

OPINIONS  
OF THE  
ATTORNEY GENERAL  
AND  
REPORT

TO THE  
GOVERNOR OF VIRGINIA

*From July 1, 1939, to June 30, 1940*

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## LETTER OF TRANSMITTAL

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COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 15, 1941.*

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)

NAME	COUNTY	OFFICIAL TITLE
ABRAM P. STAPLES.....	Roanoke city.....	Attorney General
EDWIN H. GIBSON.....	Culpeper.....	Assistant
W. W. MARTIN.....	Henrico.....	Assistant
JOHN Q. RHODES, JR.....	Louisa.....	Assistant
D. GARDINER TYLER, JR.....	Charles City.....	Assistant
G. STANLEY CLARKE.....	Henrico.....	Assistant
KENNETH C. PATTY.....	Tazewell.....	Assistant
JOS. L. KELLY, JR.....	Bristol city.....	Assistant
WALTER E. ROGERS.....	Richmond city.....	Senior Attorney
NERHEA S. EVANS.....	Charlotte.....	Secretary
EVA E. KIBLER.....	Augusta.....	Secretary
LOUISE W. POORE.....	Richmond city.....	Secretary
MARIE LOW.....	Roanoke city.....	Secretary
LOIS B. KRUG.....	Richmond city.....	Secretary
CARRIE L. BIESEN.....	Richmond city.....	Secretary

**Attorneys General of Virginia**  
*From 1776 to 1936*

EDMUND RANDOLPH.....	1776-1786
JAMES INNES.....	1786-1796
ROBERT BROOKE.....	1796-1799
PHILIP NORBORNE NICHOLAS.....	1799-1819
JAMES ROBERTSON.....	1819-1834
SIDNEY S. BAXTER.....	1834-1852
WILLIS P. BOCOCK.....	1852-1857
JOHN RANDOLPH TUCKER.....	1857-1865
THOMAS RUSSELL BOWDEN.....	1865-1869
CHARLES WHITTLESEY (military appointee).....	1869-1870
JAMES C. TAYLOR.....	1870-1874
RALEIGH T. DANIEL.....	1874-1877
JAMES G. FIELD.....	1877-1882
FRANK S. BLAIR.....	1882-1886
RUFAS A. AYRES.....	1886-1890
R. TAYLOR SCOTT.....	1890-1897
R. CARTER SCOTT.....	1897-1898
A. J. MONTAGUE.....	1898-1902
WILLIAM A. ANDERSON.....	1902-1910
SAMUEL W. WILLIAMS.....	1910-1914
JOHN GARLAND POLLARD.....	1914-1918
*J. D. HANK, JR.....	1918
JOHN R. SAUNDERS.....	1918-1934
†ABRAM P. STAPLES.....	1934-1936
ABRAM P. STAPLES.....	1936-

\*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.

†Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. Jno. R. Saunders, who died March 17, 1934, and was elected November 2, 1937, for a term of four years.

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

1. *Batcheller, Henry E., et al. v. Commonwealth.* From Corporation Commission of Virginia. University of Virginia Airport License.
2. *Blankenship, McKinley, et als. v. Unemployment Compensation Commission.* From Circuit Court of Tazewell County. Involving interpretation of section 5d of the UCC Act.
3. *Campbell, Lexie Rose v. Commonwealth.* From Corporation Court of City of Danville. ABC Act.
4. *Caskey Baking Company, Inc., v. Commonwealth.* From Corporation Court of City of Winchester. License tax on peddling to retailers.
5. *Commonwealth of Virginia, ex rel. Abram P. Staples, Attorney General of Virginia v. E. Griffith Dodson, Clerk of the House of Delegates and Keeper of the Rolls of Virginia.* Petition for Mandamus. Vetoed portions of Appropriation Act.
6. *Commonwealth of Virginia, ex rel., etc., v. Fair View Cemetery Company, Inc.* From Circuit Court of City of Richmond. Tax on endowment fund to cemetery company.
7. *Commonwealth, ex rel., etc. v. Trustees Evergreen Burial Park.* From Circuit Court of City of Richmond. Tax on endowment fund to cemetery company.
8. *Jackson, Raymond L. v. LeRoy Hodges, Comptroller, etc.* Petition for Mandamus. Increase in salary of Secretary of Commonwealth.

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

1. *Abdella, Walter v. Commonwealth.* From Hustings Court of City of Roanoke. Lotteries. Affirmed.
2. *Adkins, Oren Weldon v. Commonwealth.* From Circuit Court of Giles County. Bigamy. Reversed.
3. *Bradshaw, Willie v. Commonwealth.* From Circuit Court of Halifax County. Murder. Reversed.
4. *Beckner, George D. v. Commonwealth.* From Hustings Court of City of Roanoke. Embezzlement. Reversed.
5. *Bowman, Cossie v. Commonwealth.* From Circuit Court of Pulaski County. Murder. Reversed.
6. *Commonwealth of Virginia v. W. O. Ellett.* From Hustings Court of City of Richmond. Motor Vehicle Act. Reversed.
7. *Commonwealth of Virginia v. Blair B. Stringfellow.* From Hustings Court of City of Richmond. Taxation of intangible property. Affirmed.
8. *Commonwealth of Virginia, at the relation of Mrs. W. G. Stone, etc., v. H. G. Shirley, State Highway Commissioner, etc.* Petition for Mandamus. Condemnation proceedings. Mandamus refused.
9. *Commonwealth of Virginia, at the relation of Mrs. W. G. Stone, etc., v. H. G. Shirley, State Highway Commissioner, etc.* Condemnation proceedings. Petition for rehearing. Petition denied.
10. *Carr, W. W. v. Commonwealth.* From Circuit Court of Isle of Wight County. Bad checks and grand larceny. Affirmed.
11. *Dudley, Bessie Sirt v. Commonwealth.* From Hustings Court of City of Roanoke. ABC Act. Reversed.
12. *Grubb, P. D., et als. v. H. G. Shirley, State Highway Commissioner.* From Circuit Court of Wythe County. Condemnation proceedings. Reversed.
13. *Harris, Alvin v. Commonwealth.* From Corporation Court of City of Lynchburg. ABC Act. Affirmed.
14. *Howard, Clarence v. Commonwealth.* From Circuit Court of Prince Edward County. Rape. Affirmed.
15. *Hubbard, J. O. v. Commonwealth.* From Hustings Court of City of Roanoke. Rape. Reversed.
16. *Mullins, James v. Commonwealth (No. 2179).* From Circuit Court of Buchanan County. Attempt to rape. Reversed.

17. *Mullins, James v. Commonwealth* (No. 2180). From Circuit Court of Buchanan County. Attempt to rape. Reversed.
18. *McCann, John Henry v. Commonwealth*. From Corporation Court of City of Norfolk, No. 2. Attempt to rape. Affirmed.
19. *McCann, John Henry v. Commonwealth*. From Corporation Court of City of Norfolk, No. 2. Attempt to rape. Petition for rehearing. Petition denied.
20. *Pruner, J. A. v. State Highway Commissioner*. From Circuit Court of Russell County. Condemnation Proceeding. Reversed.
21. *Poulos, William v. Commonwealth*. From Circuit Court of City of Suffolk. Arson. Reversed.
22. *St. Clair, Mrs. R. L., etc. v. Commonwealth*. From Hustings Court of City of Roanoke. ABC. Reversed.
23. *State-Planters Bank & Trust Company, Executor, Etc. v. Commonwealth*. From Circuit Court of City of Richmond. Inheritance tax. Reversed.
24. *Story, J. L., in his own right, and Commonwealth of Virginia, at the relation of J. L. Story v. George A. Bowles, Commissioner of Insurance, and William Meade Fletcher, Chairman, State Corporation Commission*. Petition for mandamus. Insurance agent's license. Petition dismissed.
25. *Sturgill, J. M. and Jeff Flanary v. Commonwealth*. From Circuit Court of Wise County. Murder. Dismissed.
26. *Story, J. L. v. Commonwealth*. From State Corporation Commission. Insurance agent's license. Affirmed.
27. *Terry, Henry v. Commonwealth*. From Circuit Court of Norfolk County. Murder. Reversed.
28. *Virginia Electric and Power Company v. Commonwealth*. From State Corporation Commission. Franchise tax. Affirmed.
29. *Wilson, Frank K. and Sarah E. Wilson v. State Highway Commissioner*. From Circuit Court of Lee County. Action for damages. Affirmed.
30. *Watkins, G. Lewis v. Commonwealth*. From Hustings Court of City of Roanoke. Forgery. Affirmed.
31. *Whited, Wilmer v. Commonwealth*. From Circuit Court of Wise County. Murder. Reversed.
32. *Wingfield, W. L. v. Commonwealth*. From Circuit Court of Rockingham County. Grand larceny. Affirmed.

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

1. *Wm. H. Osborn, et als. v. Thos. W. Ozlin, et als.* Injunction proceedings. Injunction denied.

#### Cases Pending in United States District Courts

1. *Commonwealth of Virginia, Assignee of Mose E. Davis v. Ralph Elliott Sprinkle*. Action for injuries sustained by highway employee.

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

1. *American Bank and Trust Company of Suffolk, and Hugh L. Holland v. Independence Indemnity Company and International Reinsurance Corporation and John M. Purcell, Treasurer of the Commonwealth of Virginia*. Receivership.
2. *American Insurance Company of Newark, New Jersey v. M. E. Bristow, Commissioner of Insurance and Banking*. Circuit Court of City of Richmond.
3. *Bazile, Leon M. and H. M. Bandy, Receivers for Independence Indemnity Company and International Reinsurance Corporation v. Commonwealth of Virginia, State Highway Department, Treasurer of the Commonwealth, James Cain & Company, et al.* Circuit Court City of Richmond.
4. *Blankenship, McKinley, et als. v. Unemployment Compensation Commission*. Circuit Court of Tazewell County. Involving interpretation of section 5d of the UCC Act. Decided in favor of the Commonwealth.
5. *Bonham, Fred C. v. State Highway Commissioner, et al.* Circuit Court of Washington County. Chancery suit.

6. *Boschen-Schmidt Realty Corp., etc., et al. v. Commonwealth of Virginia and Regina V. G. Millhiser, Exec., etc., et al. v. Commonwealth.* Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes.
7. *Branch, Blythe W. v. Commonwealth.* Chancery Court City of Richmond. Income tax. Judgment for Commonwealth.
8. *Brand, Phyllis v. Commonwealth.* Chancery Court City of Richmond. Income tax. Judgment for Commonwealth.
9. *Branham, Aubrey, et als. v. Unemployment Compensation Commission.* Circuit Court of Dickenson County. Involving interpretation of section 5d of the UCC Act. Decided in favor of the Commonwealth.
10. *Buhl Optical Company, a Corporation v. E. R. Bell, et als., as Virginia State Board of Examiners in Optometry.* Circuit Court City of Richmond. Injunction.
11. *Burnett, Oakley, et als. v. Unemployment Compensation Commission.* Circuit Court of Lee County. Involving interpretation of section 5d of the UCC Act. Decided in favor of the Commonwealth.
12. *Carlyle's Dairy, Inc., etc. v. T. R. Snavely, et al.,* individually and as members of the State Milk Commission of Virginia, et al. Circuit Court City of Richmond. Injunction instituted. Injunction made permanent and suit dismissed.
13. *Carolene Products Company v. George W. Koiner, Commissioner of Agriculture and Immigration of the Commonwealth.* Circuit Court City of Richmond. Injunction. Injunction dissolved and suit dismissed.
14. *Chitwood, E. M. v. Commonwealth of Virginia.* Circuit Court of Wythe County. Question of whether a Virginia operator's license could be revoked on a conviction in a foreign State. Court held Director's action in revoking valid.
15. *Clover Creamery Company, Inc., et al v. N. J. Webb, et al.,* individually and as members of the Milk Commission. Circuit Court City of Richmond. Declaratory judgment. Dismissed.
16. *Commonwealth v. Caskey Baking Company.* Corporation Court City of Winchester. License tax. Judgment for Commonwealth.
17. *Commonwealth v. Columbia Broadcasting System.* State Corporation Commission. Entrance fee of foreign corporation. Judgment for defendant.
18. *Commonwealth v. Trustees Evergreen Burial Park, et al. and Commonwealth v. Fair View Cemetery Company, Inc., et als.* Circuit Court City of Richmond. Judgment for taxpayers. Intangible property tax.
19. *Commonwealth v. Roanoke Oil Company, Inc.* Circuit Court City of Richmond. Merchant's license tax.
20. *Commonwealth of Virginia, at relation of Department of Highways v. Wilmer Mertens.* Circuit Court of City of Richmond. Action for damages to State-owned automobile.
21. *Commonwealth of Virginia, at relation of Department of Highways v. C. L. and G. T. Millican.* Circuit Court of City of Richmond. Action to recover damages to highway bridge. Settled.
22. *Commonwealth of Virginia, at relation of State Highway Commissioner v. John F. Proffitt, et als.* Circuit Court of Nelson County. Suit to recapture Front Street, Lovingsston.
23. *Commonwealth of Virginia, at relation of H. G. Shirley v. Roger S. Warren.* Circuit Court of Washington County. Suit for specific performance, to force defendant to execute deed. Settled.
24. *Commonwealth of Virginia, at relation of State Highway Commissioner v. Geo. E. McGhee.* Circuit Court of Smyth County. Suit to recapture portion of old Southwestern Turnpike.
25. *Commonwealth of Virginia v. John and Robert Askew.* Circuit Court of City of Richmond. Action to recover damages to highway bridge. Settled.
26. *Commonwealth of Virginia, Dept. of Highways, Assignee of Raymond Harrison, v. A. T. and Ruth Luzzadder.* Circuit Court of Chesterfield County. Action to recover damages for injuries to highway employee.
27. *Commonwealth of Virginia v. Cralion Corporation.* Circuit Court City of Richmond. Receivership.

28. *Commonwealth of Virginia, at the relation of the Attorney General v. Grand Fountain United Order of True Reformers, et al.* Circuit Court City of Richmond. Receivership.
29. *Commonwealth of Virginia v. Gambling Paraphernalia, Adding Machines and Money.* Circuit Court of City of Hopewell. Action to condemn property seized by police officers. No recovery for Commonwealth.
30. *Commonwealth of Virginia v. Guaranty Realty Company, Inc.,* sometimes known as Guaranty Realty Corporation. Circuit Court City of Richmond.
31. *Commonwealth of Virginia v. Hoover Lines, Inc.* Circuit Court City of Richmond. Notice of motion for judgment.
32. *Commonwealth of Virginia v. Clifford E. Marks and Nancy Marks.* Circuit Court City of Richmond. Appeal from Juvenile and Domestic Relations Court. Order affirming judgment of and remanding papers to the Juvenile and Domestic Relations Court.
33. *Commonwealth of Virginia v. J. Herbert Mercer, Sheriff, etc., Administrator of the estate of H. Stewart Jones, deceased, et al.* Circuit Court City of Richmond. Action on surety bond.
34. *Consolvo & Cheshire, Inc. v. Virginia Alcoholic Beverage Control Board and T. McCall Frazier, et al., members constituting the Virginia Alcoholic Beverage Control Board.* Circuit Court City of Richmond. Injunction.
35. *Coulling, L. R. t/a Southern Gas Company v. T. McCall Frazier, Director of the Division of Motor Vehicles.* Circuit Court City of Richmond. Petition for mandamus. Petition denied.
36. *Cowan, C. M. and James T. Horton v. T. McCall Frazier, Director of the Division of Motor Vehicles.* Circuit Court City of Richmond. Injunction.
37. *County School Board of Pittsylvania County, in its corporate capacity, v. E. Lee Trinkle, et al., members of and as such constituting the State Board of Education of the Commonwealth of Virginia.* Circuit Court City of Richmond. Injunction.
38. *DeJarnette, H. C., Special Commissioner, etc., et al. v. Commonwealth of Virginia and County of Orange.* Circuit Court City of Richmond. Damage suit.
39. *Department of Highways v. Horton Motor Lines.* Circuit Court of Brunswick County. Suit to recover for damage to bridge. Settled.
40. *Dickson, Mrs. Beatrice D. v. Commonwealth of Virginia.* Industrial Commission of Virginia. Writ of error denied.
41. *Evans, Emma F. v. Consolidated Indemnity and Insurance Company and John M. Purcell, Treasurer.* Circuit Court City of Richmond. Receivership.
42. *Evans, Nathan G. v. Consolidated Indemnity and Insurance Company and John M. Purcell, Treasurer.* Circuit Court City of Richmond. Receivership.
43. *Flynn, Nora Langhorne v. Commonwealth.* Chancery Court City of Richmond. Income tax. Judgment for Commonwealth.
44. *French, G. Mark v. C. W. Carr (Member of State Police).* Circuit Court of Dickenson County. Action for damages for removing unsafe vehicle from highway. No recovery. Judgment for the defendant.
45. *Fugate & Girtan Driveway Co., Inc., v. John Q. Rhodes, Director, Division of Motor Vehicles.* Circuit Court City of Richmond. Declaratory Judgment. Dismissed.
46. *Gardiner, Robt. H., et als. v. Henry G. Shirley, et als. Chas. O. Dearmont, et als. v. Henry G. Shirley, et als.* Circuit Court of Clarke County. Petition for injunction. Petition denied.
47. *General Outdoor Advertising Company v. State Highway Commissioner and Board of Supervisors of Arlington County.* Circuit Court City of Richmond. Appeal from action of Highway Commissioner in refusing to grant license for outdoor advertising. Dismissed.
48. *Gillum, Major v. Industrial Commission of Virginia.* Circuit Court City of Richmond. Petition for mandamus. Dismissed.
49. *Gibbs, Green B. H. v. Commonwealth.* Chancery Court City of Richmond. Income tax.
50. *Guntner, J. W., et als. v. State Highway Commissioner.* Circuit Court of Wise County. Condemnation proceedings.
51. *Hanewinkle, Estate of Emile v. Commonwealth.* Circuit Court City of Richmond. Inheritance tax. Judgment for taxpayer.

