALTH OF VIRGINIA,**
**OFFICE OF THE ATTORNEY GENERAL,**
**RICHMOND, VA., OCTOBER 3, 1938.**

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

**MY DEAR DR. SANGER:**

I am in receipt of your letter of October 1, in which you state that buildings are being constructed for the Medical College of Virginia, the cost of which will amount to approximately $1,500,000. I assume that this work is being done by independent contractors, and you state that the contractors are "carrying the forms of insurance required." You desire to know whether there will be any liability on the Medical College of Virginia on account of injuries to the workmen of the contractors or to the general public because of these construction activities. The real effect of your question is whether there is any liability on the College on account of injuries sustained due to negligence in connection with this work.

The Medical College of Virginia belongs to the State and is, of course, an arm of the State, and in accordance with many opinions of this office on similar questions, it is my view that the College would not be liable for injuries either to the workmen of the contractors or to the general public due to negligence in the prosecution of this construction work. I, therefore, see no necessity for the College securing a contingent liability insurance policy.

Of course, the Medical College of Virginia is an employer within the meaning of the Workmen's Compensation Act, but I do not presume that any of the employees of the College are engaged in this construction work.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE IMMUNITY IN TORT—Student Employees Driving VPI Automobiles.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 19, 1938.

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

My dear Mr. Fogleman:
I have received with your letter of November 4, the liability insurance policy issued to the Board of Visitors of the Virginia Agricultural and Mechanical College and Polytechnic Institute.

In your letter of October 31 you inquire whether or not, in my opinion, this policy would protect the Board of Visitors against liability in the event that a student using one of the cars covered by the policy should be injured while driving same in going to and from rural schools in which these students are teaching.

The policy expressly excludes any liability for personal injury to a person operating the car. The operator of the car, if he is operating same with the authority of the Board of Visitors, would be protected against liability to other persons upon whom he might inflict an injury through negligence, but the policy would not protect the Institute against liability to the student operating the car, or any other student riding in the car with him, if such other student occupies the status of an employee of the Institute.

You further inquire in your letter whether the Board of Visitors would be under any liability to the student should he be injured in an accident while driving the car.

The Virginia Polytechnic Institute is a State institution or agency and is in legal contemplation a part of the State. I have frequently expressed the opinion that neither the State nor any of its governmental agencies, such as V. P. I., is liable for any negligent injury to any person or for any tort committed by any of the employees of any such institution or agency.

Of course, if the student should be injured through the negligence of some third person who should be driving on the highway, there would not be any liability upon the Board of Visitors.

Sincerely yours,
Abram P. Staples,
Attorney General.

STATE INSTITUTIONS—Power to Convey Real Estate—Power Line Easement—Catawba Sanatorium.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1938.

Senator L. G. Muse,
Attorney-at-law,
306-317 Boxley Building,
Roanoke, Virginia.

My dear Senator:
This is in reply to your letter of October 20, in which you request my opinion upon the question of the authority of the Catawba Sanatorium authorities to grant to an electric power company an easement or right-of-way over the lands
of the Commonwealth which are being used in connection with the operation of
the Catawba Sanatorium.

This office has had frequent occasion to pass upon substantially this same
question in relation to other State agencies and institutions. We have always
expressed the opinion that only the General Assembly has the power to grant
an easement of this kind extending for a period of time longer than six months
following the next session of the General Assembly.

I believe that these institutions do possess an implied authority to deal with
the property in a temporary manner and that a temporary easement, limited in
time as above indicated, can be given. In the meantime an enabling act could be
passed by the General Assembly.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Assessments—Applications for Relief from—Time.

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

HON. C. AUBREY WHITE,
Treasurer of Mathews County,
Mathews, Virginia.

MY DEAR MR. WHITE:
I am in receipt of your letter of November 12.
Section 414 of the Tax Code of Virginia provides in part as follows:

"Any person assessed with county or city levies or other local taxes, on
real estate, aggrieved by any such assessment, may, unless otherwise specially
provided by law, within two years from the thirty-first day of December of
the year in which any such assessment is made, and any person assessed with
local levies on personal property or a local license tax, aggrieved thereby,
may within one year from the thirty-first day of December of the year in
which such assessment is made, apply for relief to the circuit court of the
county, or any city court of record of the city, wherein such assessment was
made. * * * ."

Construing the above language, I am of opinion, in answer to your question,
that applications for relief from alleged erroneous assessments of 1936 real estate
taxes may be filed up to and including December 31, 1938.

The limitation on applications for relief from assessment of local taxes on
personal property is one year from December 31 of the year in which the assess-
ment is made. Therefore, I am of opinion that applications for relief from 1936
local taxes on personal property are now barred, but that applications for relief
from such taxes for 1937 may be filed up to and including December 31, 1938.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Collection—Employment of Commonwealth's Attorney to Collect Delinquent Local Taxes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 2, 1939.

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

My Dear Mr. Booker:

I have your letter of January 31, from which it appears that you have been employed by the board of supervisors of Halifax County to collect delinquent taxes on lands, and also on personal property.

The statutory provisions applicable to the collection of these two classes of delinquent taxes are contained in separate sections of the Code. I am enclosing you herewith a copy of an opinion given by this office to Honorable Robert R. Jones, Commonwealth's Attorney for Powhatan County, in August, 1937.

You will note that this office was of opinion that the board of supervisors did not have authority to employ any person other than the Commonwealth's Attorney for the collection of delinquent real estate taxes, and that section 394 of the Tax Code authorizing appointment of tax collectors by boards of supervisors related only to such taxes on tangible personal property as were placed on list No. 3, as provided in section 387 of the Tax Code. Section 394 of the Tax Code was amended in 1938, but I do not think the amendment has any bearing upon the question in which you are interested.

As to collection of delinquent real estate taxes, this is covered by section 403 of the Tax Code and provides for the employment of an attorney for that purpose. Prior to the 1938 session of the General Assembly, the provisions relating to the appointment were as follows:

"Such proceedings shall be instituted and conducted in the name of the Commonwealth of Virginia by the attorney for the Commonwealth of the county or by the attorney for the city or town wherein they were assessed upon the request of the treasurer of such county, city or town, or the department of taxation, or the attorney general. * * * ."

However, in 1938 the language above quoted was changed so as to read as follows:

"Such proceedings shall be instituted and conducted in the name of the Commonwealth of Virginia, or 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 the 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. * * * ."

You will note that under this section as amended the board of supervisors of your county is empowered to employ you as its attorney to collect delinquent real estate taxes.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Collection of Real Estate Taxes—Sale of Personalty to Satisfy.

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

HON. W. W. WEBB,
Treasurer of Washington County,
Abingdon, Virginia.

My Dear Mr. Webb:
I am in receipt of your letter of June 20, in which you ask if a treasurer may under section 378 of the Tax Code levy and sell personal property to satisfy taxes against real estate.

In my opinion this may be done, and I think this office has heretofore so ruled. The first sentence of section 378 provides that “any goods or chattels * * * belonging to the person * * * assessed with taxes or levies may be distrained therefor by the treasurer * * *.” I can find nothing in the section which can reasonably be construed to prohibit the treasurer from proceeding against personal property for the collection of real estate taxes. Indeed, as will be seen from the quoted language, the section seems to contemplate that any goods or chattels belonging to the person assessed for taxes may be distrained therefor by the treasurer.

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

TAXATION—Collection—Distraint—Warrant.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 16, 1939.

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

My Dear Mr. Weems:
I am in receipt of your letter of June 14, in which you summarize your question as follows:

“Does section 378 of the Tax Code authorize me as Treasurer to obtain a distress warrant and have the distraint made by the sheriff, sergeant or constable, and can such sheriff, sergeant or constable receive the fees allowed by law for his services, which fees are to be made out of the taxpayer?”

In my opinion, section 378 of the Tax Code, authorizing the Treasurer of a county and certain other officers to distrain for taxes, applies only to cases where the property is distrained or levied on by the Treasurer or other officer in whose hands the bills are. The section, in my opinion, does not contemplate the issuance of a warrant, but that the action shall be taken on the tax bill itself by the officer in whose hands the tax bill is. Where the section refers to the action being taken by a sheriff or sergeant, this has application to a case where the tax tickets have been turned over to the sheriff or sergeant by the local governing body, as provided in section 394 of the Tax Code. In other words, it is my view that section 378 is limited to the distress or levy as is provided in the section, and that the section does not contemplate that the distress warrant may be obtained by the Treasurer and turned over to the sheriff or other officer for execution.
REPORT OF THE ATTORNEY GENERAL

To be more specific, I am of the opinion that the statute does not authorize such procedure.

If it is desired by you that the collection be made by the sheriff under a warrant, then I am of opinion that the provisions of section 403 of the Tax Code must be invoked.

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

TAXATION—Collection—Distraint.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 8, 1939.

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

MY DEAR MR. WEEMS:
I am in receipt of your letter of June 5.

By section 378 of the Tax Code, goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the Treasurer. In my opinion, and I am informed that it is the long standing practice, no warrant is necessary for the Treasurer to distrain or levy under this section, the unpaid tax bill itself being sufficient. Where the levy is made, it is my view that the sale may be had in accordance with the provisions of section 2832 of the Code of Virginia.

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

TAXATION—Collection—Garnishment—Exemptions.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 1, 1939.

HONORABLE C. B. WATSON, Treasurer,
Orange, Virginia.

MY DEAR MR. WATSON:
I have your letter of May 30, requesting my opinion as to whether taxes may be collected through proceedings in garnishment regardless of the amount of the taxpayer's wages or salary.

I take it that you refer to proceedings against the taxpayer's employer under Tax Code sections 382-384, prescribing a special form of garnishee process for the collection of taxes.

Virginia Code (Michie 1936) section 6555, as amended by Acts 1938, chapter 356, provides, in part, as follows:

'* * * wages owing or to be owing to a laboring man who is a householder or head of a family, shall be exempt from distress, levy, garnishment or other process to the extent of seventy-five (75) per centum of such wages, provided, however, that in no case shall such exemption be less than fifty ($50.00) dollars per month nor more than seventy-five ($75.00) dollars per month * * *.'
I find nothing in the provisions of the Tax Code or elsewhere in our statutes which would except proceedings for the collection of taxes from the operation of this section.

It is my opinion, therefore, that where the taxpayer is a laboring man and a householder or head of a family, his wages are exempt from garnishment for collection of taxes to the extent indicated. Where the taxpayer does not come within this classification, the question of his salary or income would not be material.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Decedents’ Estates—Second Assessment on Qualification of Administrator d. b. n.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 8, 1939.

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

My Dear Mr. Thoma:
I am in receipt of your letter of February 6, in which you ask if a probate tax should be assessed under section 125 of the Tax Code of Virginia on the appointment of an administrator d. b. n. where the tax is assessed and paid by the estate at the time of the grant of the first administration.

It is my opinion that section 125 of the Tax Code contemplates the payment of only one probate tax on an estate and, if such a tax was paid on the entire estate on the grant of the first administration, I am of opinion that no additional probate tax should be assessed on the appointment of the administrator d. b. n.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Decedent’s Estates—Valuation—Deductions for Encumbrances.
Id.—Recordation Taxes—Valuation—Deductions for Encumbrances.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1939.

Honorable O. B. Chilton,
Clerk,
Lancaster, Virginia.

My Dear Mr. Chilton:
I have your letter of January 27, in which you request my opinion upon the following questions relating to the tax to be imposed by the clerk in certain cases as hereinafter indicated:

Your first question is as to whether the clerk should impose a probate tax of $10 or $3 in the case where a testator dies leaving real estate valued at $10,000, against which there is of record a deed of trust for $7,000.

The probate tax is measured by the gross value of the property and there is no deduction on account of liens against the property. The proper probate tax in this case, therefore, is $10.
Your second inquiry is directed to the question whether or not the recordation tax on deeds should be measured by the value of the property conveyed by the deed, or whether the same should be measured by the gross value of the property less any liens thereon which may be assumed by the grantee.

The rule with reference to this tax is that the tax is measured by the value of the property. The liens thereon, if any, do not affect the amount of the recordation tax.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemptions—Tangible Personalty of Residents of United States Reservation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 23, 1939.

Mr. Chalmers Ferguson,
Delinquent Tax Collector,
285 Virginia Avenue,
Roanoke, Virginia.

DEAR MR. FERGUSON:
I have your letter of June 17, in which you inquire as to the liability for tangible property taxes of persons residing on the Federal reservation now occupied by the Veterans Facility in Roanoke County.

The liability of such persons for taxation is dependent upon when the land was acquired by the United States. There was no special statute enacted with reference to the powers and jurisdiction of the United States over this particular tract of land, so same is controlled by the provisions of the general statute.

If the lands were acquired by the United States prior to June 23, 1932, it is my opinion that the liability of persons residing on the reservation, both before and since 1936, for taxation is extremely doubtful as the jurisdiction and powers of the United States are probably fixed by their status acquired when the land was purchased. However, if the lands were acquired since June 23, 1932, in my opinion, the persons residing on the reservation are now, and at all times have been, liable for the taxes assessed against them, and you have the authority to collect same.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemptions—Writ Tax—Suits by R. F. C.

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

Hon. Dan Drinkard, Clerk,
Corporation Court City of Bristol,
Bristol, Virginia.

My dear Mr. Drinkard:
I am in receipt of your letter of October 13, in which you ask if the Reconstruction Finance Corporation should be charged a writ tax in a suit wherein it is the plaintiff.
REPORT OF THE ATTORNEY GENERAL

If the corporation is the only proper party plaintiff, I am of the opinion that the writ tax should not be assessed. One of the sections of the statute creating the corporation (15 U. S. C. A., Sec. 610) provides that:

"The corporation * * * shall be exempt from all taxation now or hereafter imposed by the United States * * * or by any State * * * except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

The writ tax imposed by section 126 of the Tax Code of Virginia is unquestionably a tax and not a fee. Therefore, under the language of the statute which I have quoted, I am of opinion that this corporation is exempt from the payment of the writ tax. This is in accord with similar rulings of this office in which Federal agencies were involved where a statute existed similar to the one from which I have quoted relating to the Reconstruction Finance Corporation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Homestead and Poor Debtors’ Exemptions—Effect of on Claims for Taxes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 15, 1939.

Hon. William A. Adair, Treasurer of Rockbridge County, Lexington, Virginia.

My dear Mr. Adair:

I am in receipt of your letter of March 13, from which I quote as follows:

"The question of the Homestead and Poor Debtor’s Law has been raised up here in regard to the collection of taxes. It has been my idea since I have been Treasurer of Rockbridge County that these exemptions do not apply to taxes, in fact, right much in the past when Hon. C. Lee Moore was Auditor of Public Accounts I was instructed to that end.

"Will you please give me an opinion on the question as to whether or not the Homestead and Poor Debtor’s Law exemptions obtain in the case of delinquent or current personal property or land taxes when payment is requested or forced."

Section 6531 of the Code, providing for the householder’s exemption, expressly stipulates that it “shall not extend to any execution, order or other process issued on any demand in the following cases: * * *"

"Fourth. For a lawful claim for any taxes, levies or assessments accruing after the first day of June, eighteen hundred and sixty-six."

Section 6563 of the Code refers to the poor debtors exemption and provides that this exemption “shall not extend to distress for State, county or corporation taxes or levies. * * *”.

In view of these provisions, I am of opinion that neither the homestead exemption nor the poor debtor’s exemption may be claimed where the collection of tangible property or real estate taxes is attempted to be enforced by legal process.

Very sincerely yours,

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

TAXATION—Licenses—Coal Dealer Delivering in Town on Orders Previously Taken.

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

Hon. William H. Logan,
Attorney for the Commonwealth,
Woodstock, Virginia.

My Dear Mr. Logan:

I am in receipt of your letter of September 8.

You desire to know the State license tax liability of a person selling coal in Woodstock on orders previously taken.

Two classes of cases arise: first, the coal dealer who operates from a place of business outside of the town, but in the State of Virginia, and, second, the person who operates from outside of the State.

In the case of a coal dealer who operates a place of business outside of the town of Woodstock, but in the State of Virginia, I am of opinion that no State license is necessary for the privilege of selling coal in Woodstock on orders previously taken. If the deliveries are made on orders previously taken, then the person is not peddling within the meaning of our statutes. In any event, section 188 of the Tax Code provides, among other things, that dealers in coal paying a State retail merchant's license may, except in cities of 40,000 or more, peddle the same from vehicles without paying an additional license tax. Therefore, even if a person is actually peddling coal in Woodstock, if he has a place of business in the State and is paying a retail merchant's license, he will not be required to pay any additional State license.

As to a person delivering coal in this State from a point without the State on orders previously taken, I am of opinion that no license at all may be assessed, because it would constitute a direct burden on interstate commerce and thus prohibited by the Commerce Clause of the Federal Constitution.

I observe that you quote from the schedule of State licenses contained in the Tax Code of Virginia, published by the Department of Taxation. It seems to me that the quotation is a correct interpretation of the statutes.

If there is any further information that you desire, I shall be glad if you will write me.

Very sincerely yours,

Abram P. Staples,
Attorney General.

TAXATION—Licenses—Collection of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 13, 1939.

Hon. Robert P. Bagwell,
Treasurer of Halifax County,
Halifax, Virginia.

My Dear Mr. Bagwell:

I am in receipt of your letter of February 8, in which you ask if the penalty of 10 per cent imposed for failure to secure a State license entitles the licensee to an additional thirty days of grace.

I know of no such provision in any statute and am of the opinion that this penalty does not give the licensee any additional time within which to secure a license.
You also ask what actions may be taken by the Treasurer against a delinquent licensee.

I call your attention to the last paragraph of section 136 of the Tax Code, reading as follows:

"It shall be the duty of the commissioner of the revenue to report every person, firm or corporation, who shall commence to prosecute any licensable business employment or profession without a license, or who shall unlawfully fail for a longer period than one month to obtain a new license, to the attorney for the Commonwealth, who shall cause warrants to be issued for such persons, firms or corporations, and shall prosecute them."

You will see that the duty is imposed upon the commissioner of the revenue to report the delinquent licensee to the attorney for the Commonwealth. Until a license tax has actually been assessed against a licensee, I know of no duty imposed upon the treasurer in connection therewith.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Licenses—Peddling—Ice Cream.

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

MR. CHAS. H. CALLAHAN,
Commissioner of the Revenue,
Alexandria, Virginia.

My Dear Mr. Callahan:

I am in receipt of your letter of December 9, from which I quote as follows:

"I am writing you for an official opinion as to the proper application of the Virginia State license tax law regarding one type of business which was carried on in Alexandria during the past year.

"The company involved manufactures and sells ice cream products of various kinds. In addition to ice cream in pint and half pint packages and in cups, it has frozen confections of numerous kinds on sticks including water ices and ice cream covered with chocolate and other coatings.

"The company manufactures its own products and sells them from trucks which are driven over all the streets of the city so that the entire town is pretty well covered every day. The delivery wagons generally operate from noon to midnight.

"They engage only in retail sales, but they do not restrict themselves to calling on householders. In fact as they go through the streets they ring bells which have an identifying sound and they sell to all individuals along their routes whether in houses or on the streets. They have no definite places to park but stop wherever they are hailed by prospective purchasers."

While at one time there may have been some question as to whether or not ice cream is a family supply of a perishable nature within the meaning of section 192 of the Tax Code of Virginia, I do not believe that under conditions as they exist today there can be any question but that ice cream now falls within this classification. As you know, section 192 of the Tax Code expressly provides that the license tax levied therein shall not apply to ice, wood, meats, etc., and other family supplies of a perishable nature "grown or produced by them". From the statements made by you, the ice cream being peddled is produced by the peddler.
The method of peddling described by you at first blush seems to make this a rather close case, but upon reflection, if we concede that ice cream is a family supply of a perishable nature, I am of opinion that the manufacturer of this ice cream may peddle it without being liable to any license tax under section 192 of the Tax Code. I believe that, if we took the position that ice cream was a family supply of a perishable nature for one method of peddling and not a family supply of a perishable nature for another method of peddling, it would be exceedingly difficult to support and would probably establish a precedent which could not be defended in every case.

My conclusion is, therefore, that under the facts stated by you the peddling of ice cream by the manufacturer is subject to no license tax under section 192 of the Tax Code, and in this view the State Tax Commissioner concurs.

Of course, this ruling does not mean that the manufacturer is exempt from all State taxes, for he is subject to the State income tax and to the tax on capital and other taxes applicable to his business.

Very sincerely yours,

W. W. MARTIN,
Assistant Attorney General.

TAXATION—Licenses—Peddlers—Orders for Future Delivery.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 17, 1938.

HON. JULIAN K. HICKMAN,
Attorney for the Commonwealth,
Warm Springs, Virginia.

My Dear Mr. Hickman:
I am in receipt of your letter of August 15, from which I quote as follows:

"Section 192 of the Tax Code imposes on peddlers of goods, wares and merchandise, not grown or produced by them, a license tax. I shall greatly appreciate your opinion as to whether or not peddlers who take orders for subsequent delivery of goods, wares, merchandise, vegetables, etc., purchased by them for sale are required to obtain the peddlers license."

If the orders are taken in good faith and not as a mere subterfuge to avoid the payment of peddler’s license, I am of opinion that no license is necessary under the facts stated by you. I speak of the orders being taken “in good faith” because I have had presented to me cases where an individual, to avoid the tax, would go into a house or place of business and take an order for goods and then immediately deliver them from a stock of goods which the individual had with him at the time the order was taken.

I call your attention to the possible liability of such an individual to a merchant’s license tax, although I am not passing on this question for the reason that your letter does not contain sufficient facts to enable me to do so.

Yours very sincerely,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Licenses—Peddlers—Signed Orders.

Mr. Edward M. Clem, Jr.,
Commissioner of the Revenue,
Woodstock, Virginia.

My Dear Mr. Clem:

I am in receipt of your letter of October 14, in which you ask "whether a peddler should have a signed order from a customer when he is delivering merchandise sold prior to the order, or would his order be sufficient without the signature of the customer."

You refer to section 192 of the Tax Code of Virginia. I presume that you are concerned with whether or not a certain person is in fact a peddler within the meaning of that section.

There is nothing in the section which requires a person to have a signed order from a customer to prove that he is not a peddler. If he does have such a signed order, this may be taken as evidence on the factual question of the nature of his business, but whether or not a person is a peddler within the meaning of that section is to be determined by a consideration of all the facts in the case relating to his method of doing business. As you know, a peddler within the meaning of the section is "any person who shall carry from place to place, any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same."

Very sincerely yours,

Abram P. Staples,
Attorney General.

TAXATION—Licenses—Physicians Selling Drugs—Liability for Merchant's License.

Hon. Dexter Goad,
Attorney for the Commonwealth,
Hillsville, Virginia.

My Dear Mr. Goad:

I am in receipt of your letter of November 10, in which you state that physicians are being requested to pay a State merchant's license tax under certain circumstances when drugs are sold by the physician, and asking me to advise you fully.

Of course, there is no State license tax imposed upon physicians in Virginia. However, I do not think that the fact that a physician is exempt from a State license tax on his profession relieves him from liability as to any other license tax, such as a merchant's license tax, if the physician is engaged in the business of a merchant. Liability to this merchant's license tax would depend upon the facts in each particular case. If a physician, in addition to his practice, is engaged in the business of buying and selling merchandise, such as drugs, then he may be subject to the regular retail merchant's license tax depending, as I have said, upon the facts in any case.

Very truly yours,

Abram P. Staples,
Attorney General.
REPORT OF THE ATTORNEY GENERAL


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 1, 1938.

Hon. John Sparrow,
Commissioner of the Revenue,
Princess Anne, Virginia.

My dear Mr. Sparrow:

I am in receipt of your letter of August 25, in which you ask if the local Board of Equalization, appointed in 1938 under section 344 of the Tax Code of Virginia, has power to equalize an assessment of real estate made by the Board appointed in 1934.

I am of opinion that the Board clearly has this power, in fact, it is its duty to make such decreases and increases in the several items of the general reassessment of real estate as are necessary or proper to equalize as among themselves the several items of such assessment.

The case that you have in mind, I think, is that of City of Lynchburg v. Taylor, 156 Va. 53, wherein it was held that the Board did not have power to order a general reduction of a definite percentage in all items of the assessment, as that in effect would be making a new general assessment.

However, the case in question is clear authority for the power of the Board as I have stated it above.

Very sincerely yours,

Abram P. Staples,
Attorney General.

TAXATION—Real Estate—Division of Taxes When Land Divided.

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

Honorable Edward Meeks, Judge,
Amherst, Virginia.

My dear Judge Meeks:

Your letter of October 5 was duly received, and I regret that my reply has been delayed on account of the preparation for and appearance in a case before the Supreme Court of the United States.

As I construe section 280 of the Tax Code, it can only be invoked where "there has been or shall be a partition of such real estate." I gather from your letter that one of several joint tenants of real estate is simply desirous of having his portion of the taxes on the whole tract determined. In my view, section 280 is not applicable to such a case, the actual partition of the real estate being a condition precedent to the operation of the section.

Nor does it appear to me that section 281 is applicable in the case you have, since that refers to the situation where one or more lots in a tract of land are assessed on one or more lines of the land assessment books. I do not understand from your letter that the land in question is divided into lots.

Very sincerely yours,

Abram P. Staples,
Attorney General.
TAXATION—Real Estate—Statutes of Limitation.
Id.—Id.—For 1929 and 1930—By Whom Collectible.

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

HON. H. B. Chermside, Clerk,
Circuit Court of Charlotte County,
Charlotte Court House, Virginia.

MY DEAR MR. CHERMIDE:
I am in receipt of your letter of October 15, in which you inquire if there is any statute of limitation which applies to the collection of local taxes assessed on tangible property for the years 1929 and 1930.

In my opinion, there is no statute of limitation applicable to the collection of these taxes. I have been unable to find any statute which can be reasonably construed to attach any limitation to the collection of these items.

As to whether the taxes should be paid to the Treasurer or to the Clerk, I am of opinion that, if they are still in the hands of the Treasurer for collection, they should be paid to him. Of course, it may be that the Board of Supervisors has placed the collection of taxes on tangible personal property for those years in the hands of some other person, pursuant to the authority contained in section 394. As to this I am not advised.

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

TAXATION—Real Property—Board of Assessors—Necessity for View by Entire Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 13, 1939.

MR. R. A. Robertson,
Chairman, Board of Assessors,
Professional Building,
Portsmouth, Virginia.

MY DEAR MR. ROBERTSON:
I am in receipt of your letter of January 11, in which you state that the Circuit Court of Norfolk County has recently appointed a Board of Assessors for the purpose of assessing real estate in Norfolk County. There are a number of members of the Board and you desire to know "whether or not it is necessary for the entire Board to view each individual piece of the property in Norfolk County at the same time, or if one or two members can view the property in their respective districts and afterwards confer with the entire membership of the Board as to the value placed on the land and improvements by them."

Sections 242, 243, 244, 247 and 250 of the Tax Code relate to the general reassessment of real estate in counties. None of these sections carries any provision making it mandatory that the entire Board shall view each particular piece of real estate. In my opinion, this is more a practical matter than a legal one, the primary duty of the Board being to ascertain sufficient facts about the various parcels of real estate to enable it to properly assess them. If the Board chooses to accept the view of any one member thereof as to the value of one or more pieces of real estate, based upon the facts reported by that member, I see no objection to this practice. Indeed, I am informed by Honorable C. H. Mor-
rissett, State Tax Commissioner, that such a practice is quite common throughout
the State.
Specifically answering your question, therefore, I am of opinion that it is
not necessary for the entire Board of Assessors to view each individual piece
of property in Norfolk County at the same time in order to perform the duties
required by law.

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

TAXATION—Real Property—Life Estates.

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

HONORABLE L. C. HARRELL, JR.,
Attorney for the Commonwealth,
Emporia, Virginia.

MY DEAR MR. HARRELL:

This is in reply to your letter of December 17, in which you request my
opinion upon the question whether or not a parcel of real estate should be as-
sessed for taxation on the land books in the name of the life tenant or in the
name of the remainderman.

I agree with you that, under the provisions of section 252 of the Tax Code
and section 5392a of the Code, the property should be assessed on the land books
in the name of the life tenant, and upon the death of the life tenant, if another
life estate supervenes, the property should thereafter be assessed in the name of
the second life tenant, and at the expiration of the second life estate, then in the
name of the remainderman.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Taxes—Exemption of State Agencies.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 15, 1939.

MR. B. DRUMMOND AYRES,
Attorney at Law,
Accomac, Virginia.

MY DEAR MR. AYRES:

I am in receipt of your letter of March 14, in which you ask whether the
Commission of Fisheries will be required to pay the State recordation tax im-
posed by section 121 of the Tax Code of Virginia for recording bills of sale
between the Commission and the seller of oyster shells.

The Commission of Fisheries, of course, is an agency of the State. This
office has heretofore ruled that the State is not subject to the recordation tax
for recording instruments to which it is a party. If, however, the bill of sale is
offered for recordation by the seller, I am of opinion that the tax should be
imposed.

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

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 14, 1939.

HON. CHARLES R. PURDY, Clerk,
Hustings Court, Part II,
Richmond, Virginia.

MY DEAR MR. PURDY:
I am in receipt of your letter of March 13, relative to the basis of the recordation tax imposed under section 121 of the Tax Code of Virginia, where the consideration stated in the deed is less than the assessed value of the real estate. As you state, the section provides that the tax shall be based on the "consideration of the deed or the actual value of the property conveyed, whichever is greater."

It is a matter of common knowledge that the assessed value of real estate does not always represent the actual value. In some cases the assessed value may be greater than the actual value and in others it may be less. I do not think that, in assessing the recordation tax, the clerk of the court is bound by the assessed value of a particular piece of real estate, but, of course, this value is a factor that should be taken into consideration in determining the actual value. Where a deed states the actual bona fide consideration paid for real estate, it is my opinion that, generally speaking, this should be accepted by the clerk in determining the recordation tax, whether this consideration be somewhat in excess of or less than the assessed value. Of course, where you have a deed which designates the consideration, for example, as "ten dollars and other valuable consideration", then it becomes the duty of the clerk to determine the actual value of the real estate conveyed, and in doing this he may consider the assessed value and all other pertinent information. As you know, no indebtedness may be deducted in determining the value of real estate for the purpose of recordation tax.

I have consulted Mr. C. H. Morrissett, State Tax Commissioner, and he agrees with the views I am expressing herein.

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

TAXATION—Recordation Taxes—Leases.

COMMONWEALTH OF VIRGINIA;
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 10, 1939.

HON. JOHN HENRY POWELL, Clerk,
Circuit Court of Nansemond County,
Suffolk, Virginia.

MY DEAR MR. POWELL:
I am in receipt of your letter of February 6, from which I quote as follows:

"There has been presented for recordation in my office a lease, the consideration for which is in the following words and figures: 'First: That the lessee will pay to the lessor as rental for the use of said rails, (a) the sum of $1,783.40 per annum in twelve (12) equal installments of $148.62
REPORT OF THE ATTORNEY GENERAL

each. ‘Eighth: That unless terminated by lessor as in sixth hereof pro-
vided, this lease shall continue in force and effect for the full term of one (1)
year, from and after the date hereof, and thereafter, as a lease from month
to month, until the same shall be terminated by thirty (30) days’ written
notice from either party hereto to the other.’”

You desire to know how the recordation tax imposed by section 121 of the
Tax Code should be computed.

While I should prefer to have the entire lease before me, I should say from
the facts stated by you that the tax should be based on the specified rental of
$1,783.40. Apparently the lease is only for a year and may be terminated at the
expiration of that period. I do not see, therefore, how the tax could be based on
any other amount than the year’s rental.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax—Compensation of—Conveyance of Undi-
vided Half Interest.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 18, 1938.

HON. JOHN M. WHALEN, Clerk,
Circuit Court of Fairfax County,
Fairfax, Virginia.

MY DEAR MR. WHALEN:

I am in receipt of your letter of October 8, in which you ask what recorda-
tion tax should be charged for a deed executed under the following circum-
stances:

“A and B, husband and wife, acquire real estate in this county, the deed
conveying the same to them as joint tenants, with the right of survivorship
expressly retained. They are subsequently divorced, and following the grant-
ing of the divorce, B, the wife, conveys to A, the husband, all of her right,
title and interest of every kind in and to the real estate which they held as
such joint tenants with the right of survivorship.”

Inasmuch as A and B were equally interested in the real estate, the most that
B can be said to have conveyed to A by the instrument is a half interest. In my
opinion, therefore, the recordation tax should be based upon half of the actual
value of the real estate.

As to the amount of U. S. Internal Revenue Stamps, I suggest that you get
a ruling on this from the Collector of Internal Revenue, since I am not familiar
with all of the regulations and, in addition, my opinion in no way would be bind-
ing upon the Federal authorities.

Very sincerely yours,

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

TAXATION—Release of Penalties, etc.—Evidence of Payment Which Treasurer Should Require.

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

Hon. L. McCarthy Downs,
Auditor of Public Accounts,
Richmond, Virginia.

My Dear Mr. Downs:

I am in receipt of your letter of November 5, in which you refer to chapter 94 of the Acts of 1938, the effect of which is to authorize boards of supervisors to release all penalties, interest and costs on real estate taxes for the year 1937 and prior years on condition that all such taxes on any particular real estate shall be paid on or before the 5th day of December of this year. You ask "whether or not it will be necessary for the treasurer to have an affidavit stating that all taxes accrued and of record in the clerk's office have been paid before he can release the penalties on delinquent taxes still in his office for collection."

It seems to me your inquiry relates more to a matter of practice and accounting than to law. The Act itself authorizes the board of supervisors to release these taxes, penalties, and costs, and, once the resolution is passed by the board, these charges are automatically released, if, as a matter of fact, all delinquent taxes are paid prior to December 5, 1938. The Act seems to require nothing affirmatively to be done by the treasurer. Of course, I should think it would be good practice for the treasurer to show on his books that these charges have been released, but whether or not he does so show, if the conditions laid down by the board have been met, these charges are released.

Speaking unofficially, I should also think it would be good practice for the treasurer to require some evidence of the payment of delinquent taxes which are actually receipts for the payment of the taxes or by some other proof satisfactory to the treasurer. However, this is not necessary under the statute and I, therefore, suggest that the way the matter should be handled is purely an accounting or administrative proposition. Inasmuch as you audit the books of these officers, it may be that you will desire, for the sake of uniformity throughout the State, to make suggestions to them.

Sincerely yours,

Abram P. Staples,
Attorney General.

TAXATION—Statute of Limitations—Insurance Companies—License Tax.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 26, 1938.

Hon. Geo. A. Bowles,
Commissioner of Insurance,
State Office Building,
Richmond, Virginia.

My Dear Mr. Bowles:

I am in receipt of your letter of July 9, from which I quote:

"The question has arisen as to whether or not an insurance company can plead the statute of limitations provided in section 418 of the Tax Code
of Virginia, in regard to assessment for omitted license tax on premiums levied under section 237 of the Tax Code. The premiums in question were not returned to this Department for taxation and this Department had no way of determining their omission."

The authority for assessing omitted license taxes by the Bureau of Insurance, in my opinion, is contained in section 419 of the Tax Code. That section provides in effect for the assessment of omitted taxes for the three years last passed. In view of the fact that this section is the authority for making the assessment of omitted license taxes on insurance companies, I am of opinion that the Bureau of Insurance is bound by the three-year limitation contained in the section.

Yours very truly,
W. W. MARTIN,  
Assistant Attorney General.

TAXATION—Tangible Personality—"Agricultural Products"—Poultry.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 10, 1939.

HON. D. WAMPLER EARMAN,  
Attorney for the Commonwealth,  
Harrisonburg, Virginia.

My Dear Mr. EARMAN:

I am in receipt of your letter of February 6, in which you ask if poultry is subject to a local tax on tangible property, as such property is defined by section 283 of the Code of Virginia.

In my opinion, this class of property is subject to the tax and is included in subsection 15 of section 283 under the language "the aggregate value of all other tangible personal property."

I am advised that the argument has been sometimes made that poultry is exempt from local taxation under the following language contained in subsection 8 of section 283:

"Provided that grain, tobacco and other agricultural products in the hands of a producer of the same are hereby declared exempt from taxation as property under this section."

It is my opinion, however, that the language "and other agricultural products" applies only to such products as are cultivated in and grow out of the soil. It seems to me that the rule of *ejusdem generis* is applicable here. The word "other" following the specified crops, grain and tobacco, makes it reasonably clear, I think, that it was the intention of the Legislature to exempt only agricultural products that are grown in the soil.

Very sincerely yours,

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

TAXATION—Towns—Licenses—Exceeding Amount of State License.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 21, 1939.

Hon. J. Livingstone Dillow,
Attorney for the Commonwealth,
Pearisburg, Virginia.

My Dear Mr. Dillow:
I am in receipt of your letter of April 20, from which I quote as follows:

"Considerable inquiries have been made by the Councils of the incorporated towns of Giles County upon the question of whether or not in imposing a town license tax on firms doing business within the town, the town had a right to exceed the amount of license tax imposed by the State."

Section 296 of the Tax Code authorizes councils of cities and towns to impose a license on businesses and professions on which the State imposes a license. There is no limitation in this section as to the amount of the local license, and I am of opinion that, generally speaking, it is not controlled by the amount of the State license, and that a town, if it so desires, may impose a license tax in excess of that imposed by the State.