52. *Hartford Steam Boiler Inspection and Insurance Company v. Commonwealth.* State Corporation Commission. License tax. Application for relief denied and proceeding dismissed.
53. *Hubbard, Fletcher v. Fred Smith and Trooper J. W. Matthews* (Member of State Police). Circuit Court of Campbell County. Action for damages for misprisonment. Settled.
54. *Hutcheson, Mildred A. v. Commonwealth.* Circuit Court of Mecklenburg County. State intangible property tax. Application for relief denied.
55. *The Imperial Council of the Ancient Arabic Order of Nobles of the Mystic Shrine of North America, a corporation, v. Abram P. Staples, the Attorney General of the State of Virginia, et al.* Circuit Court City of Richmond. Property settlement. Docketed and final order.
56. *Jones, Mrs. Irene R. v. H. G. Shirley, et als.* Circuit Court of Lee County. Action for damage against highway employee. Dismissed.
57. *Kennedy, N. B. v. C. H. Morrisett, et als.* Circuit Court of Wise County. License tax as slot machine operator.
58. *Lane, J. H., et al. v. Commonwealth.* Circuit Court of City of Richmond. Action for damages due to construction of road.
59. *Life and Casualty Insurance Company of Tennessee v. Unemployment Compensation Commission.* Hustings Court City of Richmond. Involving interpretation of section 2 of the UCC Act.
60. *Miller, Tommy, et al. v. Unemployment Compensation Commission.* Circuit Court of Buchanan County. Involving interpretation of section 5d of the UCC Act. Decided in favor of the Commonwealth.
61. *New Amsterdam Casualty Company, a corporation v. Alemite Company of the Virginias, Inc., et als., Commonwealth of Virginia, John M. Purcell, Treasurer, Henry G. Shirley, Chairman of the State Highway Commission, et al.* Circuit Court City of Richmond.
62. *New Amsterdam Casualty Company v. Jim Frank, et al., together with Henry G. Shirley, Highway Commissioner, and A. B. Gathright, State Treasurer.* Circuit Court City of Richmond.
63. *Nye, Jr., L. Bert, et al. v. W. W. Sanders.* Circuit Court of Arlington County. Action for damages against highway employee. Dismissed.
64. *Pickeral, Arney R. v. Commonwealth, Director of the Division of Motor Vehicles.* Corporation Court of the City of Lynchburg. Appeal from the Director's decision revoking the driver's permit upon the conviction of an offense committed in a foreign state. Action of the Director upheld.
65. *Potts, J. J. v. F. L. Houser and Commonwealth of Virginia, Co-defendant.* Circuit Court City of Richmond. Garnishment proceedings. Dismissed.
66. *Powell, Jr., Legh R. and Henry W. Anderson, as Receivers of the Seaboard Air-line Railway Company v. Commonwealth of Virginia and State Corporation Commission.* Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes.
67. *Ragland, C. A. v. Commonwealth, Department of Highways.* Circuit Court City of Richmond. Action for breach of contract.
68. *Ramey, Albert, et als. v. Unemployment Compensation Commission.* Circuit Court of Wise County. Involving interpretation of section 5d of the UCC Act. Decided in favor of the Commonwealth.
69. *Ridenour, J. M. v. John Q. Rhodes, Jr., Director of the Division of Motor Vehicles.* Circuit Court City of Richmond. Petition for mandamus.
70. *Sanford, W. W. v. Commonwealth—Department of Highways.* Circuit Court of Orange County. Suit to close highway. Settled.
71. *Scott, Fred W. v. Commonwealth.* Hustings Court City of Richmond. State tax on intangible personal property. Dismissed.
72. *Smith, Jr., H. M. v. Public Indemnity Co., etc., and John M. Purcell, Treasurer of the Commonwealth.* Circuit Court City of Richmond. Receivership.
73. *Smith, Louis, an infant who sues by and through his father and next friend, Henry Smith v. Commonwealth of Virginia, Division of Motor Vehicles, and O. N. Lohr.* Circuit Court City of Richmond. Notice of motion for judgment. Judgment for plaintiff.
74. *Smith, Paul T. M., et al. v. Commonwealth.* Circuit Court City of Richmond. Action for damages due to construction of road.

75. *Southern States Cooperative v. Commonwealth*. Circuit Court City of Richmond. State corporation income tax. Dismissed.
76. *Southern States Cooperative v. Commonwealth*. Circuit Court City of Richmond. Wholesale merchant's license. Dismissed.
77. *State Board of Dental Examiners v. H. D. Stembridge*. Circuit Court City of Richmond. Appeal.
78. *State Board of Dental Examiners v. M. C. Stembridge, D. D. S.* Circuit Court City of Richmond. Appeal.
79. *State Corporation Commission v. American Bank and Trust Company of Richmond*. Receivership.
80. *State-Planters Bank and Trust Company v. Commonwealth*. Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes.
81. *Temple, C. P., etc. v. D. S. Blount, et al., H. G. Sharley, Chairman of the Department of Highways of the State of Virginia, et al.* Circuit Court City of Richmond.
82. *Tidewater Farmers Exchange, Inc., etc. v. Hampton Roads Fire and Marine Insurance Company and John M. Purcell, Treasurer*. Circuit Court City of Richmond.
83. *Trio Productions, Inc. v. Commonwealth of Virginia, ex rel. Division of Motion Picture Censorship*. Circuit Court City of Richmond. Appeal. Order affirming decision of Division of Motion Picture Censorship.
84. *United States Trust Company of New York, Trustee of the estate of Rachel Gaff Holmes, deceased v. Commonwealth of Virginia*. Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes.
85. *VanClief, Margaret Good v. Commonwealth of Virginia*. Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes. Dismissed.
86. *Virginia Electric & Power Co. v. Commonwealth of Virginia and John Q. Rhodes, Director of the Division of Motor Vehicles*. Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes.
87. *Virginia Lincoln Furniture Corporation v. W. H. Rouse, et al. the Unemployment Compensation Commission of Virginia*. Circuit Court City of Richmond. Constitutionality of UCC Act. Dismissed.
88. *Virginia Public Service Company v. Commonwealth—State Corporation Commission*. Circuit Court City of Richmond. Franchise tax.
89. *Wallerstein, Morton L., et al., partners t/a etc. v. Great National Insurance Company, etc., and John M. Purcell, Treasurer of the Commonwealth*. Circuit Court City of Richmond. Receivership.
90. *Walters, John W., et al. v. State Highway Commission and Board of Supervisors*. Circuit Court of Gloucester County. Suit to have public road closed.
91. *Waters, L. R. v. Alcoholic Beverage Control Board of Virginia, Brooks Transfer Storage Company and Carter Brothers, Inc.* Circuit Court City of Richmond. Petition for mandamus. Petition denied.
92. *Wilkins, Julia C. v. Commonwealth*. Circuit Court City of Richmond. Income tax.
93. *Willard, Belle L., Ex'or. Estate of Jos. E. Willard v. Commonwealth*. Circuit Court of Fairfax County. Inheritance tax.
94. *Willis Kent Productions v. Division of Motion Picture Censorship*. Circuit Court City of Richmond. Appeal. Order affirming decision of Division of Motion Picture Censorship.
95. *Wood, L. H. v. Commonwealth of Virginia*. Circuit Court City of Richmond. Notice of motion for judgment. Dismissed.

# OPINIONS

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## ACTS OF ASSEMBLY—In Hands of Officers—Ownership.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 5, 1940.*

HON. S. B. BARHAM, JR., *Clerk,*  
*Circuit Court of Surry County,*  
*Surry, Virginia.*

MY DEAR MR. BARHAM:

I am in receipt of your letter of March 4.

Copies of the Acts of the General Assembly are sent to certain designated State, county, city and town officers, pursuant to the provisions of section 390 of the Code of Virginia. It is reasonably plain, in my opinion, that these books are sent to the officers in their official capacity and belong to the office and not to the officer in his individual capacity.

In the case you put, therefore, namely, that of county officers, I am of opinion that these books belong to the office and that, if retiring officers do not turn them over to their successors, they may be required to do so by appropriate proceedings in the circuit court of the county.

I am of the same opinion concerning the 1930 Code which was bought by the county for the use of the attorney for the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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## ADMINISTRATION—Debts due the United States—Priority.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 14, 1940.*

HONORABLE BURNETT MILLER, JR.,  
*House of Delegates,*  
*Richmond, Virginia.*

MY DEAR MR. MILLER:

I am in receipt of your letter of February 13, enclosing a copy of House Bill No. 275, amending and re-enacting section 5390 of the Code relating to the order in which debts of decedents shall be paid. The only change in the proposed Bill is to substitute in the second class the word "debts" for the word "taxes" due the United States. You state that the patron of the Bill explained "that under the law debts to the United States had priority any way and the amendment was merely to clarify the statute in accordance with the present law."

After consideration and investigation I have concluded that the patron of the Bill is correct in his statement. Section 191 of the U. S. Code Annotated (Revised Statutes, section 3466) reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all of the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Decisions of the Supreme Court of the United States hold that local laws of a State cannot create priority in favor of other creditors and so defeat the priority of the United States. *Field v. U. S.*, 9 Pet. 182, 200, 9 L. Ed. 94; *U. S. v. Oklahoma*, 261 U. S. 253, 67 L. Ed. 638.

I may also call your attention to the fact that the change now proposed is in accord with section 5390 as it was adopted by the revisors of 1919. The section thus adopted remained the same in this respect until 1938 when the word "taxes" was substituted for the word "debts".

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ADMINISTRATION—Disposition of Estates Where No Distributee.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 13, 1940.

MR. L. V. SNELL,  
*Commissioner of Accounts,*  
301 Law Building,  
Newport News, Virginia.

MY DEAR MR. SNELL:

Your letter of March 7, with reference to the estate of a decedent who left no surviving heir, addressed to the Auditor of Public Accounts, has been referred to this office.

It is noted that there is a small balance of \$50 or \$75 left in the hands of the administratrix.

I call your attention to section 5275 of the Code, which provides that to the Commonwealth shall accrue all the personal estate of every decedent of which there is no other distributee. There being no other distributee in this case, it would seem that the money should be paid over to the Commonwealth.

However, I call your attention to section 6311 of the Code and the following few sections. I am not entirely clear whether these sections are applicable in this case where the Commonwealth is in effect made by law a distributee. In any event, under section 6311 no publication is necessary where the amount involved is less than \$100.

On the whole, my suggestion is that you report your findings to the court, and it would seem to me that the court would be justified in directing that the money be paid into the treasury of the Commonwealth. Check should be made payable to the Treasury of Virginia.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## ADMINISTRATION—Taxes and Fees.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 8, 1940.

HONORABLE E. O. RUSSELL,  
*Clerk of the Circuit Court of Loudoun County,  
Leesburg, Virginia.*

DEAR MR. RUSSELL:

This is in reply to your letter of March 4, in which you request a construction of sections 4149(41) and 5748 of the Code of Virginia.

You describe a situation in which an intestate dies with various checks drawn on a certain bank outstanding, the total amount of said checks being greater than the amount he had on deposit at such bank.

You ask, if the administrator of the decedent's estate qualifies before two weeks has passed since the decedent's death and gives a check drawn on the decedent's account for the State tax and clerk's fees, can that check be paid if presented before the fund in the bank has been exhausted by the payment of checks drawn by the decedent.

In my opinion sections 4149(35), 4149(41) and 5748 of the Code impose the duty upon banks to retain funds on deposit to the credit of a decedent for two weeks after the death of the decedent in order to pay checks drawn by him during his lifetime, and that the bank should not pay such funds to, or upon the order of, the administrator before such time. Since, during this two weeks, the entire amount on deposit may be exhausted by the payment of checks drawn by the decedent, it is my opinion that the clerk of the court in which the administrator qualifies should, to be perfectly safe, require the payment of taxes and fees in some way other than by a check of the administrator drawn upon the decedent's account, if the qualification is before the expiration of two weeks after the decedent's death.

You also request my opinion regarding the method which the bank should use in paying the outstanding checks drawn by the decedent and the priority, if any, which should be given to certain of such checks under certain conditions. Since this is a problem relating solely to the duties of the bank and the rights of the various payees of the checks and of the administrator, it is one upon which this office should express no opinion.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

## AGRICULTURE, DEPARTMENT OF—Apiary Law—Constitutionality of—

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

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

DEAR MR. FRENCH:

You have requested my opinion regarding the constitutionality of the Virginia Apiary Law (Chapter 430, page 965, Acts of Assembly 1938).

This law provides for the regulation of the bee industry and has as its purpose the eradication or control of infectious and contagious bee diseases detri-

mental to good bee keeping, particularly the disease known as American Foulbrood, which ultimately results in the death of bees becoming infected with it.

The State Apiarist and State bee inspectors are authorized by the Act to enter upon premises where bees are kept for the purpose of ascertaining the existence of American Foulbrood or other bee diseases. Whenever any infectious or contagious bee disease is found and the owner of the bees and apiaries fails to take such steps as are prescribed by the State Apiarist to eradicate the disease, the State Apiarist is required by the Act to cause such bees, together with the hives, honey and appliances to be destroyed in such manner as he deems best. Before doing so, however, he is required to give fifteen days' notice to the owner of the bees, who has the right, within ten days after receiving said notice, to appeal to the Circuit Court of the county or corporation in which the bees are located. The law makes no provision for compensating the owner of the bees, etc., which are destroyed by the State Apiarist.

The question has arisen as to whether this Act, in providing for the destruction of diseased bees, etc., without compensation, is unconstitutional.

The validity of statutes authorizing the destruction of animals and plants having infectious or contagious diseases, and containing no provision for compensation for the destruction of animals and plants actually diseased, has been sustained in a number of cases as a proper exercise of the police power. See the cases collected in the annotations found in 8 A. L. R. 67; 12 A. L. R. 1136; and 67 A. L. R. 208. It is generally held that the destruction, under statutory authority, of animals or plants affected with a contagious disease is not a taking of property for public use within the meaning of a constitutional provision requiring adequate compensation to be made for a public use without his consent. The public interest in having wholesome food supplied in reasonable quantities and in seeing that established industries materially contributing to such supply be not extinguished or impaired in their efficiency by the spread of disease is considered of sufficient importance to justify, as an exercise of the sovereign police power, the destruction, without compensation, of anything which constitutes a real menace to such supply.

In *Bowman v. Virginia State Entomologist*, 128 Va. 351, the Virginia Cedar Rust Law, which authorized the destruction of red cedar trees which were the hosts of the communicable disease known as "cedar rust of the apple" was held valid. Since the law did not provide for compensation as a matter of right, the court considered the question of the validity of the statute as if no compensation was provided. The statute was held a proper exercise of the police power as a means of protecting the apple growing industry. The court, in its opinion, considered fully the authorities relating to this question.

The Cedar Rust Law was again considered by the Virginia Supreme Court of Appeals in *Miller v. State Entomologist*, 146 Va. 175, in which case the court adhered to the decision in *Bowman v. Virginia State Entomologist*, *supra*. *Miller v. State Entomologist*, *supra*, was affirmed by the United States Supreme Court in *Miller v. Schoene*, 276 U. S. 272.

It is my opinion, therefore, that the Virginia Apiary Law is not unconstitutional because it fails to provide compensation for the diseased bees, etc., destroyed by the State Apiarist acting pursuant to the statute. It is my opinion also that no valid objection can be raised concerning the procedure provided by the statute for the destruction of the diseased bees. The procedure is almost identical with that provided by the Cedar Rust Law for the destruction of cedar trees affected with "Cedar Rust." Ample opportunity to appeal to the courts, as well as to be heard by the State Apiarist before the bees, etc., are destroyed, is afforded the owners of bees by the Virginia Apiary Law. This right of appeal affords due process of law. The fact that the statute provides that the State Apiarist may destroy the bees, etc., without a court order, if the owner does not avail himself of his right to appeal, does not affect the validity of the statute.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

**AGRICULTURE AND IMMIGRATION, DEPARTMENT OF—Sale of  
Nursery Stocks—Certificate Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 19, 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 July 14, in which you ask if an agent of an out-of-State nurseryman soliciting orders for nursery stock in Virginia, to be shipped by the principal from out of the State, is required to secure a certificate of registration from the State Entomologist under section 882 of the Code of Virginia.