There may be certain cases where the statute authorizing a State license expressly prohibits a locality from imposing a larger license, but this is the exception rather than the rule. I presume that your letter refers to businesses and professions generally.

There also may be provisions in the charter of any particular locality relating to this subject and, of course, the charter provisions should be considered.

Very sincerely yours,

Abram P. Staples,
Attorney General.

TAXATION—Writ Tax—Refund Upon Settlement before Trial.

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

Hon. James Ashby, Clerk,
Stafford Circuit Court,
Stafford, Virginia.

My Dear Mr. Ashby:
I am in receipt of your letter of December 24, in which you ask if the writ tax required by section 126 of the Tax Code of Virginia may be refunded under the following circumstances:

"A notice of motion for judgment was served on the defendant November 28, 1938, and filed in my office December 1, 1938, and the writ tax, required by law, was paid by the attorney for the plaintiff. This notice of motion was made returnable January 10, 1939. Today the attorneys for the plaintiff and defendant appeared in my office and advised me that the matter involved in the notice of motion had been settled, and one of the attorneys told me that he thought the writ tax should be refunded because the suit had been settled before the return date."
Section 126 of the Tax Code as it is applicable to the situation here imposes a writ tax "when any original suit * * * is commenced in a court of record. You state that the particular notice of motion for judgment was filed in your office on December 1, 1938, and the writ tax then paid. In my opinion, when the notice was filed in your office the suit had been "commenced" within the meaning of the statute imposing the tax. It is true that the section provides that the clerk shall not issue any writ or any notice until the writ tax on the suit has been paid, but, in my opinion, the tax liability falls when the suit has been commenced, and in this case it appears to have been commenced. I, therefore, do not think that a subsequent settlement of the litigation justifies a refund of the tax.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRADE MARKS—Descriptive Terms—Duties of Secretary of Commonwealth.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 8, 1939.

HONORABLE R. L. JACKSON,
Secretary of the Commonwealth,
Richmond, Virginia.

My Dear Mr. Jackson:

I have your letter of February 20, enclosing certain correspondence between yourself and certain representatives of the H. H. Meyer Packing Company, of Ohio, with reference to that company's application for registration of a certain trade-mark.

From the application it appears that the Meyer Company, whose products are packed meat, eggs, butter, etc., has adopted and used, and wishes to have registered as its trade-mark, a certain shield-shaped design bearing the words "Meyer's Veri-Tender Ham" (or presumably, "Bacon", or "Sausage", etc.). The name "Meyer's" is reproduced in the form of a signature in longhand—not in ordinary print. The company expressly disclaims, in its application, the words "Veri-Tender" apart from the design as a whole.

You request my opinion as to whether the company's application should be accepted or rejected under the provisions of our statute providing for the registration of trade-marks—Virginia Code (Michie 1936) sections 1455-1463.

Code section 1455 defines the term "Trade-mark" to "mean and include label, trade-mark, term, design, device or form of advertisement", and section 1458 provides that any person adopting and using a trade-mark, as so defined, is entitled to register the same "subject to the limitations hereafter set out".

I find nothing in the statute conferring on the Secretary of the Commonwealth any discretionary powers in this respect.

The only limitations set out in the statute which might be applicable here are those prescribed as follows in Code section 1458a:

"The Secretary of the Commonwealth shall not register as a trade-mark * * * any trade-mark which consists merely in the name of any person, not written, printed, impressed or woven in a particular or distinctive manner, * * * or which consists merely in words which are descriptive of the merchandise with which they are used or the character or quality of such merchandise."
REPORT OF THE ATTORNEY GENERAL

It is difficult to see how the mark here involved can be said to consist "merely in words which are descriptive of the merchandise" (etc.), or "merely in a name not written * * * in a particular manner". On its face, certainly, the Meyer Company's mark would seem to consist of the entire device which is pictured in the application—not "merely" the descriptive words "Veri-Tender", or "merely" the name "Meyer's" (which, for that matter, is written or printed in a distinctive manner).

I have examined the decided cases referred to in your letter of January 30, 1939, to the Meyer Company, denying registration of certain descriptive phrases under the Federal Trade Mark Act—an Act substantially similar, in this respect, to the Virginia statutes just referred to. These cases seem to support the contention that, under such a statute, descriptive words may not be registered as a trade-mark even though coupled with other words of an arbitrary character. However, from the opinions in these cases, I am unable to determine to what extent the descriptive words involved could be called simply parts of an arbitrary design.

On the other hand, your attention is called to the case of Beckwith v. Commissioner of Patents, 252 U. S. 538, in which the Supreme Court of the United States construed the same Federal Act to permit registration of a certain design which bore the word "Moistair", as a trade-mark for certain heating systems, the essential feature of which was a device for adding moisture to the air as it was heated.

It seems clear, therefore, that the most that can be said of the decided cases is that they cast some doubt upon the Meyer Company's right to register the mark in question. In my opinion, such doubt should always be resolved in favor of the applicant; any person who deems himself injured thereby has his remedy in court, and even if it be ultimately determined that the mark was not properly registrable, less harm may have been done by an improper registration, which is wholly void and without legal effect, than would have been done by improperly refusing the protection of the registration statutes to a person who is in fact entitled thereto.

For these reasons, it is my opinion that the application of the Meyer Company should not be rejected.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRADEMARKS—What Subject to Registration—Form of Package.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 16, 1939.

HONORABLE RAYMOND L. JACKSON,
Secretary of the Commonwealth,
Richmond, Virginia.

DEAR MR. JACKSON:

Some time ago you referred to this office certain correspondence between yourself and the Ada Milling Company of Ada, Oklahoma, requesting my opinion as to whether you should grant that company's application for registration of a trade-mark.

At the time of your request, in a conversation with Mr. Kelly of this office, it was understood that this application was not being pressed, the Ada Company apparently doing little business in this State. This accounts for the delay in my reply.

The Ada Company, whose products are flour, meal, feed, etc., seeks to protect as its exclusive trade-mark, through registration in your office, the use of printed bags for packing such products, each bag bearing the label "Cambrie
flour” or (presumably) “Cambric corn meal”, etc. These bags, printed in various designs, are of intrinsic usefulness as material for clothing and other cloth articles. While the language of the application is not wholly unambiguous, it seems quite clear that it is the practice of packing these goods in such bags, coupled with the use of the “Cambric” label, which the Ada Company wishes to register as a trade-mark.

As to what may be registered as a trade-mark, the statute simply provides that

“'Trade-mark' shall mean and include label, trade-mark, term, design, device or form of advertisement” [Virginia Code (Michie 1936) section 1455, par. (1)].

and that

“Every * * * person who has heretofore adopted and used, or shall hereafter adopt and use any trade-mark as provided in section fourteen hundred and fifty-five, may, subject to the limitations hereafter set out, register the same * * * .” (Id. section 1458.)

As to what may not be registered, Code section 1458a expressly provides that the Secretary of the Commonwealth shall not register alleged trade-marks of certain kinds—e. g., those consisting merely of a geographical name or term descriptive of the merchandise in question, etc. There is nothing in this section bearing on the present application.

The controlling question seems to be, therefore, whether the practice which the Ada Company wishes to register and protect under the statute comes within the definition of a “trade-mark” as defined by Code section 1455. I am of the opinion that it does not.

Statutes providing for the registration and certification of trade-marks are uniformly construed as simply affording new and additional remedies for the protection of rights which exist independently of statute. Accordingly, a device or practice which could not, under established common law and equitable principles, be appropriated as an exclusive trade-mark cannot be protected through the statutory procedure provided in registration statutes—that is to say, such statutes simply are not construed as intended to cover devices, methods of packing, etc., which were inherently incapable of appropriation as trade-marks at common law. Armstrong Paint and Varnish Works v. Nu-Enamel Corporation, 83 U. S. (L. Ed.) 183 (Dec., 1938); Oakes v. St. Louis Candy Company, 146 Mo. 391, 48 S. E. 467.

It seems clear, under the decided cases, that a practice such as the Ada Company describes in its application could not be appropriated and protected as an exclusive trade-mark in the absence of statute; a trade-mark, defined independently of statute, is usually described as an arbitrary symbol of identification calculated to serve the sole purpose of identifying the source of merchandise. A device or practice which, like that described in the present application, serves the additional purpose of making the goods more saleable by adding to the attractiveness or effectiveness of the goods or packages, is held to be inherently incapable of appropriation as a trade-mark, any manufacturer who seeks exclusive rights in such a practice being left to such protection as he may be entitled to under the patent laws. National Biscuit Company v. Pacific Coast Biscuit Company, 83 N. J. Eq. 369, 91 Atl. 126; Hoyt v. Hoyt, 143 Pa. 623, 22 Atl. 755; Putnam Nail Company v. Dulaney, 140 Pa. 205, 21 Atl. 391; Daniel v. Electric Hose and Rubber Co., 231 Fed. 827.

In this same connection, attention is called to the fact that Code section 1458 requires each application to be accompanied by "six copies, counterparts or fac-similes of the trade-mark sought to be registered.” Obviously, the method of packing which the Ada Company wishes to register could not be the subject of a copy, counterpart or fac-simile, and hence apparently is not a trade-mark of the kind which the Legislature intended should be registered. It is my opinion,
therefore, that the Virginia statute was not intended, and should not be con-
strued, to offer protection to a practice such as is described in the present ap-
lication.

The statute does not impose on the Secretary of the Commonwealth the duty of passing upon the complete eligibility for registration of every alleged trade-
mark offered for that purpose, nor does it expressly authorize him to reject an application on any grounds other than those set forth in section 1458a. How-
ever, it would not seem proper to register a device or practice which is clearly not a "trade-mark" within the contemplation of the statute, and thus extend the advantages of even a void registration to a manufacturer who is plainly not entitled thereto. It is my opinion, therefore, that the application of the Ada Milling Company should be rejected.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Clerks of—Issuing Execution.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 14, 1938.

Mr. O. W. McNeil,
Trial Justice for Rockbridge County,
Lexington, Virginia.

My Dear Mr. McNeil:
This is in reply to your letter of recent date.
You ask if the clerk of a trial justice court has authority to issue executions on judgments rendered by the trial justice.

Section 4987-g of the Code provides that the clerk "may * * * issue warrants and processes original, mesne and final, both civil and criminal, * * * ."
I am of opinion that the word "processes" as used in this section is broad enough to include executions on judgments for money rendered by the trial justice. An execution has been defined as "the usual process for carrying into effect a de-
cree requiring a defendant to pay money into court." 10 Ruling Case Law, 1217.
My conclusion is that the clerk of a trial justice court may issue an execution on judgments for money rendered by his trial justice.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Clerks of—Committing Prisoners to Jail.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 17, 1938.

Mr. Ernest E. Orange,
Trial Justice,
Providence Forge, Virginia.

My Dear Mr. Orange:
I am in receipt of your letter of August 13, in which you ask the following questions:

"Please advise me if a clerk of the trial justice court has the authority to issue commitments to jail of a prisoner convicted of a misdemeanor, also
whether the clerk has authority to commit to jail a prisoner charged with a misdemeanor in default of bail before trial."

The powers and duties of clerks of trial justice courts are set out in section 4987g of the Code, and I do not find in this section authority for the clerk to perform either of the acts mentioned by you. In my opinion, these should be done in the name of the trial justice.

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

TRIAL JUSTICES—Committing Accused Persons to State Hospitals for Observation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 13, 1939.

DR. H. C. HENRY,
Director of State Hospitals,
309 North 12th Street,
Richmond, Virginia.

Dear Dr. Henry:

In your letter of March 9, you ask if trial justices may commit for observation persons charged with crime to the several State hospitals without a regular commitment by a commission. You further ask if cases so committed for observation by trial justices to the Southwestern State Hospital and the Central State Hospital should be confined in the criminal insane department of these institutions.

While section 4909 of the Code of Virginia, which provides for the commitment of persons charged with crime to the State hospitals for the insane for observation, speaks in general terms of courts, I am inclined to the opinion that this section confers this power only upon courts of record. This section was passed prior to the enactment of the Trial Justice Act and is contained in that chapter of the Code which deals with the trial and its incidents of criminals in the courts of record of the State. The section itself provides that the court may permit a jury to pass upon the question of the person's insanity at the time of the trial, a procedure which is not applicable in trial justice courts.

For these reasons, I am of the opinion that trial justices may not commit any person to the State hospitals for the insane without a regular commitment by a commission. This conclusion, of course, renders it unnecessary to answer your second question.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Fees—Executions—"Renewals" of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 8, 1938.

MR. C. H. HOLYFIELD, Clerk,
Trial Justice Court,
Wise, Virginia.

My Dear Mr. Holyfield:

I am in receipt of your letter of September 5, in which you ask as to the fee to be charged by a trial justice for the "renewal" of an execution.
Section 4987-m of the Code provides that the fee for issuing an additional execution by a trial justice shall be 25 cents.

As to the "renewal" of an execution simply by endorsement on the old execution, I have learned from several trial justices of the larger counties that it is their practice to issue an additional execution in each case and not to make the endorsement that you mention. It seems to me that this is the better practice.

However, specifically answering your question if the execution is renewed simply by endorsement on the old execution, I do not think this comes within the scope of the term "additional execution" as it is used in section 4987-m of the Code, and that, therefore, no fee should be charged for this service.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICES—Fees for Admitting Prisoners to Bail After Office Hours—Disposition of.

Trial Justices and Clerks—Id.—Id.

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,

RICHMOND, VA., March 17, 1939.

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

My Dear Mr. Downs:

I am in receipt of your letter of March 14, from which I quote as follows:

"We are engaged in an examination of the accounts and records of the trial justice of Augusta county for the fiscal year ended June 30, 1938.

"The trial justice has a clerk at Staunton and also a clerk at Waynesboro. Our auditors advise that it is the practice of the trial justice and each of the clerks to pay into the county treasury fees collected for the issuing of bail bonds during office hours but if they issue bail bonds after office hours the fees are retained by them as individuals."

You desire to know whether the trial justice and his clerk may retain these fees or whether they shall be paid into the county treasury as directed by law.

Neither the trial justice nor his clerk has authority to admit persons to bail except by virtue of his office, and the fees for this service are prescribed by statute.

Section 4987-m of the Code, subsection (d) provides in effect that all fees paid to and collected by the trial justice and his clerk in criminal cases shall be turned promptly into the treasury of the city or county in which the offense was committed or in which the case is tried.

There is no exception made in the statute covering fees collected after office hours. I can see no escape from the conclusion, therefore, that all fees collected by the trial justice and his clerk for admitting persons to bail shall be paid into the treasury as are other fees of these officers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TRIAL JUSTICES—Fees—Trial Fee—Suit Dismissed Before Hearing.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 6, 1939.

HONORABLE W. CLYDE DENNIS,
Trial Justice,
Grundy, Virginia.

DEAR JUDGE DENNIS:

This will acknowledge receipt of your letter of May 31, requesting my opinion as to the construction of certain portions of the Trial Justice Act.

As I understand it, your question relates to the case in which civil process is obtained from a justice of the peace and made returnable before you, where the plaintiff does not appear and prosecute his claim for such a period of time that you dismiss the suit from your docket. In such case, you wish to know whether a trial fee should be charged, and whether you are responsible for its collection.

The trial fee is prescribed by Virginia Code (Michie 1936) section 4987m(3) in the following terms:

“For trying and giving judgment on a civil warrant, notice of motion,” (etc.) “one dollar to be paid by the plaintiff at or before the time of hearing;”

In my opinion, the dismissal of a suit under such circumstances does not amount to “trying and giving judgment” within the meaning of the statute quoted, and hence the trial justice should not charge, nor could he be held responsible for collecting, a trial fee in such a case.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICE—Holding Court for Another Trial Justice—Compensation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 24, 1939.

HON. C. CARTER LEE,
Attorney for the Commonwealth,
Rocky Mount, Virginia.

MY DEAR MR. LEE:

I am in receipt of your letter of April 19, in which you refer to section 4987-b of the Code, as amended in 1938 (Acts 1938, p. 982). You state that in a recent case in the Trial Justice Court of your county the Judge of the Circuit Court, pursuant to this section, on account of the inability of both the Trial Justice and the Substitute Trial Justice to hear the case, designated the Trial Justice of another county. You desire the opinion of this office as to the compensation that such Trial Justice should receive while sitting for the Trial Justice of your county.

The section does not in terms answer your question, but it does provide that, when the Substitute Trial Justice performs the duties of the office of Trial Justice, he shall receive a per diem compensation equivalent to one-twenty-fifth
REPORT OF THE ATTORNEY GENERAL

of the monthly instalment of the salary of the Trial Justice. The section makes it discretionary with the Board of Supervisors as to whether this payment to the Substitute Trial Justice shall be deducted from the salary of the Trial Justice.

In my opinion, in the case you put the Trial Justice of the other county is in reality acting as a Substitute Trial Justice, and that it is contemplated by the statute that he shall receive a \textit{per diem} compensation equivalent to one-twenty-fifth of the monthly instalment of the salary of the Trial Justice. It is my view that this is a reasonable construction of the statute and that it complies with its real intent.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Judgments—Execution and Garnishment on.

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

HON. W. V. BIRCHFIELD,
Trial Justice,
Marion, Virginia.

MY DEAR MR. BIRCHFIELD:

I am in receipt of your letter of May 19, in which you ask if you can issue an execution on a judgment rendered in your court "after one year since final disposition by judgment."

Section 4987-j of the Code provides in part as follows:

"All papers connected with any of the proceedings before the trial justice, except such as may relate to cases appealed or removed, or which by general law are required to be sooner returned to the clerk's office of the circuit court, shall remain in the office of the trial justice, or of the clerk appointed by him hereunder, for one year after final disposition by judgment or otherwise by the trial justice, and executions and abstracts of judgment and additional executions in such proceedings may be issued by such trial justice or clerk at any time during such period of one year in accordance with the general law in relation to abstracts of judgment and executions. * * * ."

The section goes on to provide that at the end of such period the papers shall be returned to the clerk's office of the circuit court of the county.

In view of the provisions of this section, I am of opinion that, after the papers have been returned to the clerk's office of the circuit court, the trial justice may no longer issue executions on a judgment rendered by him. However, executions may be issued by the clerk of the circuit court. I note that the clerk of your circuit court is of the opinion that he has no right to issue executions on these judgments unless abstracts of such judgments have been regularly docketed in his office. The statute to which I have referred provides that the judgment itself shall be returned to the clerk's office, and it seems clear to me that he may thereafter issue executions.

You next ask:

"If the execution in this case should be issued by the clerk of the circuit court, could a garnishment proceeding be instituted in the trial justice court?"
A garnishment proceeding on the suggestion by a judgment creditor to enforce the lien of a 
*fieri facias* against a third person by reason of his indebtedness to such judgment creditor is substantially a new action. The plain intent of the State-wide Trial Justice Act was in civil proceedings, with certain exceptions not pertinent here, to give the trial justice exclusive jurisdiction where the amount of the claim does not exceed the sum of $200, thus giving to litigants a method of having such claims speedily determined and at the same time relieving a great deal of the congestion on the dockets of courts of record. Certainly there is no statute prohibiting garnishment proceedings on a judgment entered in the trial justice court from being instituted in that court, and, therefore, from a consideration of all of the statutes involved and of the purpose and policy of the State-wide Trial Justice Act, I am of opinion that your question may be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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**TRIAL JUSTICES—Jurisdiction—Unlawful Detainer.**

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 31, 1939.

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

DEAR JUDGE MCCLINTIC:

In your letter of January 27, you ask if trial justices have jurisdiction in unlawful detainer cases.

Section 4987f, sub-paragraph 3, of the Code of Virginia (Michie 1936), provides in part that “The trial justice shall also have jurisdiction of actions of unlawful detainer or entry in cases provided by section fifty-four hundred and forty-five. Section 5445 provides in part as follows:

"* * * In any case where possession of any house, land, or tenement is unlawfully detained by the tenant, or some person claiming under him, the lease of such tenant being originally for a period not exceeding one year, or for the time such tenant is employed by the landlord as laborer, the landlord or other person entitled to the possession may present to any justice of the county, city, or town in which said premises are situated, a statement, under oath, of the facts which authorize the removal of the tenant or other person in possession (describing said premises); and thereupon the said justice shall issue his summons against the person or persons named in said affidavit."

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TRIAL JUSTICES—Jurisdiction—Writs of Capias ad Respondendum.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 18, 1939.

Hon. L. Brooks Smith,
Trial Justice,
Accomac, Virginia.

My dear Mr. Smith:
I am in receipt of your letter of March 11, in which you ask if a trial justice has authority to issue a writ of capias ad respondendum as provided for in sections 6419 to 6425 of the Code of Virginia.

This jurisdiction is not in terms given to a trial justice in the Trial Justice Act. As you know, it is a drastic procedure and a reading of the sections of the Code to which I have referred makes it clear that the details of the procedure outlined therein are not well adapted to the trial justice court.

After careful consideration, I seriously doubt whether it is contemplated that the trial justice shall have this power. In view of this doubt and of the extraordinary nature of the remedy and of the fact that the Trial Justice Act does not expressly confer this power, I am constrained to advise you that, in my opinion, this writ should not be issued by a trial justice.

Very sincerely yours,
Abram P. Staples,
Attorney General.

TRIAL JUSTICES—Proceding Before, by Notice of Motion for Judgment.

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

Mr. George P. Cridlin,
Trial Justice,
Jonesville, Virginia.

My dear Mr. Cridlin:
I am in receipt of your letter of August 15, in which you ask whether or not a person entitled to maintain an action at law on a civil warrant before a trial justice may, in lieu of action by warrant, proceed by motion after proper notice.

I am of opinion, as you seem to be, that such procedure is specifically authorized by subsection 4 of section 4987f of the Code. In Shulman Company v. Sawycr, 167 Va. 386, the statute before the court was section 6046a of the Code, and, in my opinion, the decision in that case had no bearing on the aforesaid subsection 4 of section 4987f.

Very sincerely yours,
Abram P. Staples,
Attorney General.
REPORT OF THE ATTORNEY GENERAL

TRIAL JUSTICES—Records in Criminal Cases—Alteration of, to Show Trial Under Local Ordinance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 27, 1939.

Hon. L. McCarthy Downs,
Auditor of Public Accounts,
Richmond, Virginia.

My Dear Mr. Downs:
I am in receipt of your letter of April 21, in which you ask if in a criminal case "a trial justice has the right to change his records after a case has been completed so as to make the case a county rather than a Commonwealth action." You further state that in the particular case to which your letter relates the fees of the arresting officers were paid out of the State treasury, and the fine was paid into the county treasury.

As I have previously indicated to you, it is not the practice of this office to express an official opinion in a case which has been decided by a court. However, as a general principle, I think it proper to say that, if a warrant under which a person is tried charges a violation of a State law, and the person is convicted of a violation of a State law as charged in the warrant, and final judgment entered, I know of no authority which a trial justice has after the entry of the final judgment to change the warrant so as to make it appear that the person was tried for a violation of a county ordinance.

Very sincerely yours,
Abram P. Staples,
Attorney General.

UNEMPLOYMENT COMPENSATION LAW—"Employer"—Definition of—Certain Clauses Construed.

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

Honorable Frank P. Evans, Chairman,
Unemployment Compensation Commission,
Richmond, Virginia.

My Dear Major:
I acknowledge receipt of your letter of September 9, 1938, in which you state that Mr. W. N. Woodall is the owner and proprietor of a barber shop being operated in the John Marshall Hotel in the city of Richmond, and that he is an employer within the meaning of the Virginia Unemployment Compensation Act; that after he became an employer he organized the corporation known as Richmond Barber Shop, Incorporated, with headquarters in the Richmond Hotel and transferred to the corporation a lease he had personally entered into with the owner of the Richmond Hotel for the space occupied by said barber shop and received as consideration for the lease, fifty shares of the capital stock of said corporation. Two shares of the capital stock were outstanding in the names of other individuals, making a total capital stock of fifty-two shares. You state that Mr. Woodall actually controlled the Richmond Barber Shop, Incorporated.

You further state that the Commission advised the Richmond Barber Shop, Incorporated, that it was liable for the payment of payroll tax by reason of provisions of Section 2(1) (4) of the Unemployment Compensation Act, and that liability attached at the time the corporation became an employing unit—
that is, on March 1, 1938; that on July 15, 1938, and before the Richmond Barber Shop, Incorporated, had been in business for twenty weeks, Mr. Wodall disposed of his stock in said corporation and now contends (1) that Richmond Barber Shop, Incorporated, was never liable for the payment of tax under the Unemployment Compensation Act of Virginia and (2) that if said corporation was liable for the payment of said tax, liability ceased when Mr. Woodall disposed of the stock. You request an opinion from me with respect to the two points raised by Mr. Woodall.

The first point raised depends upon an interpretation of Section 2(i) (4) of the Virginia Unemployment Compensation Act, which is as follows:

"Employer means any employing unit which together with one or more other employing units, is owned or controlled, by legally enforceable means or otherwise, directly or indirectly by the same interest, or which owns or controls one or more other employing units, by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing unit would be an employer under paragraph (1) of this sub-section."

Under the state of facts presented, it appears that Mr. Woodall, as an individual, and Richmond Barber Shop, Incorporated, are separate employing units; that from March 1, 1938, until July 15, 1938, both employing units were controlled by Mr. Woodall, who, as of March 1, 1938, was an employer by reason of his employing record as sole owner and proprietor of the Hotel John Marshall Barber Shop. It is my opinion, therefore, that both employing units were controlled by the same interest from March 1, 1938, to July 15, 1938.

The affiliation did not extend over a period of twenty weeks and, therefore, whether or not Richmond Barber Shop, Incorporated, became liable for the payment of the payroll tax depends upon whether or not liability attached at the time the affiliation began or whether liability in such cases does not attach unless during the period of control by the same interest, the employment record of the combined units, subsequent to the affiliation, meets the requirements of Section 2(i) (1) of the Virginia Unemployment Compensation Act, which is as follows:

"Employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals, irrespective of whether the same individuals are or were employed in each such day."

Your letter states that Mr. Woodall, who individually owns the John Marshall Barber Shop and is, therefore, an employing unit, was on March 1, 1938, an employer under the provisions of Section 2(i) (1). It is my opinion that under the provisions of Section 2(i) (4) of the Act, the Richmond Barber Shop, Incorporated, at the time it commenced business on March 1, 1938, became charged with the employment record of the employing unit controlled by the same interest that controlled Richmond Hotel Barber Shop. The two employing units immediately became integral parts of a group of employing units controlled by the same interest and must for the purpose of fixing liability for taxation be treated as one employing unit. If the employing record of either employing unit is such as to make such employing unit an employer under the provisions of Section 2(i) (1), then both units must be immediately classified as employers. Therefore, since Mr. Woodall was an employer as of March 1, 1938, it follows that the corporation likewise was an employer upon that date.

With respect to the second point raised by Mr. Woodall, it is my opinion that cessation of common ownership, or control by the same interests, as the case may be, alone does not operate to terminate liability. The liability, once established, can only be terminated under Section 8(b) of the Virginia Unemployment Compensation Act, which is as follows:
"Except as otherwise provided in subsection (c) of this section, an employing unit shall cease to be an employer subject to this act as of the first day of January of any calendar year, only if it files with the commission, prior to the fifth day of January of such year, a written application for termination of coverage, and the Commission finds that there were no twenty different days, each day being in a different week within the preceding calendar year, within which such employing unit employed eight or more individuals in employment subject to this act. For the purpose of this subsection the two or more employing units mentioned in paragraph (2) or (3) or (4) of section two (i) shall be treated as a single employing unit."

As provided in Section 8(b), before Richmond Hotel Barber Shop, Incorporated, can be released from its obligation to pay payroll tax on the wages paid its employees, it must file with the Commission the written application referred to in said section, and if the Commission, after considering the application, finds that there were no twenty different days, each day being in a different week within the preceding calendar year, within which such employing unit employed as many as eight individuals, including the employment record of any affiliated employing unit in such year, it must release the corporation from further liability for payment of said tax.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

UNEMPLOYMENT COMPENSATION—Interstate Railroads—Exemption of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 23, 1939.

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

MY DEAR MAJOR EVANS:
I am in receipt of your letter of January 3, 1939, in which you state:

"The Unemployment Compensation Commission of Virginia has received a letter from a railway company, which is an interstate common carrier, in which request is made of the Commission that it relieve the railway company from the requirement of furnishing detailed quarterly reports covering wages earned by its employees after December 31, 1938. The railway company bases its request upon the fact that the Railroad Unemployment Insurance Act, which becomes effective July 1, 1939, makes exclusive provision for the payment of unemployment benefits for unemployment occurring after June 30, 1939, based upon 'employment' as defined in that Act. The information contained in such reports is not necessary for the payment of benefits by this Commission upon claims filed prior to July 1, 1939."

The Railroad Unemployment Insurance Act referred to by you, and which was passed by the 75th Congress, Third Session, and approved June 25, 1938, creates a Federal agency for the purpose of collecting, after June 30, 1939, unemployment compensation tax from "employers" as defined in said act, and to pay benefits to unemployed individuals who have performed service for such employers and have become unemployed subsequent to June 30, 1939. Railway companies engaged in interstate commerce are employers under said Federal Act.

In Section 2(j) (7) (C) of the Virginia Unemployment Compensation Act it is stated:
"The term 'employment' shall not include service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress * * * ."

Under the facts presented it is my opinion, therefore, that subsequent to June 30, 1939, the Virginia Unemployment Compensation Commission will no longer have the power to assess and collect taxes upon the wages paid by railway companies engaged in interstate commerce to their employees, since such employees will no longer be deemed to be in "employment" within this State.

With respect to the reports showing the individual earnings of such railway company employees during the first six months of the year 1939, I am of the opinion that, since there is only a remote possibility that such reports will be necessary in order for your commission to properly administer the Act during that period, your commission has the right to relieve such railway companies from the requirement of filing the same, provided it appears to the commission that the information contained in said report will not be required by the Social Security Board or the Railroad Retirement Board. It is my suggestion, however, that your Regulation No. 3, with respect to the filing of reports, be amended so as to exclude employers coming within the jurisdiction of the Railroad Unemployment Compensation Act.

I further suggest that the railway company be relieved from such requirement only upon condition that it will supply, on demand from you, the required information as to any employee whose compensation may be thereby affected.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

UNEMPLOYMENT COMPENSATION—Partner as Employee.

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

Senator Vivian L. Page,
Bank of Commerce Building,
Norfolk, Virginia.

My Dear Senator:

I am in receipt of your letter of August 26, to which is attached a letter from Lawson and Newton under date of August 25, 1938, in which an opinion is requested as to whether or not a member of a partnership is to be counted as an employee in determining the liability of a partnership for the payment of the payroll tax under the Virginia Unemployment Compensation Act, approved on December 18, 1936.

In reply I wish to state that where an employer is organized as a partnership, the bona fide partners shall, with respect to such enterprise, be treated as employers rather than employees and bona fide partners are not to be considered as employees under the Virginia Unemployment Compensation Act. Neither is the compensation received by such partners subject to the unemployment compensation tax provided for by said statute.

It does not appear from the Lawson and Newton letter whether Mr. A. J. Banks, the manager, is also a partner. If he is a partner, then he would not be deemed to be an employee. If he is not a partner, he would be so considered under the Unemployment Compensation Act. This is a question of fact which I could not undertake to pass upon.

Sincerely yours,

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

UNEMPLOYMENT COMPENSATION COMMISSION—Refund of Taxes—Application Made Beyond Time Limit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 2, 1939.

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

My Dear Major Evans:
I acknowledge your letter of January 31, 1939, in which you refer to Section 14(d) of the Virginia Unemployment Compensation Act and in which you state as follows:

"This Commission, from time to time, receives application from employing units and employers requesting grants to them of refunds of contributions made to the Commission in settlement of payroll tax, assigning as a reason for the refund the fact that (1) the employing unit was never an employer under the law and no tax was ever actually due or (2), in case of an employer, that the particular individuals involved were never employees of the employer, and, therefore, no tax was ever due upon the wages of said individuals. Frequently such applications are filed later than one year after the date such tax, had there been liability upon the applicant, was due as prescribed by the regulations of this Commission.

"This Commission desires an opinion from you as to its right to grant refunds in cases where it is established that there was no liability for the specific tax involved, but the application for refund was filed later than one year after the tax for the period involved was due and payable by employers under the law."

I am of the opinion that the Commission is without the power to grant refunds where the application therefor is filed with the Commission later than one year from the time the contributions became due. The due date in each case is the last date the contributions with respect to a particular period could be filed without the addition of an interest charge under regulations prescribed by the Commission. Refunds cannot be granted in a specific case upon the ground that no tax was ever due upon the wages involved, unless the application is filed within one year from the date contributions generally were due for the period involved. Of course, within any such year, even though an application has not been filed, the Commission may make an adjustment or grant a refund on its own initiative.

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

UNEMPLOYMENT COMPENSATION COMMISSION—Suits to Collect Taxes—Costs—How Paid.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 11, 1939.

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

My Dear Major Evans:
I have before me your letter of May 10, 1939, to which is attached a memorandum dated May 2, 1939, from Paul E. Batzell, Assistant Director, State Op-
REPORT OF THE ATTORNEY GENERAL

operations, Bureau of Unemployment Compensation, to Regional Director at Washington, in which letter and memorandum it is requested that I furnish you an opinion as to whether in the appropriation to my office there are funds available to pay the costs and fees incurred in suits instituted on behalf of the Commission for collection of delinquent taxes due the Commission.

Section 1887 (106) (b) of the Virginia Code specifically authorizes the Unemployment Compensation Commission to bring civil actions for the collection of contributions in default, and states that such action shall be brought in the name of the Commission. There is no appropriation to the Attorney General's office for the payment of costs and fees which the Commission may be required to advance in connection with such suits. Under the general fiscal policy of the State, all such costs and fees are paid out of the appropriation made available to the department of State involved in the litigation.

In my opinion, therefore, the costs and fees in connection with litigation in which your Commission is involved may be paid only from the administration fund appropriated to the Commission by the General Assembly of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

UNEMPLOYMENT COMPENSATION LAW—What Constitutes an "Employer"—Individual Controlling Several Businesses.

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

HONORABLE GEORGE F. ABBITT,
Attorney at Law,
Appomattox, Virginia.

My Dear Mr. Abbitt:

This is in reply to your letter of July 20, in which you ask whether or not under the interpretation heretofore given the unemployment compensation act of Virginia (Acts Extra Session 1936, chapter I, page 3) a person who owns and operates a filling station in his individual name and as a private undertaking, but who also owns a majority of the capital stock of a corporation which employs more than eight employees, comes within the provisions of said act, and is required to pay the tax imposed by said act upon those persons employed in his filling station.

Section 2, subsection (i) (4) provides as follows:

"Any employing unit which together with one or more other employing units, is owned or controlled, by legally enforcible means or otherwise, directly or indirectly by the same interests, or which owns or controls one or more other employing units, by legally enforcible means or otherwise, and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this sub-section;"

This, and other general relevant provisions of the act, have been construed as embracing a filling station operated under the circumstances you refer to.

The general purpose of the acts seems to be to prevent employers from splitting up their activities through corporate holdings, or otherwise, and requires all of the activities controlled by any one person or group of persons to be considered as a single operation within the taxing provisions of the act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Mr. F. C. Pederson,
State Forester,
University, Virginia.

Dear Mr. Pederson:
I have your letter of January 6 enclosing copy of a letter from Mr. Watt H. Stanley of the United States Soil Conservation Service giving me the information requested by this office in connection with your request of December 9 for an opinion on certain questions relative to the administration of the resettlement area in Buckingham, Appomattox, Prince Edward and Cumberland Counties.

You first wish to know whether State game wardens have authority to enforce State game laws within the area in question, the title to which is now vested in the Federal government by virtue of deeds from the various private landowners.

From Mr. Stanley's letter, it appears that most of this property was acquired by the Federal government prior to 1936. As to such property, it is my opinion that the State and Federal governments exercise concurrent jurisdiction in the matter of police powers under the terms of Virginia Code (Michie 1930) section 19; that, therefore, in the absence of any countervailing Federal law, all of the State game laws may be enforced within such area by State game wardens.

As to that portion of the area which has been or may be acquired subsequent to the enactment of chapter 382, Acts 1936, it is clear that the State retains exclusive police jurisdiction except that the United States has power to regulate traffic over highways maintained by it within such area, to protect the area from damage and depredation, and to administer the property for the purposes for which it was acquired. Virginia Code (Michie 1930), section 19-c.

Your first question, therefore, may be answered in the affirmative.

You next wish to know whether the Federal government can prohibit all hunting on a part or all of the area in question.

Under the terms of section 19-c of the Code, expressly ceding to the United States the power "to protect * * * from damage, depredation or destruction" all such lands theretofore or thereafter acquired by the government, and to administer such lands for the purposes for which they have been acquired, it is my opinion that the United States may, like any private landowner, prohibit hunting within such an area.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA CONSERVATION COMMISSION—Power to Convey Real Estate.

Mr. Wilbur C. Hall, Chairman,
Virginia Conservation Commission,
Richmond, Virginia.

Dear Mr. Hall:
This will acknowledge your letter of recent date, requesting the opinion of this office as to your Commission's authority to convey to the authorities in
charge of the maintenance and preservation of "Stratford" an easement for the construction of a power line across a portion of Westmoreland State Park.

While the Commission is given the general power to "convey property, real and personal" under Virginia Code (Michie 1936) section 585(34), it is the opinion of this office that the Commission has authority to exercise this power only as an incident to the exercise of the functions and duties with which the Commission is charged.