This section in part provides that:

"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,  
\* \* \* "

In my opinion, a person who comes into Virginia and who takes orders for nursery stock, such nursery stock to be shipped by his principal from out of the State, is plainly offering for sale nursery stock in this State, and should, therefore, secure the certificate of registration. It, of course, follows that an agent of a principal whose place of business is in this State, who takes orders for the sale of nursery stock is also subject to registration as an agent.

You also ask if an out-of-State principal who offers for sale, or sells, or delivers, or gives away nursery stock in Virginia through an agent in this State is subject to registration under the aforesaid section.

In my opinion, one who performs these acts in Virginia through an agent is in contemplation of law performing them himself and is subject to the registration required in this section.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**AGRICULTURE AND IMMIGRATION, Department of—Agents Selling  
Nursery Stock—Registration Certificate.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 20, 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 November 14, in which you refer to my letter to you of July 19, 1939, from which I quote as follows:

"In my opinion, a person who comes into Virginia and who takes orders for nursery stock, such nursery stock to be shipped by his principal from out of State, is plainly offering for sale nursery stock in this State, and should, therefore, secure the certificate of registration. It, of course, follows that an agent of a principal whose place of business is in this State, who takes orders for the sale of nursery stock is also subject to registration as an agent."

The question you now raise is whether a person who is *employed* by a nurseryman and who offers for sale nursery stock in this State should register as an agent.

It is my view that the opinion expressed in my letter of July 19 applies to an employee of a nurseryman as well as to one who may be selling on commission. In other words, a person who is receiving a salary from his principal is just as much as agent as one who is selling on commission.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

### ALCOHOLIC BEVERAGE CONTROL—Authority of Counties, Cities, and Towns.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 5, 1940.

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

DEAR COLONEL BULLINGTON:

This is in reply to your letter of June 4, which is as follows:

"On March 12th, 1940, an election was held in the town of Richlands, Tazewell County, Virginia, on the following questions:

"1—Shall the sale of beer and wine (containing more than 3.2% alcohol by weight) be permitted in Richlands; and

"2—Shall the sale of alcoholic beverages other than beer and wine be permitted in Richlands.

"Previously a majority of the qualified voters of that town had voted against the permitting the sale of beer and wine and against permitting the sale of alcoholic beverages other than beer and wine.

"At the election held on March 12th, 1940, a majority of the voters voted 'No' on the first question and 'Yes' on the second; that is to say, they voted against the sale of beer and wine and in favor of the sale of alcoholic beverages other than beer and wine.

"Some persons are insisting that the vote prohibiting the sale of beer and wine should be restricted in its application to such sales by licensees and that it was not intended either by the Legislature or by the Electors that an Alcoholic Beverage Control store would be prohibited from selling wine in that town.

"We are preparing to open an Alcoholic Beverage Control store in that town and would respectfully ask that you advise whether we can under the law sell wine in that store."

Section 30 of the alcoholic beverage control act provides for the submission of the two questions as above set out in your letter. Section 31 of said act contains this provision:

"If in any election held pursuant to the next preceding election in any county, city or town a majority of the qualified voters voting therein shall vote 'No' on the question shall the sale of beer and wine be permitted therein, then on and after sixty days from the date on which the order of the court, or of the judge thereof in vacation, setting forth the results of such election shall be entered of record, no beer or wine shall be sold in such county, city or town except for delivery or shipment to persons outside of or to druggists in such county, city or town authorized under this act to acquire the same for the purpose of resale, \* \* \* ."

In my opinion, the language quoted is so clear as not to leave any doubt that the Board is prohibited from selling wine and beer in the State stores in Richlands, except as provided in the quoted language. There does not seem to be any latitude for interpretation.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL—Power of Counties, Cities, and Towns.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 15, 1940.

HONORABLE E. W. CHELF,  
*Commonwealth's Attorney,  
Salem, Virginia.*

DEAR MR. CHELF:

This is in reply to your letter of June 11, in which you ask if the Board of Supervisors of Roanoke county has authority to pass an ordinance requiring all road houses and like places of amusement which sell beer and wine to close their places of business within the hours of 12:00 o'clock midnight and 6:00 o'clock a. m.

Section 4675(65) of Michie's Code 1936 reads as follows:

"No county, city or town shall, except as otherwise provided in section twenty-six of this act providing for the issuance of local licenses, pass or adopt any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia."

Since the Alcoholic Beverage Control Act was passed, counties, cities and towns have been authorized to pass ordinances prohibiting or regulating the time of sale of wine and beer between the hours of 12:00 o'clock of each Saturday and 6:00 o'clock a. m. of each Monday. See section 4675(83b) of the 1938 Supplement to Michie's Code.

It is clear from these statutes that the authority of counties to regulate the time of sale of wine and beer is limited to the regulation of such sale within the hours designated by section 4675(83b)

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL—3.2% Beer—Prohibiting Sunday Sale.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 27, 1940.

HON. L. H. SHRADER,  
*Trial Justice for Amherst County,*  
*Amherst, Virginia.*

MY DEAR MR. SHRADER:

I am in receipt of your letter of February 26, in which you ask the following question:

"Please give me your opinion as to whether or not a Town Council and/or the Board of Supervisors of a county may pass a valid resolution prohibiting the sale of 3.2 beer on Sundays."

Chapter 129 of the Acts of 1938 (Acts 1938, p. 194) authorizes, among other governing bodies, councils of towns to adopt ordinances prohibiting the sale of beer and wine on Sundays. However, the Alcoholic Beverage Control Act Michie's Code 1936, sec. 4675-(2) defines "beer" as follows:

"'Beer' shall mean any beverage obtained by the alcoholic fermentation of an infusion or decoction of barley, malt and hops or of any similar products in drinkable water and containing, unless otherwise expressly provided, more than three and two-tenths per centum of alcohol by weight; this definition shall include ale, porter and stout;"

In my opinion, the aforesaid chapter 129 of the Acts of 1938 refers to beer as it is defined in the Alcoholic Beverage Control Act and, therefore, does not include a beverage containing not more than 3.2 per centum of alcohol by weight. In fact, such a beverage is expressly defined as a "beverage" and not as "beer". See Michie's Code 1936, sec. 4675(70). The Act regulating beverages of not more than 3.2 per centum of alcohol by weight expressly makes it lawful to manufacture and sell such beverages. See Michie's Code 1936, sec. 4675 (71).

My conclusion is that, beverages not being included in chapter 129 of the Acts of 1938, and since it is expressly made lawful for such beverages to be sold, a town council may not pass an ordinance prohibiting the sale of such beverages on Sundays.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL—Sales to Minor Acting as Agent—Guilt of Adult Principal.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., JULY 10, 1939.

HONORABLE W. CLYDE DENNIS,  
*Trial Justice,*  
*Grundy, Virginia.*

MY DEAR JUDGE DENNIS:

This will acknowledge your letter of July 3, requesting my opinion on certain questions arising under the Alcoholic Beverage Control Act.

At the outset it should be stated that both of your two questions seem clearly

open to a reasonable difference of opinion, and can be actually settled only through adjudication by the courts. Certainly, an opinion from this office will not be conclusive, but at your request I am glad to set forth my views for your consideration.

You first wish to know whether it constitutes a violation of section 42 of the Alcoholic Beverage Control Act for a licensee to sell or deliver alcoholic beverages to a person under twenty-one years of age who makes the purchase, with or without a written order, only as agent for an adult person. The section referred to makes it unlawful knowingly to "sell any alcoholic beverages to any person \* \* \* less than twenty-one years of age.

While it might be argued that in such a case the technical sale is to the adult principal, the agent acting only as bailee of the beverages, it is my opinion that the manifest purpose and spirit of the statute indicate a contrary construction, and that the statute should be construed to prohibit such transactions. Certainly, the effectiveness of this portion of the Act would be seriously impaired if it were held that licensees may lawfully sell alcoholic beverages to infants, interdicted persons, etc., simply on presentation of a written order, actually or ostensibly signed by some person to whom such sales may lawfully be made.

You next wish to know whether the person who sends an infant to a licensee for the purpose of making such a purchase may be punished under section 59 of the Alcoholic Beverage Control Act, which makes it unlawful "to aid and abet another in doing, or attempting to do, any of the things prohibited by this act."

As to what constitutes "aiding and abetting" our Court of Appeals has laid down the general rule that "to constitute one an aider and abetter, it must be shown that he procured, encouraged, countenanced or approved the commission of the crime." (*Gray v. Commonwealth*, 150 Va. 571, 979, 142 S. E. 397.) Under this definition, there is certainly room for serious question as to whether one who purchases alcoholic beverages, or procures another to do so, where only the sale is prohibited by the statute, is guilty as an aider or abetter. Accordingly, it was established by the great weight of authority that the purchaser could not be prosecuted as an aider or abetter under prohibition laws which dealt expressly with the seller only. Notes, 74 A. L. R. 1113; 68 A. L. R. 899.

Our court however, in the cases of *Crosby v. Commonwealth*, 132 Va. 518, 110 S. E. 270, and *Faulkner v. South Boston*, 139 Va. 569, 132 S. E. 358, adopted the contrary view. The rule of these cases was recently recognized by the court in *Guthrie v. Commonwealth*, 171 Va. 461, 198 S. E. 481.

It would seem to follow, therefore, that a purchaser at one of the sales prohibited by section 42 of the Alcoholic Beverage Control Act, or a person who procures another to be a purchaser at such sale, is guilty of aiding and abetting a violation of the Act, and subject to punishment under section 59.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ALCOHOLIC BEVERAGE CONTROL—Transportation of Spirits— Quantity Allowed.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 3, 1940.

HONORABLE JOHN W. GILLESPIE,  
*Attorney for the Commonwealth,  
Tazewell, Virginia.*

MY DEAR MR. GILLESPIE:

This is in reply to your letter of May 1, in which you request my opinion upon the question whether or not two or more persons riding in the same motor vehicle,

each bringing into the State from West Virginia, where same was legally purchased, a gallon of distilled spirits, would be considered as violating section 4675(50) (Michie 1936).

In my opinion, if this whiskey was legally purchased in West Virginia, each person would have the right to transport a gallon of same without violating the statute. The mere fact that they are traveling in the same vehicle at the same time would not render the transportation of the spirits unlawful.

Substantially the same question is covered by a regulation of the Alcoholic Beverage Control Board printed in the pamphlet containing the alcoholic beverage control act as Order No. 2247, appearing on page 117. If you do not have a copy of the pamphlet, you may obtain same by writing to the Board. For your information, this regulation is quoted below :

"Alcoholic beverages, other than wine and beer purchased from persons licensed to sell the same in Virginia and those alcoholic beverages which may be manufactured and sold without a license under the provisions of the Alcoholic Beverage Control Act, may be transported in amounts in excess of one gallon in a vehicle occupied by more than one person, provided that such alcoholic beverages shall have been lawfully acquired and are in the possession of the *bona fide* owner thereof and that no person in such vehicle shall have more than one gallon of such alcoholic beverages without a permit from the Virginia Alcoholic Beverage Control Board."

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ALCOHOLIC BEVERAGE CONTROL—Sale to Intoxicated Persons By Agent.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 26, 1940.*

MR. W. TERRELL SHEEHAN,  
*Trial Justice,*  
*Staunton, Virginia.*

MY DEAR MR. SHEEHAN :

In your letter of February 21, you ask whether, in my opinion, the case of *O'Donnell v. Commonwealth*, 108 Va. 882, 62 S. E. 373, is controlling in the interpretation of section 4675(42) of the Code of Virginia.

In that case the provision of the "Byrd Liquor Law," Act of Assembly 1908, page 275, which made it a misdemeanor for any person to knowingly sell ardent spirits to any intoxicated person was under consideration by the court. It was held that O'Donnell, who had a license to sell liquor at retail, was criminally responsible under this section for the acts of his employee in selling liquor to a person known to the employee to be intoxicated, though such act was not authorized or even permitted by O'Donnell and though O'Donnell was absent from his place of business at the time of the sale and knew nothing of it. The court stated that its holding was based upon the postulate that a man who engages in the business of selling intoxicating liquors as a licensee of the State engages in it at his peril, must see to it that the requirements of the law are rigidly complied with, and is responsible for any failure of any agent of his to comply with those requirements.

No similar case has arisen under the present statute, section 4675(42), which makes it unlawful to sell alcoholic beverages to intoxicated and certain other persons with knowledge of, or reason to know of, their condition. However, the language of the present law is almost identical to the language of the statute under consideration in the case of *O'Donnell v. Commonwealth*, *supra*.

In my opinion, since the same reasons and principles are applicable and the language of the two statutes are similar, the case of *O'Donnell v. Commonwealth, supra*, is controlling in the interpretation of section 4675(42) of the Code of Virginia. Nor, in my opinion, would the fact that the licensee, personally, was in another county or state while his agent violated this section at the licensee's place of business affect the applicability of this case.

The law recognizes no accessories in misdemeanor cases, regarding all who participate in such a crime as principals and as being present, in contemplation of law, where it is committed and answerable there for the crime, even though they were actually without the jurisdiction of the court at the time the offense was committed. 14 Am. Jur. page 838. In my opinion, the same principle would apply to the criminal liability of a licensee for the misdemeanor of selling alcoholic beverages to an intoxicated person when such sale is made by the agent of the licensee.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ALCOHOLIC BEVERAGE CONTROL—Sunday Regulations—Authority  
of Board of Supervisors.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 9, 1940.*

HON. A. BARCLAY TALIAFERRO,  
*Attorney for the Commonwealth,  
Orange, Virginia.*

MY DEAR MR. TALIAFERRO:

I am in receipt of your letter of April 8, from which I quote as follows:

"At their regular monthly meeting, this a. m., the Board requested me to ascertain your ruling as to whether, under V. C. Sec. 2743, the Board has the authority to forbid the sale of wine and beer on Sundays in Orange county; and as to whether this authority would extend to the incorporated towns of Orange and Gordonsville."

In my opinion, section 2743 of the Code should not be construed to give the board of supervisors the authority you mention. I say this because in 1938 the Legislature passed an Act (Acts 1938, page 194) authorizing the governing bodies of counties, cities and towns to adopt ordinances prohibiting or regulating the sale of wine and beer on Sunday. This Act expressly provides that the board of supervisors of a county has power to adopt such an ordinance "effective in that portion of such county not embraced within the corporate limits of any city or incorporated town". In other words, the Legislature has dealt with this whole subject in the Act of 1938 to which I have referred. If section 2743 should now be construed to give the board of supervisors authority to pass a Sunday ordinance relating to wine and beer, then the Act of 1938 is without effect.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## ALCOHOLIC BEVERAGE CONTROL BOARD—Taxing Procedure.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 12, 1940.

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

MY DEAR COLONEL BULLINGTON:

This is in reply to your letter of April 11, in which you request my opinion as to the method which should be pursued by your Board in complying with the requirements of the recent Act of the General Assembly (House Bill No. 142), imposing upon the Board the duty of collecting a tax of ten per cent of the retail price on all distilled spirits sold by the Board in government stores after July 1, 1940.

In my opinion, the Board should prepare a retail price list, on which should be designated the price at which each bottle of distilled spirits will be sold. This list should set out separately the name of the spirits, the size of the bottle, and the retail price placed thereon by the Board. In cases where the retail price ends in five cents, the tax strictly calculated would end in a half cent. It has always been customary in the administration of the tax laws to add an extra half cent where the fraction of a cent is as much or more than a half cent, and to drop the fraction of the cent where the same is less than a half cent.

In my opinion, in order for the Board to administer this law, it will be necessary to treat the sale of each separate bottle as a separate sale. Thus, for illustration, the tax on a bottle, the retail price of which is seventy-five cents, would be eight cents, and the Board would, therefore, collect from the purchaser of the bottle the retail price of seventy-five cents plus a tax of eight cents, making a total of eighty-three cents. This eight cents tax would be paid into the general fund of the treasury, as provided by the statute, and so reflected on the books of the Comptroller, and kept separately and distinct on the Comptroller's books from the retail price of seventy-five cents.

The retail price list, to which I first referred above, in my opinion, should also have entered thereon the amount of the tax on each bottle, and also a column reflecting the total amount which the Board is to collect from the purchaser of the spirits. This price list should be immediately filed with the office of the Comptroller and also with the State Auditor of Public Accounts, for the information of these offices and to enable them to properly reflect the transactions on their books and records.

It is further my opinion that it is permissible for the Board, in preparing the list of prices which it is required under the Act to collect from the purchaser for the spirits, to add the tax to the retail price as filed with the Comptroller and Auditor, and to print a statement at the top of the price list that the prices include the ten per cent State tax. I do not believe it would be practicable to undertake to separate the retail price and tax thereon on the price list distributed to the public and posted in the State stores.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ARRESTS—Compensation for—Where No Warrant Issued.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 24, 1939.

HON. BERNARD MAHON,  
*Attorney for the Commonwealth,  
Bowling Green, Virginia.*

MY DEAR MR. MAHON:

I am in receipt of your letter of October 20, in which you inquire as to the mileage to which an officer is entitled when he arrests a prisoner without a warrant and takes him to jail.

As you know, section 3508 of the Code provides for mileage for an officer for carrying a prisoner to jail "under order of a justice". In my opinion, however, the section does not cover the situation where a prisoner is carried to jail without the issuance of a warrant.

Therefore, in view of the fact that section 3508 does not cover this situation and the officer is not otherwise compensated for this service, I suggest that the court may, in its discretion, allow him a reasonable compensation under the authority of section 4960 of the Code, and especially the first paragraph thereof.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ARREST—FEES—Where Two Officers Participate.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 17, 1940.

MR. GEORGE W. WILLIAMS,  
*Sheriff of Scott County,  
Gate City, Virginia.*

MY DEAR MR. WILLIAMS:

I am in receipt of your letter of January 11, in which you ask:

"If two officers arrest a man for any criminal violation, can each of the two deputy sheriffs participating in the arrest be entitled to a fee for arrest?"

You also state that your Attorney for the Commonwealth has advised you that, if two deputies participate in an arrest, both of them are entitled to claim the fee, provided that it appears reasonably necessary for two deputies to so participate.

As you point out, the Appropriation Act of 1938 (Acts 1938, at page 876) provides that "where more than two officers participate in making an arrest, the court may allow fees therefor to only two such officers." I agree with you that the decision in the matter is within the discretion of the court, and doubtless the court will, as the Commonwealth's Attorney suggests, consider whether it was reasonably necessary for two deputies to participate.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**AUTOMOBILES—Registration of, by Non-Residents.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 17, 1939.

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

DEAR MR. LINCOLN:

I have your letter of July 13 requesting an opinion from this office as to Section 2154(70) (g) pertaining to registration by non-residents.

As I understand your letter, certain persons in Marion are employed by a Pennsylvania corporation and are operating passenger cars equipped with Pennsylvania license plates; further, these persons have been residing in this State for a period exceeding sixty days.

Section 23 of the Motor Vehicle Code, sub-section (g) provides as follows:

"It is specifically provided that any non-resident who becomes engaged in a gainful occupation in this State for a consecutive period exceeding sixty days and temporarily domiciles in this State while in such gainful occupation, shall be deemed a resident of this State for the purpose of this act, and any such non-resident who shall operate a motor vehicle in this State, shall secure the registration thereof and a license therefor."

It is the opinion of this office that the Section above referred to is applicable to the question presented and the aforementioned persons should at the expiration of sixty days from the date of entry into this State apply for and secure license plates for any motor vehicle operated by them in Virginia. The provision concerning the non-resident, sub-section (a) of the same Section, which permits the non-resident to use his car for a period of six months without registering with this Division would not apply as it seems that the owners of the above mentioned vehicles have been engaged in a gainful occupation in this State for a period exceeding sixty days. In other words, sub-section (a) would cover a non-resident merely sojourning within the State and not engaged in any occupation or business. I am of the opinion that "temporarily domiciled" in the statute means residing temporarily.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**AUTOMOBILES—Authority of State Police to Search for Whiskey.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 2, 1939.

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

MY DEAR MR. LINCOLN:

I am in receipt of your letter of September 25, in which you ask for my opinion as to "whether the State Police, or other officers have a right to arbitrarily stop a motorist on the highway for the purpose of searching his car for whiskey."

I am of opinion that section 4675 (38a) of the Code contemplates that before a vehicle may be searched for illegally acquired whiskey a search warrant should

be first obtained, as provided by the section. It is true that section 4822-d of the Code provides that an officer empowered to enforce the laws with reference to intoxicating liquors may search a vehicle without a search warrant. However, I am of opinion that this section, in cases involving violations of the present Alcoholic Beverage Control Law, has been superseded by section 4675 (38a).

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BAIL—Acceptance of Cash Security on Bail Bond.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 24, 1939.*

HON. D. W. McNEIL,  
*Trial Justice for Rockbridge County,  
Lexington, Virginia.*

MY DEAR MR. McNEIL:

I am in receipt of your letter of November 22, asking if a "trial justice may accept cash security on a criminal bail bond or recognizance."

Section 4973-a of the Code (Michie, 1936) provides how an officer authorized to admit to bail may accept cash instead of requiring recognizance with surety. You will observe that the section provides for the cash to be deposited with the clerk of the circuit or corporation court, and for the clerk to give a certificate of such deposit and, upon delivering the certificate to the officer admitting the person to bail, he may be ordered to be released. I do not think that under the section the officer admitting to bail may hold the cash, but such cash must be deposited with the clerk of the circuit or corporation court, as specified.

In my opinion, therefore, trial justices may accept cash security in the method provided in the aforesaid section 4973-A.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BAIL—Return of, Where Forfeited for Failure to Appear.  
COMPTROLLER—Authority of, to Return Bail.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 1, 1939.*

COLONEL LEROY HODGES,  
*State Comptroller,  
Richmond, Virginia.*

DERA COLONEL HODGES:

I am returning herewith the petition, and papers attached thereto, of Dr. John W. Dyer, addressed to the State Comptroller, requesting the return of \$500 cash bail which was forfeited by reason of his failure to appear as required. Dr. Dyer now claims that he has settled all of the matters with respect to which he was apprehended in Virginia, and that he should now have this money returned to him. You have requested my opinion upon the authority of the Comptroller to make such return.

In my opinion, the Comptroller does not have this authority. The only provisions contained in the statute under which the money could be returned to Dr. Dyer are those contained in sections 2569 to 2577, inclusive of the Virginia Code.

In my opinion, it is necessary that all of these procedures be complied with, and that the Governor alone can direct the return of this money in accordance with the provisions of said Code sections.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority of, to Adopt and Repeal Ordinances.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 1, 1940.

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

MY DEAR MR. WHITE:

I am in receipt of your letter of February 27, in which you refer to chapter 319 of the Acts of 1936 (Acts 1936, p. 519), providing for the protection of deer and elk in the State. Section 3 of the Act provides that:

"The provisions of this act shall not be, or become, effective in any county unless and until it shall be adopted by the board of supervisors, or other governing body thereof by a resolution approved by a majority of all the members of such board, or governing body."

You state that, pursuant to the quoted section, the board of supervisors of Augusta county passed an ordinance adopting the act, and you now ask if the board may repeal the ordinance, so that the legislation would be no longer effective in Augusta county.

This office has heretofore expressed the opinion that, where the board of supervisors has authority to adopt an ordinance, it has also the inherent authority to repeal it. However, I do not think that this rule is applicable in this case. Chapter 319 of the Acts of 1936 is a State law and it simply provides that it does not become effective in any county until the board of supervisors adopts it. But once adopted in any county, it becomes a State law in that county and not an enactment of the board of supervisors. It seems to me to plainly follow that, being a State law in the county, the board of supervisors has no authority to repeal it therein.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority of—To Change Budget Submitted by School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 2, 1940.

HONORABLE LESLIE D. KLINE,  
*Division Superintendent of Schools,  
Division of Frederick County,  
Winchester, Virginia.*

DEAR MR. KLINE:

I am in receipt of your letter of January 30, in which you inquire concerning the power of the board of supervisors of a county to make changes in the school budget submitted by the school board.

In the recent case of *Scott County School Board v. Board of Supervisors of Scott County*, 169 Va. 213, our Supreme Court of Appeals has expressly decided that the board of supervisors does have power to make changes in the budget submitted by the school board. The opinion is quite clear on this question. If you will borrow the 169th volume of Virginia Reports from the office of one of your local attorneys and read the opinion, I am sure that you will no longer have any doubt on the subject.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Approval of Loan by School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 18, 1940.*

HON. WILLIAM H. LOGAN,  
*Attorney for the Commonwealth,  
Woodstock, Virginia.*

MY DEAR MR. LOGAN:

I am in receipt of your letter of March 16, in which you state that the school board of Shenandoah county has exceeded its budget and has contracted to expend more than the amount available for school purposes. You further state that the board of supervisors did not know of this situation and is now being requested by the school board to approve a temporary loan under the provisions of section 675 of the Code.

Although section 675 does provide that no school board shall contract to expend in any fiscal year any sum of money in excess of the funds available for school purposes for that year without the consent of the tax levying body. I know of no reason why the board of supervisors may not, if in its discretion it is deemed to be proper, approve a temporary loan to be made by the county school board. It seems to me reasonably clear that, where the statute gives the board authority to approve such a loan, it may in its discretion approve the loan, even though the school board did not secure the approval of the board of supervisors before it exceeded its budget.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority of—To Approve School Budget**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 29, 1940.*

HONORABLE T. MOORE BUTLER,  
*Commonwealth's Attorney,  
Covington, Virginia.*

DEAR MR. BUTLER:

I am in receipt of your letter of April 27, the first paragraph of which is as follows:

"The Board of Supervisors of Alleghany County, Virginia, had before it for consideration at its last meeting the Alleghany County School Budget. The Board of Supervisors adopted the said budget with the exception of a pro-

posed raise in salary of the Clerk of the School Board in the amount of \$60.00, and a proposed raise in salary of the Superintendent of Schools in the amount of \$300.00."

You desire my opinion as to whether or not the Board of Supervisors has the authority to adopt the school budget with the aforesaid specific exceptions.

Since the decision of the Court of Appeals in the case of *Scott County School Board v. Board of Supervisors*, 169 Va. 213, this office has frequently expressed the view that the Board of Supervisors, in the exercise of a reasonable discretion, has the right to control the estimates submitted by the school board and to curtail the budget in the exercise of this discretion.

Therefore, if the Board of Supervisors determines to approve the school budget, less the two items mentioned by you, it seems to me it clearly has the authority so to do. I observe that this seems to be your view also.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority of, to Close Dance Halls.  
Id.—Publishing of Ordinances.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 20, 1940.

HON. A. BARCLAY TALIAFERRO,  
*Attorney for the Commonwealth,  
Orange, Virginia.*

MY DEAR MR. TALIAFERRO:

I am in receipt of your letter of February 14, in which you ask if the Board of Supervisors of Orange County has the authority to adopt an ordinance requiring the closing of public dance halls at 12 o'clock on Saturday nights.

Section 2743 of the Code provides, among other things, that boards of supervisors may "adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State."

I also find that there is no general law regulating dance halls applicable to Orange county.

In my opinion, therefore, under the authority of the quoted language, your Board of Supervisors has the authority to adopt the proposed ordinance if the Board is of opinion that the conditions in Orange county justify same. I think the proposed ordinance should be published as set out in the last paragraph of section 2743.

You also ask if an ordinance imposing a county license tax, as authorized by section 153-a of the Tax Code, should be published as provided in the last paragraph of section 2743.

I am of opinion that there should be this publication. You will observe that next to the last paragraph of section 2743 provides that:

"For carrying into effect these and their other powers, the boards of supervisors may make ordinances \* \* \* ."

I am of opinion, therefore, that an ordinance imposing a county license tax is required to be published as provided in the section.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Authority of, to Approve Loans Made by School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 14, 1940.

HONORABLE E. W. CHELF,  
*Commonwealth's Attorney,*  
*Salem, Virginia.*

MY DEAR MR. CHELF:

I am in receipt of your letter of May 13, in which you ask if the Board of Supervisors of Roanoke County has authority to authorize the School Board to make a temporary loan which will have to be paid out of next year's revenue.

Section 675 of the Code authorizes the Board of Supervisors to approve temporary loans to be made by the School Board in an amount not to exceed one-half of the amount produced by the county school levy for the year in which the loan is negotiated, or one-half of the amount of the cash appropriation made for schools for the preceding year. The section further provides that such loans shall be repaid within one year of their date.

If these and the other conditions of section 675 are complied with, I am of opinion that the loan may be made, the section not specifying the funds out of which the loan is to be repaid.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Authority of, to Regulate Hunting Season.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 24, 1939.

HONORABLE J. H. IRBY, *Clerk,*  
*Board of Supervisors of Nottoway County,*  
*Nottoway, Virginia.*

DEAR MR. IRBY:

I have your letter of August 23, requesting my opinion as to whether your board of supervisors has authority to shorten the existing open season for hunting squirrels.

Virginia Code (Michie 1936) section 3305(37) expressly provides that "It shall be lawful to hunt the wild birds and wild animals named herein \* \* \* during the open season provided \* \* \*", and I am unable to find anything in the law authorizing boards of supervisors to impose additional restrictions on hunting in their respective counties.

I can only direct your attention to Code section 3305(34), authorizing the Commission of Game and Inland Fisheries to extend or restrict the statutory provisions obtaining in any county, either upon its own motion or upon a petition signed by one hundred licensed resident land owners of the county.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Compensation to Clerks, Treasurers and Chairman.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 8, 1940.

HONORABLE T. FREEMAN EPES,  
*Attorney for the Commonwealth,  
Blackstone, Virginia.*

MY DEAR MR. EPES:

I am in receipt of your letter of May 28, from which I quote as follows:

"The auditor of public accounts refused allowance to the clerk, to the treasurer and to the chairman of the board of supervisors of \$5 each for attending meeting of the finance board under section 350-a of the Code; the auditor holding that only the citizen member of the finance board was entitled to compensation under section 350-a."

Unquestionably, pursuant to section 350-a of the Tax Code, the board of supervisors may provide compensation for the citizen member of the board. There is no express authority given to the board of supervisors to provide any compensation for the other two members of the board or the clerk. Indeed section 350 of the Tax Code makes the treasurer and the chairman of the board of supervisors ex-officio members of the board and the clerk of the board of supervisors is ex-officio clerk of the board. In other words, the section seems to contemplate that the duties performed by the three officers are duties that they must perform by virtue of the offices they hold.

In my opinion, therefore, the clerk, the treasurer, and the chairman of the board of supervisors may not be paid any additional compensation.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Contracts—Personal Interest of Officer.  
SCHOOL BOARD—Contracts—Personal Interest of Officer.**

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

HON. ROBERT RANDOLPH JONES,  
*Attorney for the Commonwealth,  
Powhatan, Virginia.*

MY DEAR MR. JONES:

I am in receipt of your letter of August 30, in which you ask, first, if the treasurer of a county may rent to the Board of Supervisors an office owned by him.

In my opinion, such a contract is prohibited by section 2707 of the Code. You will observe that this section provides in effect that no paid officer of a county shall be interested, directly or indirectly, in any contract made by or on behalf of the Board of Supervisors. The treasurer, of course, is a paid officer of the county, and I presume that the contract for the renting of the property owned by him will be made by the Board of Supervisors. As stated, therefore, it seems to me that this contract is prohibited by the said section.

You next ask if you, as Commonwealth's Attorney, may rent to the Powhatan County School Board certain office space or rooms in a building owned by you.

In my opinion, section 2707 of the Code does not prohibit this arrangement.

The contract would not be made with the Board of Supervisors or any person or agency acting for the Board and, therefore, it does not come within the prohibition contained in the section.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Expenses and Mileage Allowances to Members of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 5, 1940.*

HONORABLE PAUL E. BROWN,  
*Commonwealth's Attorney,  
Fairfax, Virginia.*

MY DEAR MR. BROWN:

I am in receipt of your letter of February 1, the first paragraph of which reads as follows:

"During the month of January, five members of the Board of Supervisors of Fairfax County, as a special committee representing the County, went to Richmond to confer with Mr. Shirley, Chairman of the State Highway Commission, and other State officials, in connection with legislation proposed at the present session of the General Assembly. Yesterday one of the members of the Board presented to the Board a bill for mileage and expenses, in connection with this trip. The Board of Supervisors approved the payment of this bill, but on my advice have withheld payment of the same until I can obtain a ruling from you on this question."

As you suggest, there is no statute dealing with this particular subject. Section 2769(a) of the Code, providing for compensation for members of the board of supervisors and for expenses in attending meetings of the board, does not cover the situation. However, in my opinion, where, by direction of the board, a member or members incur traveling expenses in connection with performing a legitimate function of the board pertaining to county business it is within the inherent power of the board to pay such traveling expenses out of any county funds available for the purpose.

I note that you refer to my letter of August 26, 1936, to Honorable Joseph H. Poff, Commonwealth's Attorney of Floyd County. In my opinion the principle stated in the last sentence of that letter is applicable here.

As to what constitutes legitimate county business, I am of opinion that this is a matter to be determined by the board in each particular case, and that the decision of the board should be accepted unless plainly erroneous.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Levies by, to Meet Literary Fund Loan.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 22, 1940.

HON. G. R. REPASS, *Clerk,*  
*Circuit Court of Bland County,*  
*Bland, Virginia.*

MY DEAR MR. REPASS:

I am in receipt of your letter of January 15, in which you ask if a county may validly impose a levy under section 644 of the Code for the payment of a loan made from the State literary fund to such county where the amount of such levy when added to the school levies authorized by section 698a of the Code would exceed the limits fixed by said section 698a for the county school levy.