It is my opinion, therefore, that the Commission has no authority to make the conveyance in question unless it can be shown to be an appropriate measure for the accomplishment of some function which the Commission is authorized to perform.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA CONSERVATION COMMISSION—Power to Convey Real Estate—Hungry Mother Park Boulevard.

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

HONORABLE WILBUR C. HALL, Chairman,
Virginia Conservation Commission,
Richmond, Virginia.

Re: Hungry Mother Park Boulevard.

DEAR MR. HALL:

I have your letter of October 14, referring to your file on the above matter and making the following request:

"This is to request your official opinion as to the power and authority of the Virginia Conservation Commission to execute a deed to the State Highway Commission conveying to the latter all the rights and control over and appurtenant to the fifty foot strip occupied by the present road which are necessary for highway improvement and maintenance purposes."

Your file discloses that the Commission originally acquired title to the strip of land in question under certain deeds which provided that the Commission should, among other things, construct a road throughout the length of the said strip, so as to connect Hungry Mother State Park with the main highway.

Your file further discloses that a road has been built as required by this deed, but that it has never been given a smooth surface, and no provision has been made for maintaining the same. However, arrangements have been made with the State Highway Department, with the approval of the Board of Supervisors of Smyth County, to include this roadway in the secondary highway system, and the Highway Department is prepared to surface the road immediately and maintain the same as other secondary roads are maintained. It is for this purpose that it is desired to convey to the Highway Department such control over and rights in the roadway as shall be necessary for highway improvement and maintenance purposes.

The Virginia Conservation Commission is given the general power to convey real property by the provisions of Virginia Code (Michie 1936) 585(34). In view of the valid contract obligating the Commission to provide the roadway in question, it is the opinion of this office that the exercise of such power in this particular is within the authority of the Commission.
It is my opinion, therefore, that the Virginia Conservation Commission can legally and validly make the conveyance which you propose.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA MILITARY INSTITUTE—Endowment Fund—Investments—Purchased of Its Own Obligations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 1, 1938.

GENERAL C. E. KILBOURNE, Superintendent,
Virginia Military Institute,
Lexington, Virginia.

Dear General Kilbourne:

I have your letter of September 30, in which you request my opinion of the authority of the Board of Visitors to purchase with money in the Virginia Military Institute Endowment Fund notes or bonds executed by the Virginia Military Institute in 1928 and now held by and owing to some of the officers of the Institute, and which these officers are willing to sell to the Endowment Fund.

You state that these obligations of the Institute bear 6% interest, whereas the yield from investments of the Endowment Fund averages only about 4%.

While I, of course, am not familiar with the terms of the loans or the legal liability of the Institute with respect thereto, in my opinion, if the obligation of the Institute is a legal one and safe in the judgment of the Board of Visitors, the Board has authority to make this investment.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA MILITARY INSTITUTE—Powers of Board of Visitors—Construction Program.

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

GENERAL C. E. KILBOURNE, Superintendent,
Virginia Military Institute,
Lexington, Virginia.

My Dear General Kilbourne:

This is in response to your request for my opinion as to the authority of the Virginia Military Institute, acting through its Board of Visitors in the event that through donations and bequests or otherwise than by borrowing sufficient funds become available for the purpose, to construct and erect additions to the barracks and hospital, and also to construct a riding hall, additional professors’ houses and academic buildings, a stadium, a central heating plant, and also to cause certain landscape work necessary to these projects to be carried out.

The Virginia Military Institute is an agency of the Commonwealth of Virginia and the general management of its affairs is vested in the Board of Visitors. In the event that funds for the projects above indicated, or any of them, shall become available from the sources mentioned, it is my opinion that the Board
of Visitors of the Institute would, on its behalf, have ample authority to carry out the said projects as above indicated, and to that end will be within its legal rights in completing an application or applications to the Federal Emergency Administration of Public Works for Federal grants in aid of said projects.

Since no specific legislation has been enacted by the General Assembly of Virginia with reference to any of these projects, or providing funds therefor, it is my opinion that the foregoing statement should be accepted in lieu of the form providing for supplemental legal information usually attached to applications for grants of the type above mentioned.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA STATE BAR—Act Creating—Appropriation.

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

Senator John S. Battle,
Charlottesville, Virginia.

Dear Senator Battle:

This is in reply to your letter of July 15, in which you request my opinion upon the question whether or not the provisions contained in chapter 410 of the Acts of the General Assembly of 1938 constitute an appropriation, for the purposes of administering said Act, of the moneys resulting from the collection of the annual fees thereby authorized to be assessed against and collected from members of the Virginia State Bar.

The provisions of the Act, which are clearly within the scope of the title, authorize the Supreme Court of Appeals to "prescribe, adopt, promulgate and amend rules and regulations. * * * Fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this act, and providing for the collection and disbursement of such fees * * * ".

It is my opinion that the provisions contained in the language quoted evidences an obvious legislative intent that the moneys received from said fees shall be disbursed and paid out in compliance with the rules and regulations adopted by the Supreme Court of Appeals pursuant to this authority conferred upon it.

The Constitution does not require the employment of any specific words or language to constitute an appropriation of moneys from the State Treasury. It is sufficient that the General Assembly by its legislative enactments indicate a plain and clear intention that moneys therein shall be paid out for a specific purpose. This test, I think, is fully met by the language contained in the Act.

It is my opinion, therefore, that this Act does appropriate the proceeds from the collection of said fees, and that same should be paid out on warrants of the State Comptroller drawn upon the State Treasurer, such warrants to be signed by such authority as may be prescribed in the rules and regulations hereafter adopted by the Supreme Court of Appeals.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
MR. STAHL BUTLER, Superintendent,

Virginia State School for Colored
Deaf and Blind Children,
Newport News, Virginia.

DEAR MR. BUTLER:

I have your letter of September 13, requesting an opinion of this office as to whether you have legal authority, in your official capacity, to request the resignation of a member appointed by the Board of Visitors on the grounds of insubordination where such employee has disregarded instructions.

Virginia Code (Michie 1936) section 985, requires the Board of Visitors of the Virginia State School for Colored Deaf and Blind Children to "elect such professors, officers or agents as may be necessary or expedient" and authorizes the Board to "remove for cause the superintendent, professors, officers, and agents at any time, causing to be entered upon the journal of the board the cause of such removal or removals, together with a copy of the order of removal."

In view of this express provision of the statute, it is my opinion that the superintendent is not authorized to discharge an employee who has been elected or appointed by the Board of Visitors.

You also request my opinion as to whether it would be legally necessary to give such an employee thirty days' notice before discharging him. I know of no provision of law making such notice a matter of absolute right to such an employee.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

WEAPONS—Carrying Concealed—Treasurers and Deputies.

HON. ROBERT P. BAGWELL,
Treasurer of Halifax County,
Halifax, Virginia.

MY DEAR MR. BAGWELL:

I am in receipt of your letter of March 20, in which you ask if "it is necessary for my deputies to obtain a permit in order to carry a concealed weapon while in discharge of their duties as deputy treasurer."

Section 4534 of the Code prescribes the punishment for carrying concealed weapons. There are several exceptions to the statute, among others, being one for a "collecting officer while in the discharge of his official duty". I think perhaps that this exception is broad enough to include a treasurer and his deputies, for, while these officers are not always "collecting", they are "collecting officers".

However, the matter of obtaining a permit from the Judge of the Circuit Court is a simple one, and while, as above stated, I am inclined to be of the opinion that a deputy treasurer may carry a concealed weapon without being subject to
the penalties of the statute, yet, to be absolutely on the safe side, I would recommend the obtaining of the permit from the Judge, unless he should advise you that it is not necessary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WITNESSES—Compensation—Mileage.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 9, 1939.

HONORABLE ROBERT S. SMITH,
Commonwealth's Attorney,
Roanoke, Virginia.

My Dear Mr. Smith:

In reply to your letter of June 5, it is my opinion that the law does not provide any strict or exact standard for determining the mileage upon which allowances to witnesses shall be computed, and, in the case to which you refer, it is primarily a matter for the exercise of your own discretion as to what distance the witness may be said to have traveled for the purpose of attending the court or the hearing before the grand jury.

Of course, no witness should be made any allowance for any trip not actually made, regardless of the fact that the hearing or the trial may be held at a point remote from the witness' residence.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WITNESSES—Criminal Cases Before Trial Justices—Allowances—Certification;
Id.—Id.—Id.—Maximum Number;
Id.—Criminal Cases in Circuit Court—Maximum Number.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 19, 1939.

HON. A. H. GOFF, Clerk,
Circuit Court of Buchanan County,
Grundy, Virginia.

My Dear Mr. Goff:

I am in receipt of your letter of May 13, in which you ask several questions. Your first question is:

"Who is the proper person to issue a certificate of allowance drawn on the Treasurer of Virginia for the services of witnesses duly summoned in a criminal case and used before the Trial Justice Court?"

I have conferred with the State Comptroller and he advises me that, where witnesses appear before a Trial Justice in a criminal case whose fees are to be paid by the State, it is the practice for the Trial Justice or his clerk to furnish the names of the witnesses, with the amounts due, to the clerk of the circuit court. The clerk of the circuit court in turn issues his certificate to the Treasurer of
the county, who then pays the witness upon presentation of the certificate. The Treasurer files with the Comptroller his statement of the amount paid to witnesses in such cases, accompanied by the certificates on which the witnesses were paid, and the Treasurer is then reimbursed by the State Comptroller.

You next ask how many witnesses may be paid out of the State treasury in any one criminal case before a Trial Justice Court.

Section 3512-a of the Code provides that the maximum number that may be paid out of the treasury before a Justice of the Peace or a Police Justice in the trial of a criminal case is five. I am of opinion that the provisions of this section are by reference incorporated in the Trial Justice Act. The section further provides that the limitation shall not be construed to apply in a case where a court or the judge thereof deems it necessary for additional witnesses to appear. I think it reasonably plain, however, that this proviso applies to courts of record and not to Trial Justices.

Your third question is as follows:

"Under what proceedings is the clerk of the circuit court justified in issuing certificates of allowance drawn on the Treasurer of Virginia for the pay of witnesses used in any one criminal case before the circuit court of his county in the excess of ten witnesses? I have no doubt as to the authority of the court to use and have summoned more than ten witnesses in any one criminal case, but my point is: On what evidence that the court has authorized more than ten witnesses to be used and summoned in any one criminal case should the clerk act in the paying of said witnesses?"

The limit on the number of witnesses paid out of the treasury before a court of record is ten, but, as you suggest, the court may authorize the payment of more than ten where it deems necessary. As to the evidence that you should have to the effect that the court has authorized more than ten, I should say that the court could enter an order to that effect or make such entry as to the court is proper. This is a matter largely within the discretion of the court, and I suggest that you confer with the judge.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WITNESSES—Experts—Compulsory Attendance of—Physicians in Criminal Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 3, 1938.

HONORABLE BENTLEYHITE,
Attorney for the Commonwealth,
Christiansburg, Virginia.

DEAR MR. HITE:

This is in reply to your letter of November 2, in which you request my opinion upon the question whether or not physicians may be compelled to testify as expert witnesses in criminal cases.

The authorities seem to draw a distinction between instances in which the physician has knowledge of facts material to the issue in the trial and other instances in which the entire testimony of the physician is of an opinion nature. In the former class of cases, where the testimony relates to facts, the general holding seems to be that the physician may be compelled to testify without any compensation, and that he may also be required to give his opinion upon relevant questions arising from the facts within his knowledge.
In civil cases, where the Commonwealth is not involved, there seems to be a conflict of authority as to whether a physician may be compelled to testify without compensation where he has no knowledge of the facts in issue. However, even those cases which seem to hold that a physician may not be compelled to testify where he does not have knowledge of facts seem to hold that it is his duty to the public to testify as an expert and give his professional opinion in criminal cases.

I find no authority on this subject in Virginia, but the leading authorities in other states are referred to in 11 R. C. L. 648 and 2 A. L. R. 1573, and the note to this case.

Sincerely yours,

ABRAM P. STAPLES,

Attorney General.
## INDEX

### ACTS OF ASSEMBLY

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authorizing “Sunday Beer” Ordinance—Validity of</td>
<td>8</td>
</tr>
<tr>
<td>Distribution of:</td>
<td></td>
</tr>
<tr>
<td>Certain educational institutions</td>
<td>72</td>
</tr>
<tr>
<td>High School Libraries</td>
<td>70</td>
</tr>
<tr>
<td>Substitute Trial Justices</td>
<td>71</td>
</tr>
<tr>
<td>See Constitutional Law</td>
<td></td>
</tr>
</tbody>
</table>

### AGRICULTURE AND IMMIGRATION

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appropriations—Special accounts for special revenues</td>
<td>16</td>
</tr>
<tr>
<td>Crop Pest Control:</td>
<td></td>
</tr>
<tr>
<td>Nursery Stock—License for shipment, sales, etc.—Shipments into State</td>
<td>1</td>
</tr>
<tr>
<td>Nursery Stock—Regulating shipments into State—Requiring inspection certificates of state of origin</td>
<td>1</td>
</tr>
</tbody>
</table>

### ALCOHOLIC BEVERAGE CONTROL

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrest Fees</td>
<td>108</td>
</tr>
<tr>
<td>Confiscation of Automobiles:</td>
<td></td>
</tr>
<tr>
<td>Costs</td>
<td>50</td>
</tr>
<tr>
<td>Fees—Clerks and Sheriffs</td>
<td>109</td>
</tr>
<tr>
<td>Procedure</td>
<td>2</td>
</tr>
<tr>
<td>Contributions by Wholesale Licensees to Campaign Fund for “Sunday Beer” Referendum</td>
<td>3</td>
</tr>
<tr>
<td>Cooperation of Board with Boards of other States in Obtaining Fair Prices—Entering Contracts with such other Boards</td>
<td>3</td>
</tr>
<tr>
<td>Enforcement Officers—Payment of witness and arrest fees out of Treasury.</td>
<td>108</td>
</tr>
<tr>
<td>Licenses:</td>
<td></td>
</tr>
<tr>
<td>“On Premises”—Who may obtain</td>
<td>5</td>
</tr>
<tr>
<td>Ordinances:</td>
<td></td>
</tr>
<tr>
<td>“Sunday Beer”—</td>
<td></td>
</tr>
<tr>
<td>Effective date of</td>
<td>7</td>
</tr>
<tr>
<td>Procedure in adopting</td>
<td>7</td>
</tr>
<tr>
<td>Publishing notice of</td>
<td>8, 61</td>
</tr>
<tr>
<td>Validity of act authorizing</td>
<td>8</td>
</tr>
<tr>
<td>Validity of, where adopted after issuance of licenses</td>
<td>6</td>
</tr>
<tr>
<td>Possession—“Illegal Whiskey”</td>
<td>5</td>
</tr>
<tr>
<td>Unlawful possession and transportation—Penalties</td>
<td>9</td>
</tr>
<tr>
<td>Warrants used in payment for beverages—Form of certain warranties, etc.</td>
<td>10</td>
</tr>
</tbody>
</table>

### APPROPRIATIONS

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agencies exceeding—Governor’s Emergency Powers—State Library Building</td>
<td>11</td>
</tr>
<tr>
<td>Commission of Fisheries—Federal Laboratory at Yorktown</td>
<td>12</td>
</tr>
<tr>
<td>“Discretionary Fund”—Covering deficit in county school funds—Authority of Governor</td>
<td>12</td>
</tr>
<tr>
<td>Education of World War Orphans—Construction of Act</td>
<td>13</td>
</tr>
<tr>
<td>Highway Funds—Fund for secondary convict camps—Unused surplus</td>
<td>15</td>
</tr>
<tr>
<td>Maintenance Medical College Hospital—Disbursement through Health Department under Federal Social Security Law</td>
<td>14</td>
</tr>
<tr>
<td>Public Assistance:</td>
<td></td>
</tr>
<tr>
<td>Power of board of supervisors to appropriate funds for</td>
<td>194</td>
</tr>
<tr>
<td>Power of board of supervisors to increase items in budget</td>
<td>193</td>
</tr>
<tr>
<td>Schools—Reduction in local levies below 1936-1937 level—Reassessment</td>
<td>220</td>
</tr>
<tr>
<td>Special accounts for special revenues of administrative agencies—Department of Agriculture and Immigration</td>
<td>16</td>
</tr>
<tr>
<td>Virginia State Bar</td>
<td>299</td>
</tr>
</tbody>
</table>
ARCHITECTS, ENGINEERS, ETC. Page
Nonresidents exempted from qualifying to practice..................... 18

ATTORNEYS
Disbarment—Procedure............................................. 18

AUDITOR OF PUBLIC ACCOUNTS
Duties—Auditing accounts approved by courts—Opinions Attorney General as to correctness of same.................. 19

AUTOMOBILES
Confiscation under Alcoholic Beverage Control Law:
Costs........................................................................ 50
Procedure................................................................... 2

BAIL
Jurisdiction of Justice of the Peace to grant................................ 152
Trial Justices and Clerks admitting persons to bail after office hours—Disposition of fees................................................. 285

BOARD OF EDUCATION
Authority to sell Literary Fund certificates and reinvest proceeds. 160
Respective powers of Board and Sinking Fund Commissioners with respect to certain public securities.......................... 22

BOARD OF EQUALIZATION
Powers in changing assessments on real estate.......................... 272
Necessity for appointment of—Cities of 12,000 population or less 140

BOARD OF HEALTH
Catawba Sanatorium Property—Granting easement over............ 251
Certain sanitary regulations in counties adjoining incorporated communities—Necessity for action by local board of health. 252
Members of—Oath of office............................................. 217

BOARD OF SINKING FUND COMMISSIONERS
Respective powers of Commissioners and State Board of Education with respect to certain public securities.......................... 22

BOARDS OF SUPERVISORS
Compensation—Extra services........................................... 65
Contracts—School board—Interest of member in....................... 58
County school levies—Maximum limit.................................... 221
Duty to provide funds for providing voting booths..................... 80
Employment of Commonwealth’s Attorneys:
Collection of delinquent taxes............................................ 38, 39, 40
Representing county before Corporation Commission in tax matter 39
Member holding office as Soil Conservation Supervisor................ 215
Parliamentary Procedure—"Majority of those present"—Effect of refusal to vote.......................................................... 23
Powers:
To accept WPA grant—Construction of county buildings............. 57
To adopt zoning ordinances—Area surrounding school.............. 66
To appropriate funds for public assistance................................ 194, 197
To change specific items in budget of local board of public welfare 196
To contract for street lighting.............................................. 64
To employ counsel to assist Commonwealth’s attorneys in proceed-
itions.......................................................................... 40
To expend surplus funds for constructing county office building.... 61
To increase items in budget adopted by local board of public welfare 193
REPORT OF THE ATTORNEY GENERAL