You will observe that section 644 is mandatory in its requirement that the board of supervisors of a county "shall include in its levies, or appropriate a sum sufficient" to meet its liabilities in cases of loans made from the literary fund. Indeed the section provides that the failure of the board of supervisors to lay the required levy or to make the required appropriation constitutes cause for the removal of the members of the board from office. You will also observe that the section does not say that the board of supervisors shall include in its school levy a sufficient amount to meet its obligations to the literary fund, but simply "shall include in its levies" a sum sufficient.

It is my opinion, therefore, that it is mandatory upon the board of supervisors to impose a levy or make an appropriation large enough to take care of its obligations to the literary fund, no matter what the amount of its school levy or appropriation may be. If such obligations can be paid from the general school levy or appropriation, I presume a county would adopt this course, but where the school levy or appropriation is not sufficient to take care of the literary fund obligations. I think the duty upon the board of supervisors to make the required levy or appropriation under section 644 is plain. If the county has already made its maximum permissible school levy or appropriation under section 698a, the levy or appropriation made under section 644 to take care of the literary fund obligations would not be a *school* levy or appropriation, but simply a levy or appropriation under the authority of section 644.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOARD OF SUPERVISORS—Official Bonds—Amount and How Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 6, 1939.

HON. SIDNEY S. KELLAM,  
*Treasurer of Princess Anne County,*  
*Princess Anne, Virginia.*

MY DEAR MR. KELLAM:

I am in receipt of your letter of November 5, from which I quote as follows:

"I would appreciate it if you would advise me whether or not in your opinion the Board of Supervisors have the right to pay their official bonds out of county funds.

"I would also appreciate it if you would advise me what is the smallest bond a Supervisor is permitted to give."

In my opinion, the answer to both of your questions is contained in section 2698 of the Code. There it is provided that the "bond of the supervisors shall not be less than one thousand nor more than two thousand, five hundred dollars." It is also provided in the same section, which section refers to the bond to be given by members of the Board of Supervisors, that "the Board of Supervisors of any county and the Council of any city or town in this State may pay the costs of the premium of said surety when given by such surety or guaranty company." I am, therefore, of the opinion that your first question must be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Power of—to Establish Sinking Fund for Future Expenditures.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 25, 1940.

HONORABLE A. BARCLAY TALIAFERRO,  
*Attorney for the Commonwealth,  
Orange, Virginia.*

MY DEAR MR. TALIAFERRO:

I am in receipt of your letter of June 24, from which I quote as follows:

"The board of supervisors of Orange county requested that I write you and ascertain your ruling in reference to their power or authority to establish a general sinking fund, without borrowing money for the construction or repair of county buildings, etc. In other words, it is their idea that they have authority and power to set aside money in and as a general sinking fund, from which they can make allotments to meet miscellaneous expenses as they see fit."

Unquestionably, the board of supervisors may annually appropriate a sum for the repair of county buildings and miscellaneous expenses in connection therewith. Likewise, the board, if the funds are available, may make an appropriation for the construction of a county building. However, I know of no authority that the board has to make an appropriation to create, as you express it, a "general sinking fund", other than a sinking fund for the purpose of paying interest and retiring existing indebtedness, which will be automatically carried forward and allowed to accumulate from year to year.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Time of Making Levy.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 12, 1940.

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

MY DEAR MR. CARTER:

I am just in receipt of your letter of March 11, with reference to your problem concerning a county levy in the light of the amendment to section 288 of the

Tax Code adopted by the last General Assembly fixing the time of the county levy as not later than the meeting of the Board of Supervisors in April. For your information, I am advised that this Bill has already been approved by the Governor.

I note that the regular April meeting of your Board of Supervisors is to be held on April 1. However, it seems to me that probably the necessary time can be had for the taking of all of the prescribed steps by fixing the day for the making of the county levy at an adjourned meeting of the Board of Supervisors.

In addition, I may also say that, while I have not had time to make a real study of the question, since you desire an immediate reply to your letter, even if the levy is not fixed until the meeting in May, I cannot feel that a court would hold a levy made under the circumstances to be invalid.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOARD OF SUPERVISORS—Warrants for Expenses and Salary—  
Auditing Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 27, 1940.

HON. C. CARTER LEE,  
*Attorney for the Commonwealth,  
Rocky Mount, Virginia.*

MY DEAR MR. LEE:

Your letter of March 25 addressed to Hon. L. McCarthy Downs, Auditor of Public Accounts, has been referred to this office. I quote from your letter as follows:

"The Board of Supervisors of Franklin County, Virginia, at its meeting held on March 18th, passed a resolution authorizing the Clerk of the Board of Supervisors to pay each county official the county's portion of his salary and expenses on the first day of April, 1940, the warrant to be dated as of the date of the meeting of the Board of Supervisors, and not to be delivered until the first day of April.

"The resolution was passed because of the fact that the next meeting of the Board of Supervisors will not be until April 29th, and some of the county officials, and especially the janitor of the court house, wanted their money on the first day of April."

You ask as to the validity of this action of the board of supervisors and state that the purpose of the resolution is to enable each of the officers involved to receive his salary on the first of the month for the services rendered during the preceding month.

The purpose of the resolution of the board, of course, is a commendable one. However, I question the validity of such an action, on account of the provisions of sections 2724 and 2724-a of the Code. I call your particular attention to the requirements in section 2724-a that no board of supervisors shall order any warrant issued for any purpose other than the payment of a claim received, audited and approved as required by the preceding section. Section 2724 provides that the board of supervisors shall receive and audit all claims against the county. I do not see how on March 18 the board of supervisors can audit a claim for salary or expenses for the entire month of March. Obviously an expense account for an entire month cannot be audited in the middle of the month, for the board does not know how much the expense account will be; nor can a salary account be audited for an entire month, for the particular officer might die or resign during the month, or for

other reasons fail to perform the duties of his office. Our Court of Appeals, in the case of *Leachman v. Board of Supervisors*, 124 Va. 616, has emphasized the obligation of boards of supervisors to audit all claims before warrants are issued.

For the reasons stated, I regret to have to advise that, in my opinion, the proposed action of the board of supervisors does not comply with the statutes relating to its duties.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOND ISSUE—Election on—Type of Ballot—Manner of Voting.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 29, 1939.*

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

MY DEAR DR. HALL:

I am in receipt of your letter of August 28, enclosing some correspondence from Russell County. I observe from this correspondence that the opinion of this office is desired in connection with a proposed district bond issue election to be held in Russell County, pursuant to the provisions of sections 673, 2738, 2739 and 2740 of the Code. The questions upon which the views of this office are specifically desired are:

"First, whether the words 'for bond issue' and 'against bond issue' should be printed upon the same or separate ballots; and

"Second, if printed upon the same ballots, whether the positive method of marking a check or a cross preceding the proposition favored by the voter or the negative method of striking out the proposition opposed by the voter should be used."

In my opinion, it is plain from a consideration of section 2739 that the words "for bond issue" and "against bond issue" may be printed on a single ballot. It would be most inconvenient and unusual for two ballots to be used. The case of *County School Board v. Miller*, 164 Va. 334, is ample authority, in my opinion, for the use of one ballot.

The second question would seem to be answered in terms by chapter 362 of the Acts of 1938, adding section 197-a to the Code (Acts 1938, p. 577). This act of 1938, among other things, provides the affirmative method of voting shall be used, such as is now used in elections generally. Reference is made to this act for the guidance of the local authorities. You will observe that the sections under which the election is to be held provide for no other method of voting.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BONDS—Impounding of Automobile—When Seizure May be Made.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 27, 1939.

HONORABLE JOHN SNEAD,  
*Trial Justice, Chesterfield County,  
Chesterfield, Virginia.*

DEAR JUDGE SNEAD:

I am in receipt this morning of a letter from Honorable Alex Hamilton, Jr., in which he states that he is requesting, in your behalf, a ruling from me upon the question of whether or not a plaintiff who desires to have a car impounded in accordance with the provisions of section 2146 of the Code is required to give bond in order that such action may be taken.

He suggests that the following language in the second paragraph of the section, "If no such deposit is made or bond executed, the machine may be seized and impounded anywhere in the State, upon the order of a justice", had reference to the bond referred to in the first paragraph of said section. I have carefully considered the statute, however, and am unable to concur in the thought that this language was intended to relieve a plaintiff of giving such a bond. A procedure of this kind would be entirely foreign to all attachment proceedings and would subject a defendant to possible harassment from an irresponsible plaintiff without any protection whatever. I believe the better view is that the language quoted had reference to a failure on the part of a defendant to give a bond for the purpose of preventing his machine from being impounded. In other words, the statute seems to me to give to a defendant the option of either giving a bond to answer the judgment of the court, or else to permit his machine to be impounded by the justice after the plaintiff has given a bond to protect him should the litigation terminate favorably to the defendant.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BONDS—Surety on—Kind of Property Required.**

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

HON. ROBERT D. STONER, *Clerk,*  
*Circuit Court of Botetourt County,  
Fincastle, Virginia.*

MY DEAR MR. STONER:

I am in receipt of your letter of September 21, in which you ask my views on the following question:

"Having been recently appointed clerk of Botetourt County, and not being familiar with section 2850 of the Code, which prescribes that upon the qualification of a notary public he shall enter into bond with surety in the amount of not less than \$500, the writer would appreciate just what property and kind of property a personal surety should have before he can or should be allowed to sign a notary bond?"

As you state, section 2850 provides that each notary shall give bond with surety in a penalty of not less than \$500 in the circuit court of the county or corporation court of the city for which the notary is appointed. Section 279 of the Code

stipulates, among other things, that every bond required by law to be given before any court shall, unless otherwise provided, "be made payable to the Commonwealth of Virginia with surety deemed sufficient by such court, board or officer."

I hardly know how to advise you as to what property a personal surety should have. The kind of property that the surety has will necessarily be different in different cases, but the prime consideration of the clerk in accepting the bond should be the financial responsibility of the individual, and he may take into consideration every factor bearing on this point. Specifically answering your question, the statutes do not prescribe the nature of the property that the surety should have.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BOND—Treasurers—Penalty of—By Whom Fixed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 19, 1939.*

HONORABLE J. SOL WRENN, *Clerk,*  
*Greensville County,*  
*Emporia, Virginia.*

MY DEAR MR. WRENN:

I have your letter of December 13, with reference to fixing the penalty of the bond to be given by your county treasurer.

As you have observed, Virginia Code (Michie 1936) section 2698, after requiring that all treasurers and certain other officers shall give bond, provides that:

"The penalty of the bond of each officer shall be determined by the court, judge, or clerk before whom he qualifies \* \* \*."

I call your attention, however, to the further provision of this section, with specific reference to the bonds of treasurers, in the following language:

"The penalty of said bonds shall be such as the court or judge may require, but not less than thirty per centum of the amount to be received annually by him."

In this and other respects, this statute seems to be self-contradictory. I recently had occasion to discuss the statute with the Honorable E. Hugh Smith, Judge of the Twelfth Circuit, and we agreed that, while the form of this Act has been considerably mutilated by piecemeal amendments and its meaning is not altogether clear, the wiser and safer policy would be to have the penalty of each bond fixed by the judge of the court.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BONDS—BAIL—Recognizance and Cash Deposit—Proceedings for Forfeiture.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., September 12, 1939.

HON. PHILIP KOHEN,  
*Attorney for the Commonwealth,  
Buchanan, Virginia.*

MY DEAR MR. KOHEN:

I am in receipt of your letter of September 6, in which you present two cases where persons arrested on a criminal charge are admitted to bail upon their personal recognizance and a deposit of cash. Neither of the persons appeared on the day set for trial of the warrants. It seems that the cash was deposited with the officer admitting the individuals to bail and not with the clerk of the court, as prescribed by section 4973a of the Code. However, the trial justice has forfeited the cash bonds and deposited the moneys with the clerk of the court.

I agree with you that the provisions of section 4973a should have been complied with by the original deposit of the money with the clerk before admitting to bail, and I do not think that the statute authorizes the person admitting to bail to receive the cash, as was done in these cases. However, the situation now is that the money has found its way to the hands of the clerk, and the individuals admitted to bail have failed to appear and will probably never appear. In my view, they are now estopped to claim that the money has been improperly received.

Your next question is as follows:

"If proceedings can now be taken to forfeit that money, will you please advise me what proceedings should be taken when the *scire facias* is issued, if it cannot be served upon either defendant, they both being non-residents?"

Section 4978 provides that the justice shall enter the default of a person under recognizance in a criminal case in the proper book, which is the book in which the record of judgments is kept. I assume that this has been done or will be done. As you state, the *scire facias* cannot be served upon either of the defendants, because they are non-residents, but the purpose of the writ of *scire facias* to forfeit a recognizance is merely to give notice to the defendant of an application for award of execution upon the recognizance, to enable him to show cause why the recognizance should not be forfeited. In this case, where the *scire facias* cannot be served, I should simply let the record so show, and an execution not being necessary, inasmuch as the cash is in hand, it seems to me that it would be proper for the trial justice to direct the forfeiture of the cash and so advise the clerk, who may then dispose of the cash as provided by law. You will observe that section 4973a states that the same action shall be taken in cases of cash bond and the same proceedings had "so far as is applicable" as if the recognizance had been with surety instead of with cash, and the clerk, having the money, shall dispose of the same, if there be a judgment of forfeiture, in the same manner as other money received on account of forfeited recognizance.

In my opinion, the proceeding I have outlined complies with proceedings in cases as if the recognizance had been with surety "so far as is applicable".

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**BONDS—Indemnity—Where Payment Made Upon Lost Coupons.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 15, 1940.

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

DEAR MR. DOWNS:

I have your letter of March 4, enclosing one dated February 28 from Mr. C. R. Turner, Assistant Cashier of the Planters Bank and Trust Company of Chatham, Virginia, together with an indemnity bond executed by said bank and payable to Pittsylvania county. The bond recites the loss of certain coupons on county bonds representing interest due on such bonds to the extent of \$150.00, and is conditioned for the indemnification of the county against any further claim on account of such coupons. The bond is for the full amount of the coupons in question.

You request my opinion as to whether the county may authorize the bank to charge its account with this amount, taking such bond in lieu of the lost coupons.

While I find no express statutory authority for such procedure, it is clear that the bank is entitled to recover this amount upon giving such a bond, either by suit in equity or action under section 6242 of the Code (Michie 1936).

Since, therefore, the bank has a binding and enforceable claim against the county, conditioned only upon its giving such a bond, it is my opinion that the county may pay the same or authorize its account to be charged therewith.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**BOXING AND WRESTLING COMMISSION—Money Collected by—  
How Distributed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 20, 1940.

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

MY DEAR MR. DOWNS:

This is in reply to your letter requesting an interpretation of section 585(51)w of the Code of Virginia, which provides for the disposition of moneys collected by the State Boxing and Wrestling Commission and which reads in part as follows:

"All moneys collected by the Commission pursuant to the provisions of this Act shall be paid promptly into the State treasury. One-half of all such moneys collected, remaining after providing for the cost and expenses of administration, shall be apportioned and distributed by the State Treasurer, upon warrants of the Comptroller to the cities, counties and towns of the Commonwealth, in proportion to the amount collected from contests held and licensees resident in such respective cities, counties and towns \* \* \*."

You ask the following questions:

"1—Should fees collected from non-residents be retained in full by the Commonwealth or should such amounts be included in the collections to be distributed to the Commonwealth, cities, counties, and towns?"

"2—Should fees collected by the Commission from amateur boxers be retained in full by the Commonwealth or should they be included in the amounts collected to be distributed to the Commonwealth, cities, counties, and towns?

"3—In applying the cost and expenses of administration against one-half of the moneys collected to determine the excess distributable to cities, counties, and towns, should direct costs (i. e. those expenses which can be allocated specifically to any one locality) be applied against the portion of the moneys collected applicable to the locality and the remaining costs and expenses apportioned on the basis of moneys collected, or should all costs and expenses be deducted from one-half of the moneys collected and the remainder apportioned among the localities?"

Since section 585(51)w provides that all moneys collected shall be paid into the State treasury and that one-half of said moneys remaining after providing for the costs of administration shall be distributed to the cities, counties and towns, it is my opinion that all moneys collected by the Commission, including fees collected from non-residents and amateurs, should be included in the fund to be distributed to the Commonwealth, cities, counties, and towns.

With further reference to your second question your attention is called to the fact that the statute providing for the regulation of boxing and wrestling does not impose any license fee upon the individual amateurs or provide for licensing them as is done in the case of professionals and clubs. I am informed that the Commission, in order to regulate amateur boxing, merely registers amateurs and requires the payment of a small fee to cover the expense of such registration. In my opinion such fees, though to be included in the fund to be distributed between the Commonwealth and the localities, are not to be considered in determining the amount of money received from the cities, counties, and towns where the amateurs reside for the purpose of computing the percentage to be distributed to such localities.

This is true because the statute provides that the fund is to be distributed "in proportion to the amount collected from contests held and licensees resident" in the cities, counties, and towns. Since the amateurs are not licensees, the fees received from them are not moneys collected from licensees resident in such cities, counties, and towns.

In regard to your third question, I will first state that in my opinion the costs and expenses of administration should be applied, not against the one-half of the moneys collected which is to be distributed to the localities, but, rather, against the total of all moneys collected before any division is made.

I am further of the opinion that direct costs—i. e., those expenses which may be incurred in specific localities—should not be applied against the funds received from such specific localities, but, along with general overhead and all other expenses, should be applied against all money collected by the Commission. This is true because the statute does not provide for the allocation of the costs and expenses of administration, whether direct costs or general overhead, against the localities. It provides that the costs shall be paid out of the funds received and that of the funds remaining one-half thereof shall be distributed to the localities according to a given ratio.

It is my opinion that the following method should be used in determining the amount each locality is to receive:

From the total of all moneys collected by the Commission should be deducted the total of all expenses. This remainder is to be divided in two, one-half to be kept by the State and one-half to be distributed among the localities, each locality receiving a percentage thereof equal to the ratio which the amount collected from contests held and licensees resident in such locality bears to the total collected from contests held and licensees resident in all counties, cities, and towns.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CHECKS—Delivery of—What Constitutes—Deposit in Mail.**

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

HONORABLE JAMES W. PHILLIPS,  
*Director of Public Assistance,  
Department of Public Welfare,  
Richmond, Virginia.*

DEAR MR. PHILLIPS:

In your letter of December 2 you ask for my opinion as to what constitutes the delivery of a check under the law of Virginia. You have stated that you particularly desire to know whether depositing a check in the mails constitutes a constructive delivery.

What constitutes such a delivery of a check as will make it an enforceable obligation is a question which cannot be answered categorically but is one which depends upon the facts and circumstances, as well as the issues involved, in any particular case. In general, it may be said that delivery is complete when the drawer has evidenced an intent to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee or some third person for his use. *Howe v. Ould and Carrington*, 28 Gratt. (Va.) 1.

Delivery to a third person in order to be effective must be with the previous consent of the payee, otherwise such third person would be the agent of the drawer and not the payee. A deposit of the instrument in the mail, as designated by the payee, constitutes delivery and is effective from the time of the deposit. Whether or not deposit in the mail constitutes delivery in any particular case depends, of course, upon the intention of the parties, both drawer and payee, as indicated by their previous dealings. *Burr v. Beckler*, 106 N. E. (Ill.) 206; *Howe v. Ould and Carrington*, *supra*: 3 Am. Jur. page 808.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CITIES AND TOWNS—Jurisdiction—License Tax on Shows, etc.—Outside Limits.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 13, 1939.

HONORABLE GORDON LEWIS,  
*Member of House of Delegates,  
Tappahannock, Virginia.*

DEAR MR. LEWIS:

In your letter of July 12 you state that you are under the impression that Mr. Helms Crutchfield has requested a ruling from this office regarding the constitutionality of an ordinance of the Town of Tappahannock imposing a \$10 license upon shows operated outside the Town but within one mile thereof.

As yet I have received no request for a ruling upon this matter. However, I call attention to the case of *Robinson v. The City of Norfolk*, 108 Va. 14, in which the Supreme Court of Appeals of Virginia held that section 3006 of the Code of Virginia, which provides, in part, that "the jurisdiction of the corporate authorities of each town or city, in criminal matters, and for imposing and collecting a license tax on all shows, performances, and exhibitions, shall extend one mile beyond the corporate limits of such town or city" was unconstitutional, in so far

as it authorized towns and cities to levy a license tax upon such shows for the sole purpose of raising revenue to defray the general expenses of such towns and cities.

The court in this case did not attempt to decide whether or not the City of Norfolk could impose such a tax under its police power for the purpose of police regulation. The court pointed out that such a tax could only be valid when it was imposed to defray the expenses incident to the carrying out of the provisions of the police regulation, and held that since the tax imposed in that case was clearly levied solely for the purpose of raising revenue to defray the general expenses of the City it was invalid.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

### CITIES AND TOWNS—Sewers—Authority to Compel Connection With.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 5, 1940.*

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

MY DEAR MR. MORTON:

I am in receipt of your letter of December 30, enclosing copy of an ordinance of the town of Keysville. The effect of this ordinance, you say, is to require "each house which is occupied by human beings, which is within the corporate limits of the said town and where the sewer system is available, to be connected with the town's sewer system." The sewer system has recently been constructed by the town at a cost of \$40,000, and the ordinance recites that so far only "a few" people have made use of this health protective measure by making sewerage connection" with the system.

You ask my opinion as to whether the ordinance "would be enforceable against any person until it had first been established that his or her sewer system did not meet the requirements of the State Board of Health."

As you know, the question of the validity of an ordinance as applied to any particular case must be determined by the facts in such case. The ordinance has already been adopted and its validity in any case may now only be finally determined by a court of competent jurisdiction. For these reasons, I do not think I should attempt to express any official opinion, but I am glad to give you the benefit of my views on the principles involved for what they may be worth.

It must be assumed that the town had the authority to construct the sewer system. This authority may be expressly contained in the charter of the town, which is not before me, but it would seem in any event to be given by general law. See sections 3031 and 3079 of the Code. Where a health measure is adopted by a municipal corporation, I think it must be conceded that it is not the prerogative of the citizens of the municipality to determine whether or not they should comply with such a measure. Certainly the burden would be on a complaining citizen to prove that the measure was unreasonable or *ultra vires* or not applicable to him.

The question you present might be a subject of exhaustive research, which I am sure you will understand that I have not been able to make. However, I have found and refer you to a discussion of the question in McQuillin on Municipal Corporations, 2nd Edition, Vol. 4, p. 329. Not knowing whether this publication is available to you, I quote below section 1565, which discusses the matter of compulsory sewer connections:

"Power to regulate and control sewers and drains carries with it as a necessary incident thereto authority to compel, regulate and control all indispensable, desirable or convenient connections subject, of course, to the observance of private property rights. Accordingly express power to 'construct, establish and maintain drains and sewers' includes power to make reasonable regulations for tapping and connecting with the sewers. Laws sometimes confer upon persons entitled to connect with municipal sewers a right of action to enforce the privilege.

"Municipalities are generally authorized to compel property owners to make connection with a sewer within a reasonable distance when the public health requires it, at their own expense, and may enforce the requirement by appropriate ordinance penalties. So the municipal corporation may require property owners on sewered streets to connect their closets, bath tubs, etc., with the sewer, and may enforce the observance of such a regulation by fine. The municipality may fix the charge at which private persons or corporations may connect with its sewers and drains. But the charge for the privilege of making connections must be reasonable, not arbitrary, and uniform, not discriminatory. Where the fee for connecting with a municipal sewer is fixed by ordinance, the authorities have no right to demand more than the amount so fixed. The municipality may establish a uniform charge for building lateral or connecting sewers from the property line to the public sewer, and the fact that some property is closer to the sewer, therefore requiring less work, than others, does not render the charge unreasonable.

"A municipality may reserve in itself the exclusive right to construct the lateral sewers or connections between the proper line and the public sewer. So a municipality may connect a district drainage system, which has been constructed at the expense of the inhabitants of that district with other systems and thus devote its use to the inhabitants generally of the municipality. Furthermore, a municipal corporation has the right to say what is a proper connection with its sewers and to require that connections be made by its authorized agent and under the discretion of its inspector and that only suitable material be used in making the connection. But it cannot require those desiring to connect their premises with a sewer to purchase the material from the municipality nor employ the city to do the work.

"Laws often provide that public sewers may be connected with any other sewer of any class, or with some natural course of drainage. Under a charter requirement that every district sewer shall connect with a public sewer or some natural course of drainage, a district sewer may be connected with another district sewer if the latter connects with a public sewer. But such a requirement is not complied with by a connection with a stream or ravine which is not the base or basin of any part of the sewer system. Nor is it complied with by a connection with an abandoned creek bed which the construction of streets had converted into a pond."

Certainly, I would not be willing to say that the ordinance in question is invalid in any case, and, in view of the principles as they seem to have been established, I am of opinion that the town of Keysville would be amply justified in attempting to enforce its ordinance. As I have stated, its validity as applied to any contested case can only be determined by the courts. I may say that I do not think the burden is upon the town to first prove in any case that any individual's sewer system does not meet the requirements of the State Board of Health.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CITIES—SECOND CLASS—Election of County Officers.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 26, 1939.

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

DEAR MR. RANDALL:

I have your letter of July 25, in which you state that "South Norfolk, a city of the second class located in the County of Norfolk, has for its official family a mayor, treasurer, commissioner of the revenue and city sergeant; also five members of the Common Council and City Attorney. The charter provides for its Police Department."

You ask if the electorate of South Norfolk is entitled to vote in the election for the sheriff of Norfolk County, where South Norfolk has a city sergeant and Police Department which operate independently of Norfolk County.

Section 2894, which is a part of the chapter of the Code dealing with cities of the second class, provides:

"The Commonwealth's attorney, the clerk of the circuit court and the sheriff of the county, of which the city is a part, whether heretofore or hereafter elected or appointed, shall continue to exercise and have the same rights and privileges, and perform the same duties, and have the same jurisdiction, and receive the same fees therefor in such city as they did in such town before such municipality became a city; and the qualified voters residing in such city shall be entitled to vote for said officers at the general election for county officers and the wards of the city shall be treated, for such election purpose as precincts of the county, as if such city had not been declared to be a city of second class."

Sections 2887 and 2893 provide that cities of the second class shall have such officers, including city sergeants, as you mentioned in your letter as constituting the official family of South Norfolk. It is my opinion, therefore, that the electorate of South Norfolk is entitled to vote in the election for the sheriff of Norfolk County.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**CLERKS—CIRCUIT COURT—Authority of, to Issue Execution on Judgment Rendered by Trial Justice.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 6, 1939.

MISS JOSEPHINE M. SCHAEFFER, *Clerk,*  
*Circuit Court of Wythe County,*  
*Wytheville, Virginia.*

MY DEAR MISS SCHAEFFER:

I am in receipt of your letter of November 3, in which you ask if you have authority to issue executions and summons in garnishment in the case of a civil judgment rendered by the trial justice of your county, all of the papers in the case now being on file in your office, having been placed there pursuant to section 4987-j of the Code, the judgment having been rendered on September 28, 1938.

In my opinion, under the provision of section 4987-j, the clerk of the circuit court has authority to issue executions on this judgment. It is my opinion also that, pursuant to and in accordance with the provisions of section 5509 of the Code, the clerk of the court also may issue a summons in garnishment. It seems to me that section 4987-j of the Code contemplates that after the papers in such a case have been returned by the trial justice to the clerk's office of the circuit court, the clerk of such court then has the same power and authority to issue an execution and summons in garnishment as if the judgment had been rendered in his court.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**CLERKS—DEPUTY—Compensation of—While Performing Duties of Clerks.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 24, 1940.

MISS CORINNE BARNETT, *Deputy Clerk,*  
*Corporation Court City of Winchester,*  
*Winchester, Virginia.*

MY DEAR MISS BARNETT:

I am in receipt of your letter of June 12, reading as follows:

"On April 22, 1940, the clerk of the corporation court of Winchester died. Since his death I, his deputy, have performed all of the duties of the office in exact accordance with the directions of section 136 of the Code.

"On the day following the death of the clerk the Auditor of Public Accounts, through one of his deputies, conducted an audit of the deceased clerk, closed the books of the clerk, opened a new set of books in my name, transferred all funds to me together with all of the public property in the office, such as stamps, seals, wafers and the like, and, generally, charged me with responsibility for the conduct of the office, including the duty to account for public funds coming into my hands.

"Since then I have conducted the office and performed its duties, and the personal representative of the deceased clerk has neither exercised or attempted to exercise any rights in the office, nor has she undertaken to assume any responsibility therefor.

"I contend that I am entitled to the fees and emoluments of the office between the date of the death of the clerk and the qualification of a clerk appointed by the corporation court. I respectfully request an opinion from you as to whether I am right in this contention."

Section 136 of the Code provides that "upon the death of the clerk of a court the deputy clerk thereof shall perform all of the duties of the clerk until a clerk shall be appointed and qualified according to law."

I am advised that the Compensation Board has ruled under the circumstances stated by you that, while the deputy is acting as clerk he is entitled to the compensation provided by law for the clerk. I concur in the opinion of the Compensation Board. Of course, while the deputy is receiving compensation as clerk he is not entitled to receive any salary or other allowances as deputy clerk.

You will understand that, in case the matter is contested by the personal representative of the deceased clerk, it can only be finally decided by the court.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Duties Where Fines Certified by Police Justice.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 19, 1940.

HONORABLE ELLIOTT F. HOFFMAN,  
*Clerk of the Corporation Court,*  
*Alexandria, Virginia.*

MY DEAR MR. HOFFMAN:

This is in reply to your letter of April 13, in which you request my opinion upon the question whether or not it is your duty to issue a writ of *feri facias* for fines and costs contained in a list of such fines and costs imposed by the Civil and Police Justice of the City of Alexandria for violation of city ordinances, said list having been certified to you by the said Civil and Police Justice and said certification purporting to have been made by virtue of section 2550 of the Code of Virginia.

It necessarily appears from your letter that the Civil and Police Justice has construed section 2550 of the Code as providing for the certification by him as justice to you as clerk of fines and costs for violation of city ordinances. If his construction of said section 2550 is correct, then it is my opinion that by virtue of sections 2551 and 2552 it is your duty to issue a writ of *feri facias* for each of said items so certified. The entire question of your duty clearly depends upon whether or not the Civil and Police Justice has correctly construed this section.

It has always been the practice of the Attorney General to carefully refrain from trespassing upon the jurisdiction of the courts in giving opinions upon legal matters and to avoid what might appear as acting in the capacity of reviewing the action of any court. This is a function which, under our Virginia system of jurisprudence, is vested in the superior courts which alone have jurisdiction to review the action of courts of inferior jurisdiction.

Section 2551 imposes upon the corporation court the duty to examine the list provided for by section 2550 and where the list shows that executions have not been issued for said fines appearing on said list to order the clerk to issue the same in the manner provided by law.

In accordance with our well established practice, I feel that the Attorney General should not, under the circumstances, express an opinion upon the question of your duty to issue these executions, but that, if you desire the opinion of the corporation court and its judgment upon said question, you may present the list to the court and call its attention to the statutory provisions above referred to so that said court may order such executions issued, if so advised.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Duty of, to Permit Inspection of Records.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 4, 1940.

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 23, in which you ask the following question:

"I shall thank you to give me your opinion as to whether it is the duty of a court clerk to allow a representative of a newspaper to examine the plead-

ings and evidence in a pending suit where the pleadings and evidence involve mental capacity, improper conduct and other matters of a personal nature to the litigants."

Section 3388 of the Code of Virginia provides in part as follows:

"The records and papers of every court shall be open to inspection by any person, and the clerk shall, when required, furnish copies thereof, except in cases where it is otherwise specifically provided."

I have not been able to find any statute which would authorize you to refuse to any person the privilege accorded by the section unless, as the section says, such inspection should interfere with the business of the office or with the reasonable use of the same by the general public. There may be some other statute dealing with the subject, but I have not been able so far to locate it in the Code. As a general principle, I would say that the records of a court are under the general supervision of the judge thereof, and I would certainly confer with the judge before refusing anyone the privilege of inspecting the records.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**CLERKS—Fees—In Criminal Cases—By Whom Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 13, 1939.

HON. CARTER B. GALLAGHER, *Clerk,*  
*Circuit Court City of Clifton Forge,*  
*Clifton Forge, Virginia.*

MY DEAR MR. GALLAGHER:

I am in receipt of your letter of July 10, from which I understand that you desire the opinion of this office on what fees of the clerk of a court should be taxed as costs in criminal cases.

Section 3504 of the Code provides that the "fees prescribed by law for services \* \* \* of clerks of court \* \* \* in all cases of felony, and in every prosecution for a misdemeanor, if not paid by the prosecutor, or in cases of conviction by the defendant, and in cases where there is no prosecutor and the defendant shall be acquitted, or convicted, and unable to pay the costs, shall be paid out of the State treasury, unless now or hereafter otherwise provided by law, when certified as prescribed by section 4961 of the Code \* \* \*." The section then goes on to provide for the judge to certify that he has examined the papers, etc.

It seems to me plain from the above quotation that the clerk is entitled to be paid out of the treasury in the prescribed circumstances all of the fees allowed by law for services rendered by him in criminal cases.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Fieri Facias—Garnishment Proceedings.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 29, 1940.

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

MY DEAR MR. THOMA:

I have your letter of May 10, in which you request the opinion of this office as to whether a clerk may issue either a *fieri facias* or a summons in garnishment on an abstract of judgment docketed in his office, where the judgment has been rendered in the circuit court of some other county.

I am unable to find any authority for issuing such process on a judgment, except out of the clerk's office of the court in which the judgment was rendered, or the clerk's office to which the judgment was returned by a justice within the same county.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Recordation—Compliance With Statute.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 29, 1940.

HONORABLE EVA W. MAUPIN,  
*Clerk, Circuit Court of Albemarle County,*  
*Charlottesville, Virginia.*

MY DEAR MRS. MAUPIN:

I am in receipt of your letter of May 23, in which you refer to chapter 155 of the Acts of 1940 (page 248), providing for the filing and docketing of chattel mortgages or deeds of trust embracing live stock or poultry.