To make additional appropriation in excess of county budget........ 57
To make appropriation for benefit of widow of constable killed on duty 60
To make appropriation for person injured on county property........ 60
To provide compensation and mileage for coroners.................. 47
To release penalties, interest and costs on State taxes..............63, 66
To supplement regular fund in counties for public assistance—Medical,
etc., expenses.................................................................................. 206
To transfer district debt funds.................................................. 59
To use county school levies for use of acquisition of new plant.....223
Publications of financial statement—"Newspapers of the county".....25

BONDS
Public Contracts:
Construction, etc.—Check in lieu of........................................... 208
Sureties—Interest in contract.......................................................... 207
Requirement of:
Second offenses under suspension of hunting license................ 132
Second offenses under suspension of hunting license—Action pending appeal................. 132

BOOKMAKERS
Forfeiture of money in hands of................................................. 122

BUDGETS
County—Appropriation in excess of............................................ 57
Schools—Division of items......................................................... 227

BUILDING PERMITS
Application to State Project within city....................................... 180
Issuance of—Discretion of Commissioners of the Revenue..............34

CAPITOL SQUARE
Management and control of....................................................... 26

CHILDREN
Employment of on school days—Certain exceptions...................... 154
Refusal of badges for newsboys, etc............................................ 155

CITIES AND TOWNS
Town councilman as building inspector....................................... 216

CCC CAMPS
Theft of government property by enrollees—Trial for in State Courts...26

CLAIMS DUE THE COMMONWEALTH
Collection of—Subjection of lands of judgment debtors.................. 27
Commonwealth's Attorneys—Duties with respect to....................... 27

CLERKS
Admitting to bail............................................................................. 27
Distribution of receipt books for fines.......................................... 117
Fees:
Confiscation of automobiles under ABC Law.............................. 109
Criminal cases—Swearing Jury.................................................... 52
Deputies—Salaries paid by locality—Reports................................. 111
Issuing marriage license............................................................... 109
Recording veterans' certificate of discharge.................................. 29
Transfer of real property—One conveyance covering several tracts..110
Issuance of execution on judgment confessed in office of.............149
Probate Tax—Imposition by.......................................................... 265
Recordation of claim against estate of recipient of Public Assistance.204
COMMERCE AND TRADE
“Unfair Sales Act”—Interstate commerce.................................................. 29

COMMISSION FOR THE BLIND
Donations to—Disposition of Funds—Payment into Treasury......................... 30

COMMISSION OF FISHERIES
Boats of—Admiralty causes—State Immunity in Tort.................................. 258
Property acquired by—In what name held.................................................. 32
Recordation Tax—Exemption................................................................. 274

COMMISSIONERS OF THE REVENUE
Building Permits—Discretion........................................................................ 34
Compensation of in certain cities—Validity of 1938 Act with reference to... 35
Compensation—Salary and office expenses.................................................. 37
Increasing assessment—Buildings incomplete at time of general assess-ment.......................... 38

COMMONWEALTH’S ATTORNEYS
Compensation for extra duties:
Collection of delinquent taxes.................................................................... 38, 39
Representing county before Corporation Commission in tax matter........ 39
County employing counsel to assist in prosecutions................................... 40
Duties:
Advising grand jury, drawing indictment, etc.......................................... 41
Collection of claims due the Commonwealth............................................. 27
Services for school board............................................................................. 40
Employment of to collect delinquent local taxes........................................ 262
Fees:
Appealed cases............................................................................................ 53
Prosecuting ordinance cases................................................................. 54

COMPTROLLER
Collection of delinquent taxes—Reimbursing special agent for bad check of taxpayer............................................................. 42
Duties with respect to pensions of families of Confederate Veterans.......... 190

CONSERVATION COMMISSION
Division of Water Resources—Accepting private funds to perform special services.......................................................... 42
Power to Convey Real Estate:
Easement across Westmoreland Park....................................................... 297
Hungry Mother Park Boulevard.............................................................. 297

CONSTITUTIONAL LAW
Act covering more than one subject—Repeal of Act relating to State Cadets.......................................................... 43
Tax Code—Provision for collecting Poll Tax.......................................... 44
Validity of Act authorizing “Sunday Beer” ordinance................................ 8

CONTRACTORS
General—Law Regulating:
Application to work financed by FHA.................................................... 135
“Speculative” Builder.................................................................................. 135
Registration:
Applications of persons previously engaged in the business—Powers and procedure of Board................................. 47
Fixing time limit for applications............................................................. 46
### CONTRACTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABC Board—Entering contracts with Boards of other states</td>
<td>3</td>
</tr>
<tr>
<td>Public:</td>
<td></td>
</tr>
<tr>
<td>Bonds—Sureties—Interest in contract</td>
<td>207</td>
</tr>
<tr>
<td>Construction, etc.—Bond—Check in lieu of</td>
<td>208</td>
</tr>
<tr>
<td>Construction, etc.—Competitive bids—Contract involving less than $2,500</td>
<td>208</td>
</tr>
<tr>
<td>Officers interested in—Insurance on town property</td>
<td>209</td>
</tr>
<tr>
<td>Officers interested in—What constitutes “interest”</td>
<td>210</td>
</tr>
<tr>
<td>School Boards:</td>
<td></td>
</tr>
<tr>
<td>Interest of member in</td>
<td>221</td>
</tr>
<tr>
<td>Interest of member of board of supervisors in</td>
<td>58</td>
</tr>
</tbody>
</table>

### CONTRIBUTIONS

Wholesale licensees to campaign fund for “Sunday Beer” referendum... 3

### CORONERS

Compensation—Mileage—Power of board of supervisors to provide... 47

Fees—Proceedings—How paid... 110

### COSTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrest fees—Motor vehicle officers</td>
<td>49</td>
</tr>
<tr>
<td>Confiscation of automobiles under ABC Law</td>
<td>50</td>
</tr>
<tr>
<td>Criminal Cases:</td>
<td></td>
</tr>
<tr>
<td>Hospitalization of prisoner in private hospital</td>
<td>52</td>
</tr>
<tr>
<td>Professional services of physicians</td>
<td>51</td>
</tr>
<tr>
<td>Professional services of physicians—Superintendent of State Hospital</td>
<td>50</td>
</tr>
<tr>
<td>Swearing Jury—Sheriffs—Clerks</td>
<td>52</td>
</tr>
<tr>
<td>Fees of Commonwealth’s Attorneys:</td>
<td></td>
</tr>
<tr>
<td>Appealed cases</td>
<td>53</td>
</tr>
<tr>
<td>Prosecuting ordinance case</td>
<td>54</td>
</tr>
<tr>
<td>Judgments for—Effect on—Defendant serving term for non-payment</td>
<td>118</td>
</tr>
<tr>
<td>Ordinance cases—How paid</td>
<td>55</td>
</tr>
<tr>
<td>Witness Fees—Same witnesses in different cases on same day—Appportionment</td>
<td>55</td>
</tr>
</tbody>
</table>

### COUNTIES

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Borrowing funds—Referendum</td>
<td>56</td>
</tr>
<tr>
<td>Budgets—Appropriations in excess of</td>
<td>57</td>
</tr>
<tr>
<td>Construction of county buildings—Accepting WPA grant—Spending unappropriated revenues</td>
<td>57</td>
</tr>
<tr>
<td>Contracts—Interest of supervisor in</td>
<td>58</td>
</tr>
<tr>
<td>Cooperative agreement between county and town—Purchase of fire fighting equipment</td>
<td>120</td>
</tr>
<tr>
<td>Deposits—Security</td>
<td>211</td>
</tr>
<tr>
<td>District Debt Funds—Transfer of</td>
<td>59</td>
</tr>
<tr>
<td>Expenditures:</td>
<td></td>
</tr>
<tr>
<td>Compensating widow of constable killed on duty</td>
<td>60</td>
</tr>
<tr>
<td>“Relief”—Appropriation for person injured on county property</td>
<td>60</td>
</tr>
<tr>
<td>Use of surplus funds for constructing county office building</td>
<td>61</td>
</tr>
<tr>
<td>Liability in Tort—Damage by fire truck</td>
<td>120</td>
</tr>
<tr>
<td>Ordinances:</td>
<td></td>
</tr>
<tr>
<td>Paralleling motor vehicle laws</td>
<td>174</td>
</tr>
<tr>
<td>Fines—Disposition of in certain cases</td>
<td>175</td>
</tr>
<tr>
<td>Warrants for violations of, and disposition of fines</td>
<td>176</td>
</tr>
<tr>
<td>Publication of notice—“Sunday Beer”</td>
<td>61</td>
</tr>
<tr>
<td>“Sunday Beer” Punishment</td>
<td>62</td>
</tr>
<tr>
<td>Publication of Financial Statement</td>
<td>25</td>
</tr>
</tbody>
</table>
Public Assistance:

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount to be spent on administrative costs</td>
<td>197</td>
</tr>
<tr>
<td>Appropriations for, not in budget</td>
<td>197</td>
</tr>
<tr>
<td>Independent relief by counties in certain cases</td>
<td>200</td>
</tr>
<tr>
<td>Releasing penalties, interest and costs on taxes—State taxes</td>
<td>63, 66</td>
</tr>
<tr>
<td>Sanitary regulations in—Adjoining incorporated communities</td>
<td>252</td>
</tr>
<tr>
<td>Set-off of debts due—Choosing debt to be credited</td>
<td>63</td>
</tr>
<tr>
<td>Street lighting</td>
<td>64</td>
</tr>
<tr>
<td>Supervisors—Compensation—Extra services</td>
<td>65</td>
</tr>
<tr>
<td>Zoning ordinances—Area surrounding school</td>
<td>66</td>
</tr>
</tbody>
</table>

COUNTY LIBRARIES

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finances—Budgets, appropriations—Disbursements, etc.</td>
<td>67</td>
</tr>
</tbody>
</table>

COURTS

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial Justice—Jurisdiction over CCC enrollees</td>
<td>27</td>
</tr>
</tbody>
</table>

CRAIG COUNTY

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special law as to seining—Repeal of</td>
<td>68</td>
</tr>
</tbody>
</table>

CROP PEST LAW

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nursery Stock:</td>
<td></td>
</tr>
<tr>
<td>License for shipment, sales, etc.—Shipment into State</td>
<td>1</td>
</tr>
<tr>
<td>Regulating shipments into State—Requiring inspection certificates of state of origin</td>
<td>1</td>
</tr>
<tr>
<td>Prosecutions under—Venue</td>
<td>69</td>
</tr>
</tbody>
</table>

DAIRY AND FOOD LAWS

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milk—Use of paper &quot;bottles&quot;</td>
<td>122</td>
</tr>
<tr>
<td>Trade names for commercial feeds—Alleged conflict with name registered under Federal Law—Duties of Dairy and Food Division</td>
<td>69</td>
</tr>
</tbody>
</table>

DEPOSITS

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>County funds—Security</td>
<td>211</td>
</tr>
</tbody>
</table>

DIVISION OF PURCHASE AND PRINTING

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distribution of Acts of Assembly:</td>
<td></td>
</tr>
<tr>
<td>Certain educational institutions</td>
<td>72</td>
</tr>
<tr>
<td>High School Libraries</td>
<td>70</td>
</tr>
<tr>
<td>Substitute Trial Justices</td>
<td>71</td>
</tr>
<tr>
<td>Distribution of Legislative Journals—Back numbers</td>
<td>71</td>
</tr>
<tr>
<td>Franked envelopes—Purchase of directly</td>
<td>72</td>
</tr>
<tr>
<td>Purchase of automobiles for sheriffs</td>
<td>73</td>
</tr>
<tr>
<td>Purchase of automobiles for deputy sheriffs</td>
<td>73</td>
</tr>
<tr>
<td>Purchase of game birds and animals for restocking</td>
<td>213</td>
</tr>
</tbody>
</table>

DOG LAWS

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation for stock damaged by dogs—Resident’s stock killed in another state</td>
<td>123</td>
</tr>
<tr>
<td>Compensation of game wardens—Killing dogs in counties</td>
<td>134</td>
</tr>
<tr>
<td>Licenses—Where issued—Nonresident keeping dog here temporarily</td>
<td>74</td>
</tr>
<tr>
<td>License Funds—County, Distribution of 1938 surplus—Towns</td>
<td>124</td>
</tr>
</tbody>
</table>

EASEMENTS

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority of State Board of Health to grant over property of Catawba Sanatorium</td>
<td>251</td>
</tr>
<tr>
<td>Power of Catawba Sanatorium to convey real estate—Power line easement</td>
<td>260</td>
</tr>
<tr>
<td>Power of Conservation Commission to convey real estate—Power line easement</td>
<td>296</td>
</tr>
</tbody>
</table>
ELECTIONS

Absent Voters:
- Proportionate number of ....................................... 75
- Return of improperly marked ballot ................................ 75

Ballots:
- Absent Voters—Proportionate number of ........................................ 75
- Return of improperly marked ballot ........................................ 75
- Form of—Hampton Roads Sanitation District ................................. 136
- Including names of proposed deputies ..................................... 76

Candidates:
- Personally soliciting signatures ............................................. 76
- Petitions—County supervisors—County officer ................................. 77
- Petitions—When to be filed ..................................................... 76
- Primary Fees—Computation—Member of General Assembly .................... 77

Capitation Tax:
- Assessment—Registered voter who has once lost and subsequently regained Virginia residence ......................................................... 98
- Liability for ............................................................................. 79
- New residents ........................................................................... 78, 95, 96, 102
- Payment of .............................................................................. 104
- Prepayment of—Time. ......................................................... 94
- Provision for collection .............................................................. 44
- Voter coming of age ................................................................. 103

Chairman local board of public welfare serving as judge and commissioner of .......................................................... 184

Clerks of—Compensation ................................................................. 82

Costs—Providing booths, etc., duty of counties ..................................... 80

County Officers—Supervisors, constables and Justices of the Peace ............... 78

Electoral Boards—Preparing ballots—Qualifications of candidates ............... 80

Judges—Compensation ................................................................. 81, 82

Primaries:
- Ballots—Including names of unopposed candidates .................................... 84
- Candidates—Fees—Computation of in certain cases ................................. 82
- Candidates—Filing fee ................................................................ 83
- Eligibility to vote or run in—Persons who voted for Republican Presidential electors in preceding general election ..................... 85
- Unopposed candidates .................................................................. 84
- Voters coming of age between primary and general election—Capita-
  tion taxes .................................................................................. 87

Referenda—List of voters ................................................................. 87

Registration:
- Books destroyed by fire—Transfer of voters ....................................... 99

Registrars:
- Applications, printed forms .......................................................... 217
- Compensation ............................................................................ 88
- Eligibility for elective office ........................................................ 218
- Registration after sundown ............................................................ 89

Residence .................................................................................. 100, 101, 104

Army, etc., officers stationed in Virginia .................................................. 95

Domiciled citizens temporarily living out of State ....................................... 99

Women ......................................................................................... 103

Soil Conservation officials:
- Amount of compensation of regular election officials ................................. 245
- Use of regular election officials .................................................. 245
- Waiving compensation of regular election officials ................................. 245

Special:
- Certifying results—Hampton Sewage disposal contest ............................... 89
- Counties borrowing funds PWA .................................................. 56
- Prepayment of capitation taxes—Time ................................................ 91
- Qualification of voters .................................................................. 90, 91
- Sanitation District—When State Board of Canvassers to act ...................... 249
- Town—Eligibility of voters ............................................................ 50
- Town in two counties—What officials should serve .................................. 80
REPORT OF THE ATTORNEY GENERAL

Towns:  
Prepayment of capitation taxes ........................................ 92, 103  
Residence of voters ..................................................... 92

Voters:  
Capitation tax paid but name omitted from voting list .......... 94  
Certified list of .......................................................... 87

Eligibility:  
Army, etc., officers stationed in Virginia ......................... 95  
By whom determined ..................................................... 96  
New residents ............................................................. 102  
Registered voter who has once lost and subsequently regained 
    Virginia residence .................................................. 98  
Transfer of registration where books destroyed .................. 99

Voting List:  
Capitation taxes paid but name omitted from list .............. 94  
How prepared ................................................................... 96  
Persons who have paid capitation tax elsewhere ................. 98

EMBALMERS  
Licenses:  
Branch managers, etc ..................................................... 105  
Renewals—Applications, Refusal, etc .................................. 106

EXTRADITION  
Authority of Governor to promise return of prisoner after trial ... 107

FEES  
ABC Officers—Payment of witness and arrest fees out of Treasury 108

Arrest:  
ABC Law ........................................................................... 108  
Motor vehicle officers ...................................................... 49

Clerks:  
Confiscation of automobiles under ABC law ...................... 109  
Criminal cases—Swearing jury ........................................... 52  
Issuing marriage license ................................................... 109  
Recording veteran’s certificate of discharge ....................... 29

Commonwealth’s Attorneys:  
Appealed cases ............................................................... 53  
Prosecuting ordinance case ............................................... 54

Coroners’ Proceedings—How paid .................................... 110

Justices of the Peace—Issuing warrants—Several defendants ... 151

Sheriffs:  
Confiscation of automobiles under ABC law ...................... 109  
Criminal cases—Swearing jury ........................................... 52  
Serving copy of order entering judgment by confession ........ 239  
Transfer of real property—One conveyance covering several tracts .. 110

Trial Justices:  
Admitting prisoners to bail after office hours—Disposition of .. 285  
Renewals of executions ...................................................... 284  
Trial fee—Suit dismissed before hearing ............................ 286

Witness—Same witness in different cases on same day—Apportionment... 55

FEE OFFICERS  
Excess fees—Computation—Accrual basis ............................. 111

Reports—Salaries paid to deputies by locality .................... 111
### REPORT OF THE ATTORNEY GENERAL

<table>
<thead>
<tr>
<th>FINES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collection of out of deceased defendant's estate</td>
<td>112</td>
</tr>
<tr>
<td>Disposition of:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Arrest by State officer where county has parallel ordinance</td>
<td>113</td>
</tr>
<tr>
<td>Offense covered by both statute and ordinance</td>
<td>115</td>
</tr>
<tr>
<td>Town ordinance cases before trial justice</td>
<td>115</td>
</tr>
<tr>
<td>Violations of local ordinances, where validity of ordinance in doubt</td>
<td>114</td>
</tr>
<tr>
<td>Imprisonment for nonpayment of—Effect</td>
<td>234</td>
</tr>
<tr>
<td>Judgments for—Effect on defendant serving term for nonpayment</td>
<td>116, 118</td>
</tr>
<tr>
<td>Persons committed for nonpayment of fine and costs—Time off for good behavior</td>
<td>237</td>
</tr>
<tr>
<td>Receipts for—Distribution of receipt books—Sheriffs—Justices of the Peace</td>
<td>117</td>
</tr>
<tr>
<td>Remittance of after successful appeal from trial justice, where fine previously turned over to clerk</td>
<td>119</td>
</tr>
<tr>
<td>Suspension of sentence—Effect of</td>
<td>234</td>
</tr>
</tbody>
</table>