It would appear that the second paragraph of the new section is specific as to what the clerk shall do, and I am of the opinion that this requirement must be complied with by the clerk. If you record the entire instrument in the Miscellaneous Lien Book, I doubt if this will be a substantial compliance with the section.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CLERKS—Recordation Fees—Public Service Corporations.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 26, 1940.

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

MY DEAR MR. BARHAM:

I have your letter of June 24, from which I quote as follows:

"I notice in the 1940 Acts of the General Assembly, page 282, chapter 177, which amends section 5189 of the Code of Virginia, says in its second clause

that the clerk may charge a fee of 25 cents for docketing a contract, except in the case of public service corporations, when he may charge a fee not exceeding 50 cents.

"As there is a grave doubt in my mind that a clerk would have a right to charge a different fee to different parties for the same service performed, I am writing to ask that you give me an opinion as to this phase of it."

The 1940 Act makes no change as to the fees that may be charged by the clerk for the docketing of conditional sales contracts. In other words, the fee of 50 cents which a clerk may charge public service corporations has been authorized for many years, and no public service corporation so far as I know has questioned it.

I suggest, therefore, that it is entirely proper for the clerks to be governed by the provisions of the section.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### COMPTROLLER—Scope of Authority.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 4, 1940.

DR. SAMUEL P. DUKE, *President,*  
*Madison College,*  
*Harrisonburg, Virginia.*

MY DEAR DR. DUKE:

I am in receipt of your letter of May 2, in which you inquire concerning the source of authority of the State Comptroller to audit bills presented for payment and to refuse to approve same if in his opinion they should not be paid.

This authority is given to the State Comptroller by section 585 (69) of the Code (Michie, 1936). The pertinent portion of the section reads as follows:

"(k) The comptroller shall not issue any disbursement warrant unless and until he shall have audited the bill, invoice, account, payroll or other evidence of the claim, demand or charge and satisfied himself as to the regularity, legality and correctness of the expenditure or disbursement, and that the claim, demand or charge has not been previously paid. If he be so satisfied, he shall approve the same; otherwise, he shall withhold his approval. \* \* \*"

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### COMPTROLLER—Authority of—To Regulate Items on Travel Vouchers.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 21, 1940

HONORABLE LEROY HODGES,  
*Comptroller, Commonwealth of Virginia,*  
*Richmond, Virginia.*

MY DEAR COLONEL HODGES:

I am in receipt of your letter of May 16 from which I quote as follows:

"A question has been raised by members of the staff regarding the legality of charges for tips as such on travel vouchers. To my knowledge there is no

legal prohibition against charging tips; however, it has been the practice of this office over a period of time to disallow such items when set forth on travel vouchers. It is, of course, well known that the State is paying tips buried in other items of expenditure.

"I would like your opinion on whether or not there is anything in the law to restrain the Comptroller from paying tips and other gratuities on travel vouchers and from issuing administrative regulations governing the amounts and types of such gratuities that will be honored for payment."

As you state, it is "well known that the State is paying tips buried in other items of expenditures". It is also well recognized that the payment of certain gratuities while traveling, by long established custom, is considered as compensation for actual services rendered, and as a necessary expense. Indeed, my information is that it is generally the case that the wages of porters, waiters and bell boys, for example, are fixed by their employers upon the assumption that gratuities will be paid by the public.

Under these circumstances, I see no reason why the State should encourage its officers and employees to stultify themselves, in a sense, by "burying" these necessary items in other items of expense.

It is my opinion, therefore, that the Comptroller may reimburse State employees for reasonable expenditures under some such classification as "services rendered by porters, waiters, bell boys, etc."

You also ask if the Comptroller may issue administrative regulations governing the amounts and types of such gratuities that would be honored for payment. Unquestionably, the State Comptroller may audit expense accounts submitted for payment. It seems to me entirely proper, therefore, that the Comptroller should announce what in his opinion, constitute allowable expenses of this character. If such an announcement be termed a regulation, I suggest that it should not be so rigid as to preclude the consideration of each expense account on its own merits, for it is generally accepted. I think, that the types and amounts of customary gratuities vary in different localities and under differing circumstances.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### COMPTROLLER—Payment of Salaries.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 16, 1940.*

HONORABLE LEROY HODGES,  
*State Comptroller,*  
*Richmond, Virginia.*

DEAR COLONEL HODGES:

This is in reply to your letter of March 1, in which you request my opinion upon the following questions:

(1) When the general Appropriation Act provides that "out of this appropriation shall be paid the following salaries and wages only", and establishes a salary of a State employee to be paid from this appropriation at "not exceeding" a certain figure, is the Comptroller's Office justified in paying out of said appropriation a higher salary rate when fixed by the department head and approved by the Governor, as provided in section 2 of the Act, where the salary is in excess of \$1,000 per annum?

It has been the custom to use the phrase "not exceeding" preceding the amount fixed for the salary of various officers and employees of the State in appropriation acts for many years past in cases where the General Assembly did not undertake

to fix the specific salary, but intended to confer upon the department head the authority to pay a sum less than that fixed in the act.

The administrative interpretation which has been placed upon the use of these words by the General Assembly has been that, in order to pay an employee or officer an amount greater than the figure following the words "not exceeding", the approval of the Governor is required and the procedure established by the Comptroller's Office must be complied with. This usually has consisted of filing a memorandum form containing the information prescribed by the department.

The approval of the Governor in cases involving \$1,200 per year is provided for by Chapter 88 of the Acts of 1926. This Act is carried into Michie's Code and given the unofficial number of 3477a. Section 2 of the Appropriation Act is intended more or less to parallel and amend the 1926 Act, except that the Governor's approval is provided for in cases of salaries in excess of \$1,000 per annum.

"(2) Assuming the same circumstances as those referred to in (1) above, may the salary of a State employee be increased provided the additional amount is paid from another appropriation, the use of which is not specifically restricted to other purposes?"

I do not have a clear understanding of exactly what is meant by this question. Generally speaking, State officers or employees' compensation should be derived from the appropriation of the department in which they are employed. I suggest that, if any particular case arises in which you desire the advice of this office, you refer it to this office when it is presented to you.

Your third question is, I think, answered by what I have said in reply to your first question.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### COMPTROLLER—Travelling Expenses—When Paid By State.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 29, 1940.

HONORABLE LEROY HODGES,  
*State Comptroller,  
Richmond, Virginia.*

MY DEAR COLONEL HODGES:

I am in receipt of your letter of March 15, in which you refer to our conversation relative to the "purposes" for which State officials might travel at the expense of the State. You further write:

"One question which I specifically asked was whether or not a head of a department could legally charge his traveling expenses in attending local meetings upon invitation from responsible groups of citizens, such as a Rotary Club or a Home Demonstration Club, held in the State to discuss subjects pertaining to his official work and to the operations of State and local government, etc.

"Another question was whether or not traveling expenses incurred by a head of a department could legally be paid out of State funds in cases where the official concerned was traveling on a mission involving official business for the State assigned him by the Governor, but not necessarily directly involved in his usual and normal official duties.

"A third question was whether travel expenses incident to participation in public events in official capacity could be legally charged to the State."

I agree with you that the question of whether any particular expense account should be paid out of public funds is one to be determined by the facts present in

each case. It would be difficult to lay down any hard and fast rule to apply to all cases. Certainly I think the expense must be incurred in connection with the official business of the State or by an officer in his official capacity. By way of illustration, I think it would be a legitimate public expenditure to reimburse an officer for his expenses in attending, upon invitation, a meeting of a group of responsible citizens for the purpose of discussing subjects pertaining to his official work, but I doubt the propriety of paying such expenses where the officer attends for the purpose of discussing miscellaneous subjects which may be of public interest, but not connected with his duties. So, also, I think that, if the attendance of an officer upon a public event or meeting will serve to increase his efficiency in the discharge of his duties or to further the interests of the State, the expense of such attendance may be paid by the State.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COMPTROLLER—Payment for Services Performed in Violation of Statute.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 2, 1939.*

HONORABLE LEROY HODGES :  
*State Comptroller,  
Richmond, Virginia.*

DEAR COLONEL HODGES :

This is in reply to your letter of November 30, in which you request my advice as to what disposition should be made of claims against the Commonwealth by persons who completed certain printing jobs placed with them by State Departments in accordance with the custom which has prevailed for many years, but which this office recently held to be in violation of the statutes relating to public printing. You state that the vendors have rendered the required services in good faith, and in conformity with such past custom.

In my opinion, under these circumstances, if you believe that the State has actually received the benefit of the services rendered and you think the claims just, you would be acting within the proper scope of your authority in paying same.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COMPTROLLER—Expense Vouchers—Convention of Highway Officials.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 18, 1939.*

HONORABLE LEROY HODGES,  
*State Comptroller,  
Richmond, Virginia.*

MY DEAR COLONEL HODGES :

I have your letter of November 17, in which you request my opinion upon the question whether or not it is your duty to authorize the issuance of warrants in payment of certain vouchers representing expenses incurred by the State Highway Department in connection with the annual convention of the American Association of State Highway Officials, held in Richmond October 9-13, 1939.

All of these items appear to have been approved by the State Highway officers as proper expenditures in connection with the said convention, and I see nothing on the face of any of them which would show that their conclusions and judgment are incorrect. They seem to be such items as would be normally incurred in such a convention.

As to the authority of the State Highway Department to make these expenditures, in my opinion this would depend upon whether or not acting as the host of this convention could be said to be in reasonable furtherance of the program of the Highway Department in the construction and maintenance of highways. I am attaching hereto a letter from Mr. Shirley, giving in some detail the functions of the Association and the benefit the Virginia Highway Department derives from it.

It appears that the State Highway Department undertook to act as the agency representing Virginia in acting as host to this Association after a conference with the Governor, and with his approval. Invitations to the Association on behalf of the State were issued by the Governor, and the expenditures were incurred after due discussion and authorization by the entire Highway Commission and not merely by one of its officers.

Under all of the circumstances, I do not believe that the Comptroller would be authorized to conclude that these expenses are not legitimate and proper expenditures in furtherance of the purposes, objects, and duties of the State Highway Commission. The Legislature has not undertaken to prescribe in detail the particular items for which the appropriation shall be expended. Since the Governor and the Highway Commission are unanimous in their belief that the expenditures are beneficial to the State and are worth while in the public interests, it is my opinion that the Comptroller is amply justified in issuing warrants pursuant to the invoices submitted.

I am returning herewith the invoices, together with the letter from Governor Price approving the expenditures, and also a copy of the letter from Mr. Shirley setting out the functions and purposes of the American Association of State Highway Officials.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COMPTROLLER—Commission Promoting Uniformity of Legislation—  
Traveling Expenses.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 29, 1939.*

COLONEL LEROY HODGES,  
*State Comptroller,  
Richmond, Virginia.*

DEAR COLONEL HODGES:

Some days ago you informally inquired of this office whether any one member of the commission appointed under chapter 173 of the Acts of 1936 may be paid traveling expenses in excess of \$100 in any one year out of the 1938 appropriation to that commission.

At that time it was pointed out that the Act just referred to expressly provides that:

" \* \* \* The said commissioners shall receive no compensation for their services, but their necessary traveling expenses *not to exceed one hundred dollars each per annum*, shall be paid out of any funds in the State treasury not otherwise appropriated \* \* \* " (*Italics supplied*).

So much of the Act as constitutes an appropriation of funds necessarily expired

at the end of the current (1936-1937) biennium, or, at most, six months thereafter. Constitution of Virginia, section 186. Accordingly, the legislature in 1938 made an appropriation of \$400 to the commission "for promoting uniformity of legislation," without further provision as to how this sum should be used.

There being nothing in the Act of 1936 confining to the current biennium the effect of any of its provisions, and only the appropriation itself being limited by the Constitution, this office verbally advised you that subsequent blanket appropriations should be expended only pursuant to the limitations set out in the original Act, including the provision that the commissioners themselves should receive no compensation except traveling expenses "not to exceed one hundred dollars each per annum".

I now have your letter of August 24, enclosing one from the Honorable Robert T. Barton, Jr., from which it appears that Major Barton, as a member of the commission in question, has actually incurred traveling expenses in excess of \$100 and inquired of you whether he can be reimbursed for the same out of the 1938 appropriation. You request my written opinion upon the question.

Since it thus appears that a contrary view of the law has been acted upon, I regret that I can find no grounds for reversing my former conclusion in this matter. That conclusion, however, seems to me inescapable, and I must again advise that in my opinion no member of the commission established under Acts 1936, chapter 173, should be paid traveling expenses in excess of \$100 per annum.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### COMPENSATION—Where Not Specifically Provided—Allowance of, by Court.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 24, 1939.

HON. ROBERT T. WINSTON,  
*Trial Justice,*  
*Hanover, Virginia.*

MY DEAR MR. WINSTON:

I refer to my letter of October 13, dealing with the question as to whether a sheriff is entitled to mileage where he takes a prisoner in jail awaiting trial to the place of sitting of the trial justice for trial. You will recall that I expressed the view that section 3508 of the Code could not be construed to allow the officer mileage for the trip that he makes in taking the prisoner from jail to the place of trial. I am of opinion that this conclusion is correct.

However, in connection with this problem I call your attention to section 4960 of the Code and especially to that portion of it which provides that:

"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 the case is may allow therefor what it deems reasonable \* \* \*."

Certainly it is true that no other section of the Code provides any compensation for this service which the officer renders in taking the prisoner from jail to the place of trial. I suggest, therefore, that the quoted provision of section 4960 of the Code is broad enough for the trial justice, in his discretion, to allow a reasonable compensation for this service. The certificate of allowance, of course, should be made in accordance with the provisions of section 4960 and the sections immediately following.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CORPORATION COMMISSION—Report of Examination by—When  
Filed as Public Document.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 19, 1939.*

STATE CORPORATION COMMISSION,  
*State Office Building,  
Richmond, Virginia.*

GENTLEMEN:

This is in reply to your letter of September 16, in which you request my opinion upon the question whether or not under the provisions of section 4184a of the Code the final report of an examination of a life insurance company may be made public immediately after the company examined accepts the same in writing and also makes a written request that it immediately be made a public document and open to public inspection.

The Code section referred to contains this provision:

"If within thirty days after the final report of examination has been submitted to it, the company examined has neither notified the commission of its acceptance and approval of the report nor requested to be heard thereon, the report shall thereupon be filed in the office of the State Corporation Commission as a public document and shall be open to public inspection."

You state in your letter that the tentative report of the examination has already been submitted to the insurance company and that a hearing has been had with respect to certain objections made by the company to the inclusion in the final report of certain matters contained in the tentative report.

Under these circumstances, it is my opinion that, upon notification to the Commission by the company examined of its acceptance of the final report and request that same be made public, it is within the spirit and purpose of the Code section referred to that said request may be complied with by the Commission.

Yours very sincerely,

ABRAM P. STAPLES,  
*Attorney General.*

**CONSERVATION COMMISSION—Sponsoring of Projects by.**

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

HONORABLE N. CLARENCE SMITH, *Chairman,*  
*Virginia Conservation Commission,*  
*Richmond, Virginia.*

DEAR MR. SMITH:

I have your letter of August 7, with enclosures, and the documents forwarded to me in connection therewith by the Work Projects Administration of Virginia.

You request my opinion as to the authority of your commission to act as official sponsor for certain projects to be administered by the Work Projects Administration, designated, respectively, "State-Wide Records Project," "State-Wide Music Project," "State-Wide Writers' Project," and "State-Wide Art Project."

From the documents before me, it appears that these projects are to be financed partly through Federal funds and partly through contributions which have been made available by various public bodies, civic organizations, etc., throughout the State.

A major objective of these projects is to collect, preserve, and make available to the public native projects of artistic and historical value, and to assemble and publish information bearing on the historical background of Virginia communities, homes, and public records.

It is the opinion of this office that the Virginia Conservation Commission may properly undertake the sponsorship of these projects under its general statutory powers to cooperate with organizations engaged in publicizing the resources of the State or in activities similar or related thereto.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

## CONCILIATION AND MEDIATION, BOARD OF—Constitutionality.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 22, 1939.

HONORABLE W. R. SHANDS, *Director,*  
*Division of Statutory Research and Drafting,*  
*Richmond, Virginia.*

DEAR MR. SHANDS:

You have requested me to consider the tentative draft of proposed legislation providing for the creation of the Virginia Board of Conciliation and Mediation and the regulation of the conduct of employers and employees in regard to strikes and lockouts as a result of disputes over wages and hours. You request my opinion regarding the constitutionality of certain provisions of the proposed legislation.

Under the provisions of the Act, the board of conciliation and mediation would be established with power to investigate the matters involved in any dispute between employers and employees over wages and hours. It would be the duty of the board to attempt to bring about a settlement of the dispute, or, if unable to do so, to render a decision setting forth its findings of fact and expressing its opinion as to the manner in which the dispute should be settled and have the same published.