### FIRE FIGHTING

Cooperative agreement between county and town—Counties—Liability in tort—Damage by fire truck | 120 |

### FIRE LAWS

"Hotel," etc., "Of over three stories in height," etc.—What constitutes | 119 |

### FISH AND FISHERIES

Appropriation—Operation of Federal Laboratory at Yorktown | 12 |
| Licenses: |
| Fishing without—License acquired before warrant issued | 127 |
| Requirements—Employee or nonresident lessee of landowner | 128 |
| Two-day nonresident covering Sunday | 133 |
| Permits to seine minnows for sale—Of whom required | 129 |
| Property acquired by Commission of Fisheries—In what name held | 32 |
| Removal of seines unlawfully used—Procedure | 32 |
| Sale of canned trout | 131 |
| Special law as to seining—Repeal of | 68 |
| See also Game, Inland Fish and Dog Laws. |

### FOODS

Ice cream plants—License hotel | 121 |
| Milk—Use of Paper "Bottles" | 122 |

### FUNDS

County dog license—Distribution of 1938 surplus | 124 |
| "Discretionary"—Covering deficit in county—Authority of Governor | 12 |
| District Debt—Transfer of | 59 |
| Endowment—V. M. I. investments—Purchase of its own obligations | 298 |
| Literary: |
| Sale of securities and reinvestment of proceeds | 160 |
| Transactions in certain public securities—Power of State Board of Education | 250 |
| Secondary convict camp—Disposition of unused surplus | 16 |
| State College—Financing certain PWA project—Legality of method | 165 |

### GAMBLING

Forfeiture of money in hands of bookmaker | 122 |
| Shooting galleries offering prizes | 123 |
**GAME, INLAND FISH AND DOG LAWS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation for stock damaged by dogs—Resident’s stock killed in another State</td>
<td>123</td>
</tr>
<tr>
<td>County dog license funds—Distribution of 1938 surplus—Town</td>
<td>124</td>
</tr>
<tr>
<td>Expenditures of Commission—Contribution to field trial</td>
<td>125</td>
</tr>
<tr>
<td>Game sanctuaries—Commission’s power to establish</td>
<td>126</td>
</tr>
<tr>
<td>Licenses:</td>
<td></td>
</tr>
<tr>
<td>Fishing without—License acquired before warrant issued</td>
<td>127</td>
</tr>
<tr>
<td>Hunting—Lessee of hunting rights</td>
<td>128</td>
</tr>
<tr>
<td>Requirements—Employee or nonresident lessee of landowner</td>
<td>128</td>
</tr>
<tr>
<td>Suspension of and requirement of bond—Second offense</td>
<td>132</td>
</tr>
<tr>
<td>Two-day nonresident covering Sunday</td>
<td>133</td>
</tr>
<tr>
<td>Permits to seine minnows for sale—Of whom required</td>
<td>129</td>
</tr>
<tr>
<td>Purchase of game birds and animals for restocking</td>
<td>213</td>
</tr>
<tr>
<td>Regulations of Commission—Restricting magazine capacity of guns</td>
<td>130</td>
</tr>
<tr>
<td>Sale of canned trout</td>
<td>131</td>
</tr>
<tr>
<td>Search warrants—Searching dwellings for game illegally taken</td>
<td>132</td>
</tr>
<tr>
<td>Second offenses under suspension of license and requirement of bond</td>
<td>132</td>
</tr>
<tr>
<td>Second offenses under suspension of license and requirement of bond—Action pending appeal</td>
<td>132</td>
</tr>
<tr>
<td>Special law as to seining—Repeal of</td>
<td>68</td>
</tr>
<tr>
<td>Terms of members of Commission</td>
<td>33</td>
</tr>
<tr>
<td>Wardens—Compensation—Killing dogs in counties</td>
<td>134</td>
</tr>
</tbody>
</table>

**GAME WARDENS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrest by where county has parallel ordinance—Disposition of fine</td>
<td>113</td>
</tr>
<tr>
<td>Compensation—Killing dogs in counties</td>
<td>134</td>
</tr>
</tbody>
</table>

**GARNISHMENT**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collection of taxes—Exemptions</td>
<td>264</td>
</tr>
</tbody>
</table>

**GENERAL CONTRACTORS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law regulating:</td>
<td></td>
</tr>
<tr>
<td>Application to work finances by FHA</td>
<td>135</td>
</tr>
<tr>
<td>“Speculative” Bidder</td>
<td>135</td>
</tr>
</tbody>
</table>

**GOVERNOR**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to promise return of prisoner after trial</td>
<td>107</td>
</tr>
<tr>
<td>Power:</td>
<td></td>
</tr>
<tr>
<td>Covering deficit in county school funds—“Discretionary Fund”</td>
<td>12</td>
</tr>
<tr>
<td>To authorize agency to exceed appropriation</td>
<td>11</td>
</tr>
<tr>
<td>To control Capitol Square</td>
<td>26</td>
</tr>
</tbody>
</table>

**HAMPTON ROADS SANITATION DISTRICT**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Election—Ballots—Form of</td>
<td>136</td>
</tr>
<tr>
<td>Special election—Certifying results</td>
<td>89</td>
</tr>
</tbody>
</table>

**HIGHWAYS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fund for secondary convict camps—Disposition of unused surplus</td>
<td>15</td>
</tr>
<tr>
<td>Secondary:</td>
<td></td>
</tr>
<tr>
<td>State construction and reconstruction of within incorporated towns</td>
<td>138</td>
</tr>
<tr>
<td>Streets in towns of 3,500 or less</td>
<td>137</td>
</tr>
<tr>
<td>Sidewalks in incorporated towns</td>
<td>139</td>
</tr>
</tbody>
</table>

**HOMESTEAD AND POOR DEBTORS’ EXEMPTIONS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effect of on claims for taxes</td>
<td>267</td>
</tr>
</tbody>
</table>

**HOPEWELL**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board of Equalization—Necessity for appointment of</td>
<td>140</td>
</tr>
</tbody>
</table>
REPORT OF THE ATTORNEY GENERAL

HOTELS
License—Operation of ice cream plant ........................................ 121
Fire law requirements ............................................................... 119

HUNTING
Licenses:
Lessee of hunting rights .......................................................... 128
Requirements—Employee or nonresident lessee of landowner ............. 128
Suspension of and requirement of bond—Second offense .................... 132
Regulations of Commission of Game and Inland Fisheries—Restricting
magazine capacity of guns ......................................................... 130
Right of Federal Government to prohibit hunting on lands of United
States ......................................................................................... 296

INDUSTRIAL COMMISSION
Witness before—Compulsory attendance and compensation .............. 141

INSANE, EPILEPTIC, ETC.
Functions of Board of Public Welfare with reference to .................. 213
Sterilization—Consent of patient or parents—Effect of ...................... 142
Sterilization Proceedings—By whom commenced ............................ 141

INSURANCE
Countersignature by resident agent—Policy already countersigned by
Virginia agency ................................................................. 143
License tax of companies—Statute of Limitations ............................ 277

JAILORS
Compensation—“Maximum Compensation”—How computed .............. 144

JAILS AND JAILORS
Receiving prisoner without warrant or commitment ........................ 147

JAILS AND PRISONERS
Clerks of trial justices committing prisoners to jail ........................ 283
Compensation of sheriffs and Sergeants for care of county and city prisoners. 241
Detention in one county of persons charged with crime in another ....... 145
Deputy sheriff—Additional allowances for keeping jail .................... 47
Persons convicted under local ordinance—Cost of maintaining—How paid. 146
Receiving prisoner without warrant or commitment ........................ 147
Release—Authority required for .............................................. 148
Sentences—See Sentence and Punishment. .................................. 150

JUDGES
Retirement of—Judges not in office since passage of Act ................. 148

JUDGMENTS
Execution—Issuance of on judgment confessed in the office .............. 149
Institution of execution and garnishment on by trial justice .............. 287
Liens:
Priorities—Effect of docketing ............................................... 150
Priorities—When entered by Trial Justice ................................. 150
Nonpayment of Fines—Effect of serving term for ......................... 116
Proceeding before Trial Justice by notice of motion for ................. 289

JUSTICES OF THE PEACE
Fees—Issuing warrants—Several defendants ................................ 151
Jurisdiction:
Granting bail ........................................................................... 152
Issuing criminal warrants—Requiring prepayment of fees ................. 152
Issuance of warrants ............................................................... 152
LABOR LAWS

Assistant commissioner and inspectors—Necessity for oath of office............. 153
Children:
   Employment of on school days—Certain exceptions............................ 154
   Refusal of badges for newsboys, etc........................................... 155
Hours for Women:
   Employees in greenhouse.................................................................... 157
   Exception as to handling leaf tobacco.............................................. 156
   "In any one week"................................................................................. 158
   Telephone operators............................................................................. 157
   What vocations regulated—Beauty shop.............................................. 158

LANDLORD AND TENANT

Dispossession for default—Notice.................................................... 159

LEASES

Recordation taxes.................................................................................. 275

LEGISLATIVE JOURNALS

Distribution of—Back numbers......................................................... 71

LICENSES

ABC—"On Premises"—Who may obtain.................................................. 5
Chauffeurs:
   Drivers of truck licensed for-hire cab but not so used.......................... 170
   School bus drivers—Persons aged sixteen to eighteen......................... 178
Coal dealer delivering in town on orders previously taken.................... 268
Collection of.................................................................
Crabbing with dip net................................................................. 237
Dog—Where issued—Nonresident keeping dog in State temporarily............ 74
Embalmers:
   Branch managers.............................................................................. 105
   Renewals........................................................................................... 106
   Fishing without—License acquired before warrant issued....................... 127
   "For-Hire" trucks—Exemptions—Delivering lime to farmers..................... 172
   Hotels—Operation of ice cream plant............................................... 121
   Hunting—Lessee of hunting rights.................................................... 128
   Insurance companies—Statute of limitations...................................... 277
Marriage:
   Oath for obtaining............................................................................. 164
   Within what time ceremony to be performed..................................... 165
Nursery Stock:
   Sales............................................................................................... 1
   Shipment into State......................................................................... 1
Peddlers:
   Ice cream....................................................................................... 269
   Orders for future delivery................................................................. 270
   Signed orders.................................................................................. 271
   Photography—Who entitled to without examination.............................. 190
   Physicians—Selling drugs—Liability for merchants' license................. 271
   School Buses—Fictitious transfer to school board................................ 173
   Towns—Exceeding amount of State license........................................ 279
   Trailers—Portable sawmill................................................................. 179

LIENS

Mechanics—Work on personal property—Possession.................................. 168

LITERARY FUND

Sale of securities and reinvestment of proceeds...................................... 160
### LIVE STOCK
Compensation for stock damaged by dogs—Resident's stock in another State .................................................. 123

### MARRIAGE AND DIVORCE
Licenses:
- Oath for obtaining ........................................... 164
- Within what time ceremony to be performed .............. 165
- Marriage within six months after foreign divorce ....... 166
- Ministers authorized to perform marriage—Oaths of office 186
- Students of State Colleges—Rules and regulations requiring parents' consent ............................................... 251

### MARY WASHINGTON COLLEGE
Funds—Financing certain PWA project—Legality of method .......... 165

### MECHANICS
Liens for work on personal property—Possession ............... 168

### MEDICAL COLLEGE OF VIRGINIA
Special obligations—Power to incur .................................. 169
- State Immunity in Tort—Construction work ................. 259

### MILEAGE
- Coroners ............................................................. 47
- Sheriffs—Carrying prisoners .................................... 230
- Witnesses .................................................................. 301

### MOTOR VEHICLE LAWS
Chauffeurs' Licenses:
- Drivers of truck licensed for-hire cab but not so used ........ 170
- School Bus Drivers—Persons aged sixteen to eighteen .... 178
- Driving after license suspended—"Drunken Driving"—Punishment 170
- "For-Hire" truck—Exemptions—Delivering lime to farmers .... 172
- School Buses—Fictitious transfer to school board .......... 173
- Trailers—Portable sawmill ......................................... 179
Parallel Ordinances:
- Fairfax County ..................................................... 174
- Fines—Disposition of in certain cases ............................ 175
- Warrants for violation of and disposition of fines .......... 176
- Reckless driving—What constitutes ............................. 177

### MUNICIPAL CORPORATIONS
Powers of—Regulations affecting State activities—Building Codes and Permits .................................................. 180
- State Taxation—Writ taxes—Suits by city ..................... 181

### NEGOTIABLE INSTRUMENTS
Endorsement—Form—Payee making "His Mark" ................. 182

### NOTARIES
Jurisdiction .................................................................. 183
- Right to serve as member of school electoral board ....... 183

### NOTICES
Publishing of:
- Financial statement of county ...................................... 25
- "Sunday Beer" ordinance ............................................. 8, 61
NURSERY STOCK
See Crop Pest Control Law.

OATH OF OFFICE
Members of State Board of Health............................ 217
Ministers authorized to perform marriages.................. 186
Necessity for—Assistant commissioner and inspectors—Labor Depart-
ment....................................................... 153

OFFICERS
See Public Officers.

OFFICES
Compatibility of:
Chairman local board of public welfare as judge and commissioner of
election.................................................. 184
County supervisor as soil conservation supervisor.......... 215
County treasurer as notary public............................. 184
Member of school board as police boat captain and deputy inspector
for Commission of Fisheries............................... 185
Notary public as member of school electoral board......... 183
Town councilman as building inspector........................ 216

OPTOMETRY
State Board—Re—Examination.................................. 187

ORDINANCES
Building Codes—Application to State project within city...... 180
County:
Paralleling Motor Vehicle Laws............................... 174
Paralleling Motor Vehicle Laws—Fines—Disposition of in certain
cases.................................................................. 175
Paralleling Motor Vehicle Laws—Warrants for violation of and dis-
position of fines................................................. 176
“Sunday Beer”:
Effective date of.................................................. 7
Procedure in adopting.......................................... 7
Publishing notice of............................................. 8, 61
Punishment............................................................ 62
Validity of act authorizing........................................ 8
Where adopted after issuance of licenses........................ 6
Zoning—Area surrounding school.................................. 66

OVERSEERS OF THE POOR
Compensation—When terminated................................. 187

PARDONS
Effect of—“Second Offense”—Where defendant has been pardoned for
first................................................................. 188

PENSIONS
Families of Confederate Veterans—Comptroller's duties with respect to... 190
Old Age—State’s claim against pensioner’s estate—Security for........ 204

PHOTOGRAPHY
License—Who entitled to without examination................ 190

PHYSICIANS
Compulsory attendance of as expert witnesses in criminal cases...... 302
Criminal cases—Compensation for professional services............ 50, 51
Selling drugs—Liability for merchant’s license................... 271
PUBLIC ASSISTANCE ACT

Administrative costs and expenses in localities—How computed .......................... 191
Appropriations by localities:
  Budgets ............................................................................................................. 193
  When to be made .............................................................................................. 194
Budgets of local boards—Powers of boards of supervisors—Changing specific items .......................................................... 196
City of Hampton and Elizabeth City County—Single local board for .................. 202
Claim against estate of recipient:
  Conveyance by recipient to defeat ................................................................. 203
  Recordation in clerk’s office ............................................................................ 204
Counties:
  Amount to be spent on administrative costs ................................................. 197
  Appropriations for, not in budget .................................................................... 197
  Failure of locality to provide funds—Recourse of State Commissioner .......... 198
Federal Funds—Proper State officer to receive ................................................... 199
Independent relief by counties in certain cases ................................................ 200
Old Age Pensions—State’s claim against pensioner’s estate—Security for .......... 204
Persons eligible for relief but incompetent to handle cash ............................... 205
Supplementing regular fund in counties—Medical, etc., expenses .................. 206

PUBLIC FUNDS

Depositaries—Security required ........................................................................... 211
Proceeds of articles manufactured at schools for deaf and blind ....................... 212

PUBLIC HEALTH

Compulsory treatment for venereal disease .......................................................... 214

PUBLIC OFFICERS

County—Supervisors, constables and justices of the peace as .............................. 78
Interest in public contracts:
  Employment of soil conservation committeeman by committee .................... 215
  Member of town council—Insurance on town property ................................. 209
  What constitutes “interest” .............................................................................. 210
Motor Vehicle:
  Arrest fees ........................................................................................................ 49
  Arrest by—Where county has parallel ordinance—Disposition of fine .......... 113
Oaths of office:
  Members of State Board of Health .................................................................. 217

PUBLIC PURCHASING

Game birds and animals for restocking ............................................................... 213

PUBLIC WELFARE

Hospitals for Insane—Functions with reference to .............................................. 213
Single local board for city of Hampton and Elizabeth City County ................. 202

REAL AND PERSONAL PROPERTY

Undivided partial estates in—Construction of Code sections 5159, 5160 ........ 219

RECONSTRUCTION FINANCE CORPORATION

Writ tax—Exemption ............................................................................................. 266

REFERENDUM

Counties—Borrowing funds ................................................................................ 56
“Sunday Beer”—Contributions of wholesale licenses to campaign fund for ..... 3

REGISTRARS

See Elections.
REPORT OF THE ATTORNEY GENERAL

RESIDENCE

Child of resident aliens—Admission to State Hospital ........................................ 257
State Students:
  Children of nonresidents sent to school by resident relatives ....................... 255
  Children of resident but unnaturalized aliens .................................................. 255
  Family of U. S. Army, etc., officers ............................................................... 253
  Minor child of nonresident having permanent home with Virginia relatives ........ 252
  Nonresident niece sent to school by resident relatives .................................... 254

REWARDS

Sheriffs, sergeants and constables—Apprehending criminals—Fugitive wanted in another bailiwick ..................................................... 243

SALARIES

Commissioners of the Revenue ................................................................................. 35, 37

SCHOOLS

Appropriation—Reduction in local levies below 1936-1937 level—Reassessment .......... 220
Bonds:
  District—Sinking Fund—How created ................................................................. 223
  Purchase of by Sinking Fund Commissioners from State Board of Education ...... 22
County Levies:
  Amount of ............................................................................................................. 230
  Maximum Limits .................................................................................................... 221
  Use of for acquisition of new plant ...................................................................... 223
Employing relatives of board members—Person previously employed at occasional jobs .................................................. 234
Employment of member for extra work .................................................................. 225
Entrace fees for students .......................................................................................... 225
Funds—“Discretionary”—Authority of Governor to cover deficit ......................... 12
Pupils from one county or city attending schools of another ............................... 231
Regional boards for joint high schools in counties ................................................ 232
Town lying in two counties—Right of students from one county to attend school in other .................................................. 233

SCHOOL BOARDS

Borrowing money—Endorsing notes ......................................................................... 226
Budgets—Division of items ....................................................................................... 227
Commonwealth’s Attorneys—Duties—Services for .................................................. 40
Contracts:
  Interest of member of in ....................................................................................... 221
  Interest of member of board of supervisors in ..................................................... 58
Employing relatives of members—Persons previously employed at occasional jobs .................................................. 224
Immunity in Tort—Injuries to students in laboratories, etc .................................... 226
Members—Qualifications—Employee of District of Columbia ............................. 228
Member of as police boat captain and deputy inspector for Commission of Fisheries .................................................. 185
Power to vacate positions of teachers who marry .................................................. 228
Regular annual meeting falling on holiday ............................................................ 229
Sale of property located in another county ............................................................. 229

SECRETARY OF COMMONWEALTH

Duties—Registration of trade-marks ......................................................................... 280
REPORT OF THE ATTORNEY GENERAL

SENTENCE AND PUNISHMENT

Concurrent sentences—One imposed while another being served—How total term computed .......................................................... 235
Imprisonment for nonpayment of fine—Effect of............. 234
Suspension—Fines in general........................................ 234
Suspension of sentence—Code section 1922b..................... 236
Time off for good behavior—Persons committed for nonpayment of fine and costs .................................................................. 237

SHELLFISH AND OYSTERS

Licenses—Crabbing with dip net........................................ 237

SHERIFFS, SERGEANTS AND CONSTABLES

Accounts approved by court—Auditing of........................................ 19
Compensation:
Carrying prisoners—Mileage........................................ 239
Commissions in certain cases.......................................... 238
Computation of $250 limit........................................... 24
Profits from care of county and city prisoners—Disregarding in fixing maximum ........................................ 241
Deputy Sheriffs:
Compensation—Additional allowances for keeping jail........ 47
Purchase of automobile for through Division of Purchase and Printing......................................................... 74
Fees—Sheriffs:
Criminal cases—Swearing jury..................................... 52
Excess—Computation—Accrual basis............................. 111
Serving copy of order entering judgment by confession....... 239
Levying execution—Security for property seized............... 240
Local audits of accounts of sheriffs not covered by adequate appropriation—Discretion of Auditor of Public Accounts in determining which shall be made.................................................. 21
Purchase of official automobiles for sheriffs by Division of Purchase and Printing................................................. 73
Rewards for apprehending criminals—Fugitive wanted in another bailiwick. 243

SINKING FUNDS

District school bonds—How created........................................ 223

SOCIAL SECURITY ACT

State Institution engaged in construction work—Deduction from payroll. 244

SOIL CONSERVATION LAW

Elections Under:
Amount of compensation of regular election officials............ 245
Holding contemporaneously with regular general elections or primaries .......................................................... 245
Officials—Use of regular election officials.......................... 245
Waiving compensation of regular election officials.............. 245
Employment of committeeman by committee. 215

SPECIAL COUNSEL FOR STATE AGENCIES

Appearing before Legislature........................................... 247

SPECIAL LAWS

Repeal of—Seining in Craig County........................................ 68

STATE AGENCIES

Accepting private funds to perform special services................. 42
Special counsel for appearing before Legislature................. 247
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>STATE BOARD OF CANVASSERS</td>
<td></td>
</tr>
<tr>
<td>When to act—Special election for sanitation district</td>
<td>249</td>
</tr>
<tr>
<td>STATE BOARD OF EDUCATION</td>
<td></td>
</tr>
<tr>
<td>Literary Fund—Transactions in certain public securities</td>
<td>250</td>
</tr>
<tr>
<td>STATE CADETS</td>
<td></td>
</tr>
<tr>
<td>Repeal of act relating to</td>
<td>43</td>
</tr>
<tr>
<td>STATE COLLEGES AND UNIVERSITIES</td>
<td></td>
</tr>
<tr>
<td>Funds—Financing certain PWA Project—Legality of method</td>
<td>165</td>
</tr>
<tr>
<td>Rules and Regulations—requiring parents’ consent to marriage of students</td>
<td>251</td>
</tr>
<tr>
<td>Special obligations—Power to incur</td>
<td>160</td>
</tr>
<tr>
<td>State Students:</td>
<td></td>
</tr>
<tr>
<td>Children of nonresidents sent to school by resident relatives</td>
<td>255</td>
</tr>
<tr>
<td>Children of resident but unnaturalized aliens</td>
<td>255</td>
</tr>
<tr>
<td>Children of U. S. Army, etc., officers in Virginia</td>
<td>253</td>
</tr>
<tr>
<td>Minor child of nonresident having permanent home with Virginia relatives</td>
<td>252</td>
</tr>
<tr>
<td>Nonresident niece sent to school by resident uncle</td>
<td>254</td>
</tr>
<tr>
<td>Student employees driving automobiles—State Immunity in Tort</td>
<td>260</td>
</tr>
<tr>
<td>STATE HOSPITALS</td>
<td></td>
</tr>
<tr>
<td>Appropriations—Maintenance of Medical College Hospital—Disbursement through Health Department under Federal Social Security Plan</td>
<td>14</td>
</tr>
<tr>
<td>Commitment of insane persons by trial justice for observation</td>
<td>284</td>
</tr>
<tr>
<td>Insane—Functions of Board of Public Welfare with reference to</td>
<td>213</td>
</tr>
<tr>
<td>Legacies made to particular hospitals—Control and management of</td>
<td>257</td>
</tr>
<tr>
<td>Residence of patients—Child of resident aliens</td>
<td>257</td>
</tr>
<tr>
<td>Trusts for particular hospitals—Administration of by State Hospital Board</td>
<td>256</td>
</tr>
<tr>
<td>STATE HOSPITAL BOARD</td>
<td></td>
</tr>
<tr>
<td>Receiving legacy made to particular hospital</td>
<td>257</td>
</tr>
<tr>
<td>Trusts for particular hospitals—Administration of</td>
<td>256</td>
</tr>
<tr>
<td>Unexpended balance of certain trust funds—Use of, for certain purposes</td>
<td>256</td>
</tr>
<tr>
<td>STATE IMMUNITY IN TORT</td>
<td></td>
</tr>
<tr>
<td>Admiralty causes—Boats of Commission of Fisheries</td>
<td>258</td>
</tr>
<tr>
<td>Medical College of Virginia—Construction work</td>
<td>259</td>
</tr>
<tr>
<td>Student employees driving V. P. I. automobiles</td>
<td>260</td>
</tr>
<tr>
<td>STATE INSTITUTIONS</td>
<td></td>
</tr>
<tr>
<td>Deposit of proceeds from sale of articles manufactured by</td>
<td>212</td>
</tr>
<tr>
<td>Granting easement over property of Catawba Sanatorium—Authority of State Board of Health</td>
<td>251</td>
</tr>
<tr>
<td>Power to convey real estate—Power Line easement</td>
<td>260</td>
</tr>
<tr>
<td>STATUTE OF LIMITATION</td>
<td></td>
</tr>
<tr>
<td>Insurance companies—License tax</td>
<td>277</td>
</tr>
<tr>
<td>Real Estate Taxes</td>
<td>273</td>
</tr>
<tr>
<td>Real Estate Taxes for 1929 and 1930</td>
<td>273</td>
</tr>
<tr>
<td>STERILIZATION</td>
<td></td>
</tr>
<tr>
<td>By whom proceedings commenced</td>
<td>142</td>
</tr>
<tr>
<td>Consent of patient or parents—Effect of</td>
<td>142</td>
</tr>
</tbody>
</table>
# Sunday Laws

"Sunday Beer" Ordinances:
- Effective date of ............................................... 7
- Procedure in adopting .......................................... 7
- Publishing notice of ............................................ 8
- Validity of Act authorizing ...................................... 8
- Validity of—Where adopted after issuance of licenses .......... 6

# Taxation

Assessments:
- Application for relief from—Time .................................. 261
- Increasing—Buildings incomplete at time of general assessment . 38

Capitation:
- Assessment ................................................................ 98
- Collection of ................................................................ 44
- Liability for ................................................................... 78, 79
- New residents .............................................................. 95, 96, 102
- Payment of ..................................................................... 104
- Prepayment of—Time ................................................... 94
- Voter becoming of age .................................................. 103

Collection of:
- Distrain ....................................................................... 264
- Distraint—Warrant ....................................................... 263
- Garnishment—Exemptions ............................................. 264
- Real Estate—Sale of personality to satisfy ....................... 263

Decedents' Estates:
- Second assessment on qualification of administrator d. b. n ...... 265
- Recordation taxes—Valuation—Deductions for encumbrances ... 265
- Valuation—Deductions for encumbrances .......................... 265

Delinquent:
- Collection of:
  - Compensation of Commonwealth's Attorneys .......... 38, 39
  - Employment of Commonwealth's Attorneys .......... 262
  - Reimbursement of special agent for bad check of taxpayer ... 42

Exemptions:
- Tangible personalty of residents of United States Reservation . 266
- Writ tax—Suits by R. F. C ................................................. 266
- Homestead and Poor Debtors' Exemptions—Effect of on claims for taxes. 267
- Power of board of supervisors to release penalties, interest and costs on State taxes .................................................. 63, 66
- Probate tax—Imposition of ............................................. 265

Real Estate:
- Board of Assessors—Necessity for view by entire board ....... 273
- Boards of Equalization—Powers in changing assessments .... 272
- Division of taxes when land divided .................................. 272
- Life estates .................................................................... 274
- Statutes of limitation ...................................................... 273

Recordation:
- Computing base—Assessed value of land .......................... 275
- Conveyance of undivided half interest in real estate .......... 276
- Exemption of State agencies .......................................... 274
- Leases ........................................................................... 275
- Valuation of decedent's estate—Deductions for encumbrances ... 265

Release of penalties, etc.—Evidence of payment which treasurer should require .................................................. 277

Tangible personalty—“Agricultural Products—Poultry” ........ 278

Unemployment Compensation:
- Refund of—Application made beyond time limit ............. 294
- Suits to collect—Costs—How paid .................................... 294

Writ Taxes:
- Municipal corporations—Suits instituted by city .............. 181
- Refund upon settlement before trial ................................. 279
- Suits by R. F. C ............................................................. 266
REPORT OF THE ATTORNEY GENERAL

TOWNS
Secondary Highways:
- Funds—Expenditure on streets in town of 3,500 or less.............. 137
- State construction and reconstruction of within incorporated towns... 138
- Sidewalks—Construction of by Highway Commission.................... 139

TRADE-MARKS
- Descriptive terms—Duties of Secretary of the Commonwealth......... 280
- Trade names for commercial feeds—Alleged conflict with name registered under Federal law.............................................. 69
- What subject to registration—Form of package............................................. 281

TREASURERS
- Carrying concealed weapons.................................................. 300
- Collection of taxes—Distrain............................................. 263, 264
- Depositaries—Security required............................................ 211
- Evidence of payment which treasurer should require for release of penalties, etc., on taxes on real estate............................... 277
- Right to hold office of notary public....................................... 184

TRIAL JUSTICES
Clerks of:
- Committing prisoners to jail.................................................. 283
- Issuing execution—Fees for.................................................. 283
- Committing accused persons to State Hospitals for observation...... 284
Criminal cases before:
- Witnesses—Allowances—Maximum number............................................. 301
- Certification of Allowances.................................................. 301
- Disposition of court papers after one year..................................... 159
Fees:
- Admitting prisoners to bail after office hours—Disposition of........ 285
- Executions—“Renewals” of.................................................. 284
- Trial fee—Suit dismissed before hearing....................................... 286
- Holding court for another trial justice—Compensation................. 286
- Judgments—Execution and garnishment on.................................... 287
Jurisdiction:
- Unlawful detainer................................................................. 288
- Writs of capias ad respondendum............................................. 289
Proceeding before, by notice of motion for judgment..................... 289
Records in criminal cases—Alteration of, to show trial under local ordinance...... 290
Suspension of sentence............................................................. 234

UNEMPLOYMENT COMPENSATION ACT
- “Employer”—Definition of—Certain clauses construed.................. 290
- Interstate Railroads—Exemption............................................. 292
- Partner as employee............................................................... 293
- Refund of taxes—Application made beyond time limit.................. 294
- State Institution engaged in construction work—Deduction from payroll.. 244
- Suits to collect taxes—Costs—How paid....................................... 294
What constitutes an “employer”—Individual controlling several businesses 295

UNFAIR SALES ACT
- Interstate commerce................................................................. 29

UNITED STATES
Lands of:
- Right of United States to prohibit hunting on—State Police Power over................................................................. 296
- State Police Power over.......................................................... 296
REPORT OF THE ATTORNEY GENERAL 325

UNITED STATES RESERVATIONS  Page
Residents—Exemption of tangible personalty from taxation........... 266

VENUE
Prosecutions under Crop Pest Law.................................. 69

VIRGINIA MILITARY INSTITUTE
Endowment Fund—Investments—Purchase of its own obligations....... 298
Power of board of visitors—Construction program................ 298

VIRGINIA STATE BAR
Act creating—Appropriation........................................ 299

VIRGINIA STATE SCHOOL FOR COLORED DEAF AND BLIND
Superintendent of—Powers—Discharging employees—"Notice"......... 300

WARRANTS
Issuance of:
Civil warrant—Several defendants—Fee of Justice of the Peace.... 151
Criminal Warrant by Justice of the Peace—Requirement of prepay-
ment of fees......................................................... 152
Jurisdiction of Justices of the Peace................................ 152
Search—Searching dwellings for game illegally taken.............. 132

WEAPONS
Carrying concealed—Treasurers and Deputies........................ 300

WITNESSES
Compensation—Mileage............................................... 301
Compulsory attendance and compensation before Industrial Commission. 141
Criminal cases before Trial Justices:
  Allowances—Certification....................................... 301
Allowances—Maximum number...................................... 301
Experts—Compulsory attendance of—Physicians in criminal cases... 302
Fees—Criminal cases—Apportionment................................ 55

WOMEN
Hours of:
Employees in greenhouse............................................ 157
Exception as to handling leaf tobacco................................ 156
"In any one week"................................................. 158
Telephone operators.................................................. 157
What vocations regulated—Beauty shops............................ 158

WORLD WAR ORPHANS
Appropriations for education of.................................... 13
Consecutive List of Statutes Referred to in Opinions

\[
\begin{array}{ll}
\text{ACTS OF ASSEMBLY} & \\
\text{Acts of Extra Session, 1915} & \\
\text{CHAPTER} & \text{PAGE} \\
136 & 91 \\
\text{Acts of 1916} & \\
508 & 169 \\
\text{Acts of 1918} & \\
40 & 77 \\
\text{Acts of 1920} & \\
230 & 202 \\
\text{Acts of 1926} & \\
55 & 252 \\
\text{Acts of 1928} & \\
61 & 160 \\
77 & 68 \\
\text{Acts of 1930} & \\
247 & 68 \\
\text{Acts of 1932} & \\
416 & 231 \\
\text{Acts of 1933} & \\
49 & 167 \\
\text{Acts of 1936} & \\
382 & 296 \\
422 & 15 \\
422, sec. 36 & 15 \\
461 & 29 \\
\text{Acts of 1938} & \\
94 & 63, 66, 277 \\
98 & 66 \\
168 & 70, 72, 207, 213 \\
214 & 35 \\
278 & 233 \\
405 & 11 \\
428 & 11, 16, 162, 212, 220 \\
431 & 47, 135 \\
440 & 35 \\
\text{Code of Virginia, 1873} & \\
195, sec. 25 & 189 \\
\text{Code of Virginia, 1930} & \\
\text{SECTION} & \text{PAGE} \\
19 & 296 \\
\text{Code of Virginia, 1936} & \\
\text{SECTION} & \text{PAGE} \\
39 & 69 \\
46 & 257 \\
46B & 142 \\
52 & 71 \\
101 & 27, 28 \\
102 & 112 \\
175E & 135 \\
\text{Code of Virginia, 1936} & \\
\text{SECTION} & \text{PAGE} \\
5 & 94 \\
62 & 257 \\
82 & 92, 103 \\
83 & 91 \\
84 & 185 \\
93 & 79, 104, 218 \\
96 & 88 \\
97 & 218 \\
109 & 83 \\
115 & 93, 95 \\
143 & 80 \\
149 & 185 \\
154 & 78 \\
160 & 80 \\
160 & 80 \\
170 & 249 \\
191 & 81, 82, 88 \\
200 & 75 \\
208 & 218 \\
221 & 218 \\
222 & 85 \\
226 & 85 \\
227 & 84 \\
228 & 85, 87, 102 \\
229 & 76, 77, 81, 83 \\
246 & 77, 83 \\
249 & 83 \\
249(b) & 83 \\
269 & 153, 186, 217 \\
273 & 217 \\
283 & 278 \\
283(8) & 278 \\
283(15) & 278 \\
296 & 279 \\
\end{array}
\]
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>365</td>
<td>67</td>
</tr>
<tr>
<td>374a</td>
<td>248</td>
</tr>
<tr>
<td>382</td>
<td>72</td>
</tr>
<tr>
<td>383</td>
<td>207</td>
</tr>
<tr>
<td>384</td>
<td>207</td>
</tr>
<tr>
<td>388</td>
<td>71</td>
</tr>
<tr>
<td>390</td>
<td>70, 71, 72</td>
</tr>
<tr>
<td>392</td>
<td>70, 71</td>
</tr>
<tr>
<td>401</td>
<td>71</td>
</tr>
<tr>
<td>401a</td>
<td>72</td>
</tr>
<tr>
<td>401b</td>
<td>72</td>
</tr>
<tr>
<td>401f</td>
<td>73</td>
</tr>
<tr>
<td>401q</td>
<td>72</td>
</tr>
<tr>
<td>410</td>
<td>26</td>
</tr>
<tr>
<td>585(4a)</td>
<td>208</td>
</tr>
<tr>
<td>585(34)</td>
<td>297</td>
</tr>
<tr>
<td>585(69)</td>
<td>31, 200</td>
</tr>
<tr>
<td>632</td>
<td>160</td>
</tr>
<tr>
<td>633</td>
<td>22, 160</td>
</tr>
<tr>
<td>634</td>
<td>161</td>
</tr>
<tr>
<td>636</td>
<td>161</td>
</tr>
<tr>
<td>637</td>
<td>161</td>
</tr>
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<td>639</td>
<td>161</td>
</tr>
<tr>
<td>642</td>
<td>160</td>
</tr>
<tr>
<td>643</td>
<td>160</td>
</tr>
<tr>
<td>644</td>
<td>161</td>
</tr>
<tr>
<td>644(1)</td>
<td>185, 186, 225</td>
</tr>
<tr>
<td>645</td>
<td>161</td>
</tr>
<tr>
<td>653</td>
<td>183, 233</td>
</tr>
<tr>
<td>655</td>
<td>229</td>
</tr>
<tr>
<td>656</td>
<td>227</td>
</tr>
<tr>
<td>657</td>
<td>231</td>
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**Constitution of Virginia**

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