The legislation would not require either the employers or employees affected in any case to be bound by the board's decision, but would make it unlawful for the employers to cause any lockout or the employees to participate in any strike before the questions involved in any dispute shall have been referred to the board, or before four days shall have elapsed after the board shall have rendered its decision. The board is given twenty days, at most, in which to render its decision after the matter has been referred to it.

The proposed legislation, in effect, compels the employers and employees involved in an industrial dispute to submit to investigation of their dispute by a disinterested state agency and prohibits strikes and lockouts pending the report of the investigating agency.

The constitutional limitations to be considered are those forbidding the deprivation of property and liberty without due process of law and those forbidding involuntary servitude. While it is recognized by the Supreme Court of the United States that the freedom to contract or to refuse to contract is protected by the due process clause, it is also recognized that the Constitution does not recognize an absolute or uncontrollable liberty and that liberty and property rights under the Constitution are necessarily subject to the restraints of regulation which is reasonable in relation to its subject and which is adopted in the interests of the community. See *West Coast Hotel Company v. Parrish*, 300 U. S. 379.

The proposed legislation, since it does prohibit strikes and lockouts pending investigation by the board, does interfere, though the interference is comparatively slight and limited in time, with the freedom of the parties to the dispute. How-

ever, it is my opinion that such an interference is justified as a reasonable exercise of its police power by the Commonwealth.

That strikes and lockouts and other forms of industrial disputes are wasteful in the extreme and cause undue hardships to the general public is a matter of common knowledge. That the people of the Commonwealth are vitally interested in promoting a condition of permanent industrial peace is equally obvious. Legislation which is reasonably adapted to that end and which does not impose undue restrictions upon the freedom of private individuals is, in my opinion, constitu-

A number of states have, in recent years, passed legislation similar to that proposed in this instance. However, the only such statute which has been passed upon by a supreme court of a state is that of Colorado. The Colorado statute, by its terms, applied only to industries "affected with a public interest."

The Supreme Court of Colorado in the case of *People v. United Mine Workers*, 70 Colo. 269, 201 Pac. 54 (1921), held that the statute, as applied to the mining industry, did not violate the due process clause of the Federal Constitution nor the provisions of the Thirteenth Amendment forbidding involuntary servitude, the Court saying:

"There is no involuntary servitude under this Act. Any individual workman may quit at will for any reason or no reason. There is not even a prohibition of strike. The only thing forbidden is a strike before or during the commission's action."

In holding that the Act was such a reasonable exercise of the police power as not to be a violation of due process, the Court seemed greatly influenced by the fact that the law was applicable only to industries "affected with a public interest."

However, in the recent case of *West Coast Hotel Company v. Parrish*, *supra*, the Supreme Court of the United States held that a state, to protect the health, safety, and welfare of its people, may interfere with the liberty of contract of those engaging in ordinary business enterprises, to the extent of fixing the minimum wages of women. It will be seen, therefore, that the "public interest" justifying regulations affecting wages and hours and other industrial relationships is the public interest arising from an evil which affects the public at large and not necessarily the interest which the public has in businesses traditionally known as those "affected with a public interest."

While it is a question which can ultimately be determined only by the courts, it is my opinion that the interest which the public has in promoting permanent industrial peace is sufficiently great to warrant the Commonwealth in enacting legislation which only imposes reasonable restrictions upon the right to strike or declare a lockout, as does the legislation under consideration.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## CONSTITUTIONAL LAW—General and Special Laws—Classification of Counties and Cities.

### Fee System—Law Abolishing—Constitutionality.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL.  
RICHMOND, VA., August 24, 1939.

HONORABLE WILLIAM R. SHANDS, *Director*,  
*Division of Statutory Research and Drafting*,  
*Richmond, Virginia.*

DEAR MR. SHANDS:

In your letter of August 14, 1939, you state that the proposal to pay sheriffs of counties and sergeants of cities salaries in lieu of fees is now before the Vir-

ginia Advisory Legislative Council for consideration. You refer to Senate Bill No. 139, introduced during the last session of the General Assembly, the provisions of which, designed to carry this proposal into effect, listed the several counties and cities of the State by name and placed them into several groups for which minimum and maximum compensation limits were prescribed.

You request my opinion as to whether or not a statute fixing the compensation of sheriffs by such a method would violate section 110 of the Constitution of Virginia, which provides that the compensation of sheriffs shall be prescribed by general law.

The bill introduced in 1938 provided that the sheriff of each county was to be paid a salary of not less than \$1,200 nor more than \$7,500, half of which was to be paid by the Commonwealth and half by the county. The duty of fixing the actual salary to be received by each sheriff was imposed upon the State Compensation Board and the Board of Supervisors of such sheriff's county, with a decision by the Circuit Court of such county in case of disagreement.

The provisions of the 1938 bill, naming all of the counties of the State and placing them into various groups for which different minimum and maximum limits of compensation were prescribed, were expressly stated to be a mere guide to and not binding upon the authorities upon whom the duty of fixing the actual salary of each sheriff was imposed.

It is my opinion that an Act, following the same method used in the 1938 bill, would not violate section 110 of the Virginia Constitution, since the minimum compensation of \$1,200 and the maximum of \$7,500 applied alike to all counties and the method of determining the actual salary to be paid the sheriff of each county was prescribed for all counties.

Legislation which lists the various counties by names and places them in groups for which different minimum and maximum limits of compensation are definitely prescribed, instead of being suggested merely as a guide as was done in the 1938 bill, presents a more difficult problem. Of course, legislation which classifies counties by some such reasonable and general method, as by population, and assigns the several salary brackets to the various classes would be general within the meaning of the Constitution.

In my opinion, legislation applying to all the counties of the State and grouping them by name could be a general law if certain circumstances exist. The case of *Martin's Ex'rs v. Commonwealth*, 126 Va. 603, furnishes authority for this view. In that case the "West fee bill", which classified the counties according to population but limited the classification to the census of 1910, was held to be a general law. It was contended that the classification there used was not so framed as to adjust itself automatically to future changes in population.

The court held that this was no objection, since the Act applied to and operated upon the whole State at the time of this enactment and rested upon a reasonable classification. The court appeared to be bolstered in its decision by the fact that there were provisions in the Act that indicated it was only a temporary provision, and that the Legislature was relying upon future legislation to provide for the occurrence of a change in the population of counties which would necessitate a reclassification.

The same objection raised against the "West fee bill", concerning the inelasticity of the classification, could be raised against an Act which merely named the counties and placed them in different classes without stating the basis of the classification. This objection is met by the reasoning of the court in *Martin's Ex'rs. v. Commonwealth*, *supra*, to the effect that an Act territorially complete at the time of its passage would be general. However, as was expressly recognized in that case, the Act must not only be territorially complete, but the classification used must be reasonable and germane to the subject.

This was expressly so held in *Shelton v. Sydnor*, 126 Va. 625, decided the same day as *Martin's Ex'rs. v. Commonwealth*, *supra*. The statute involved in the *Shelton Case* dealt with the compensation of the members of Boards of Supervisors of counties and classified the counties according to population, but then proceeded to except from the general classification fifteen named counties and provided a

different compensation for the supervisors thereof. The Act was territorially complete, though this feature was not discussed by the court. The court held that the separation of the fifteen named counties from the general classification was purely arbitrary and, therefore, null and void, and, quoting from an Indiana case, said:

" \* \* \* 'A clause or provision special in its character applying to particular individuals, particular places or particular cases, is none the less special, because inserted in the most general of public acts.' \* \* \* " (126 Va. 637.)

Therefore, in my opinion, the Legislature in passing an Act which, instead of stating a general classification, groups the counties by name must, in order to make the Act general, group counties which, because of reasonable considerations germane to the subject, belong in separate classes.

The fact that the counties are named would not, in my opinion, make the Act invalid. In *Martin's Ex'rs v. Commonwealth*, *supra*, the court recognized that the "West fee bill", in limiting the classification to the census of 1910, in effect fixed the maximum salaries in each county and city of the State as definitely as if the Act had called each city by name, and said:

" \* \* \* We are not prepared, however, to say that such an act is special within the meaning of the Constitution. A similar one is to be found in section 3528, Code 1904, section 3505, Code 1919, fixing the salary of the Commonwealth's attorney in each of the counties and cities. We are not informed, and have not deemed it material to inquire, whether this act in its present form was passed as a general or special law, but for the purpose of illustration, if it were attacked as a special act we would have no hesitancy in saying, in the absence of anything to show that the salaries therein named were classified and fixed arbitrarily and without due regard to some proper basis, that it should be classed as a general law. It necessarily implies a classification, but it excludes no person or locality naturally belonging to its operation, and the presumption that the legislature acted in good faith and graded the salaries upon reasonable grounds would support it as general legislation. In any attack upon it, the burden would be upon the assailing party to show that it did not rest upon a reasonable basis, and was essentially arbitrary. \* \* \* " (126 Va. 614.)

In my opinion, an Act grouping the counties by name would be held general in the absence of evidence showing that there existed no reasonable grounds for the classification. Such evidence would have to be sufficient to overcome the presumption that the Legislature did have reasonable grounds upon which to base its classification. The Act would, of course, be more easily defended upon attack if the Legislature, after grouping the counties by name, stated the various considerations which influenced it in forming the various groups or classes.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

## COMMONWEALTH'S ATTORNEYS—Prosecution of Violations of Town Ordinances.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 8, 1940.

HON. T. MOORE BUTLER,  
*Attorney for the Commonwealth,*  
*Corvington, Virginia.*

MY DEAR MR. BUTLER:

Replying to your letter of April 5, I beg to advise that this office has heretofore ruled that it is not the duty of the Commonwealth's attorney of a county to

prosecute violations of ordinances of a town which may be located in the county. As I have stated in expressing this opinion in the past, the question is not altogether free from doubt. Assuming that it is not the duty of the attorney for the Commonwealth to prosecute violations of town ordinances, I see no reason why he should not be employed by the town to prosecute such violations as any other attorney and be paid such fee therefor as may be agreed upon between the town and himself.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COMMONWEALTH'S ATTORNEY—Duty to Represent School Board.  
Voters—Poll Tax—Coming of Age.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 1, 1939.*

HONORABLE JULIAN K. HICKMAN,  
*Commonwealth's Attorney,  
Warm Springs, Virginia.*

DEAR MR. HICKMAN:

This will acknowledge your letter of July 26.

You first request my opinion as to whether or not it is the duty of the Commonwealth's Attorney to represent the county school board in an appeal taken under section 667 of the Virginia Code (Michie 1936).

Section 676 of the Code expressly authorizes county school boards to employ counsel, and to pay reasonable attorney's fees for the conduct of litigation in which the board is interested, except "in any case in which the attorney for the Commonwealth is required by law to handle the same".

The plain implication of this statute is that the Commonwealth's Attorney is not required to represent the school board in litigation in the absence of an express provision of the law to that effect, and I find no such provision with reference to appeals under Code section 667.

You next request my opinion as to whether or not a person who becomes twenty-one years of age after January 1, but before the general election in that year, must pay the first year's poll tax assessable against him six months prior to the election.

As this office has previously held, the provisions of section 20 of the Constitution and Code section 93 with reference to the payment of poll taxes six months in advance of an election do not apply to persons coming of age at such a time that no poll taxes were assessable against them for the year preceding the year in which they seek to vote. In such cases, it is only necessary that such a person should pay \$1.50 toward satisfaction of the first poll tax to be assessed against him and register on or before the last day of registration.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**COMMONWEALTH'S ATTORNEY—Duty of, to Prosecute Violation of  
Town Ordinances.  
ALCOHOLIC BEVERAGE CONTROL—Local Ordinances Concerning  
—Jurisdiction of Mayor.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 15, 1939.*

HONORABLE LUCAS D. PHILLIPS, *Mayor,*  
*Town of Leesburg,*  
*Leesburg, Virginia.*

MY DEAR MR. PHILLIPS:

In your letter of December 11, you state that a person was convicted in the Mayor's Court of the Town of Leesburg of having in his possession liquor illegally acquired in violation of a town ordinance and that such person appealed from the Mayor's Court to the Circuit Court of Loudoun County. You ask if, under paragraph (d) of section 4675(62) of the Code of Virginia (Michie 1936), it is the duty of the Commonwealth's Attorney of Loudoun County to prosecute this case upon appeal.

Since the accused was tried for and convicted of a violation of a town ordinance, it is my opinion that it is not the duty of the Commonwealth's Attorney of Loudoun County to prosecute the case upon appeal. The section to which you refer only imposes a duty upon Commonwealth's Attorneys to represent the Commonwealth in the trial of any person for a violation of any provision of the Alcoholic Beverage Control Act and imposes no duty upon him with respect to trials involving the violation of a town ordinance.

I call your attention to section 4675(65) of the Code which provides as follows:

"No county, city or town shall, except as otherwise provided in section twenty-six of this act providing for the issuance of local licenses, pass or adopt any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia."

This office has previously expressed the opinion that this section prohibits local authorities from enacting ordinances paralleling the Alcoholic Beverage Control Act, except in so far as such is expressly authorized by other provisions, such as those dealing with the sale of beer and wine on Sunday. Town ordinances prohibiting the possession of liquor illegally acquired obviously conflict with this section and are invalid since not authorized by any other statutory provision.

In your second letter of the same date you state that the Mayor entered an order interdicting for a period of twelve months a person who had been convicted by him of having in his possession liquor illegally acquired. You ask if the Mayor would have the right to issue a warrant and try such person for violation of the order of interdiction in the absence of a town ordinance imposing a penalty for the illegal possession of liquor by one who has been interdicted.

Since the Mayor of the Town of Leesburg has no jurisdiction of state offenses and has jurisdiction in only those criminal cases involving violations of town ordinances, it is my opinion that the Mayor has no jurisdiction in the case to which you refer. It would seem that since, as pointed out above, towns cannot enact ordinances prohibiting the possession of liquor, that the original conviction and order of interdiction had in the Mayor's Court was without legal justification.

Section 4675(35a) to which you refer does not confer jurisdiction upon Mayors to try persons for the offenses therein mentioned, but only provides that the judge,

mayor, etc., trying such case may enter an order of interdiction. The jurisdiction of such judge or mayor arises, if at all, by virtue of other provisions of law.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CONSTITUTIONAL LAW—Incurring Indebtedness—Self-Paying Projects.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 28, 1940.*

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

DEAR GOVERNOR PRICE:

I have your letter of March 26, requesting my opinion as to whether a statute in the terms of Senate Bill 126 would be constitutional, and whether bonds issued pursuant thereto would be valid.

This bill would authorize the State Highway Commission to acquire and construct certain bridge and ferry projects, and to finance the same by the issuance of "revenue bonds" to be made payable solely out of the revenues of such projects collected by way of tolls.

The bill expressly and unambiguously provides that such obligations shall in no event be deemed general obligations of the Commonwealth, and are not to be collectible out of any funds or property other than the tolls collected from such projects.

The only constitutional limitations which suggest themselves in this connection are the public debt limitations imposed by sections 184-184-b of the Constitution of Virginia. These sections prohibit the State from incurring any debt or liability or issuing any evidence of indebtedness except under certain conditions not present here. It should be added that from the context of these sections it is manifest that the terms "debt," "liability" and "indebtedness" are used synonymously.

The question is, therefore, whether the special revenue bonds described in Senate Bill 126 would constitute "debts," "liabilities" or "evidences of indebtedness" within the meaning of those terms as employed in sections 184-184-b of the State Constitution.

In the numerous jurisdictions in which the question has been litigated it has long been well settled that constitutional limitations on public indebtedness—whether as to amount or method of incurring the same—are not applicable to limited obligations payable exclusively out of the revenues of the utility or other project for the financing of which such obligations are incurred.

Particularly noteworthy are the very recent cases of *Wyatt v. State Roads Commission*, 175 Md. 258, 1 Atl. (2d) 619; *Estes v. State Highway Commission*, 235 Ky. 86, 29 S. W. (2d) 583; *Bates v. State Bridge Commission*, 109 W. Va. 186, 153 S. E. 305, and *Bennett v. Spencer County Bridge Commission*, 213 Ind. 520, 13 N. E. (2d) 547. In each of these cases the State was prohibited from incurring "debts" or "liabilities" under Constitutional provisions indistinguishable in principle from sections 184-184-b of the Virginia Constitution, and in each case the court upheld a statute so similar to Senate Bill 126 as to warrant the inference that they were patterned after a common model.

In the *Wyatt Case*, *supra*, the court said of such a statute:

"As has been seen, in the present enactment itself, chapter 356, any obligation on the State to repay principal or interest has been excluded and so it is in the form of bonds to be issued under it. This was the clear intention, emphatically expressed. Whatever elements of contract by the State, or debt,

might be thought to exist in the arrangement, clearly, so far as the cost of construction is concerned, there is no contract to add to the burden of the taxpayers of the State present or future, none to pay anything out of taxes, and no debt incurred for which taxes could be levied. And that is the one kind of debt with which the constitutional clause deals. There is no novelty in the arrangement for self-paying construction. And it has long been settled that by use of the device no public debt within the meaning of constitutional safeguards and restrictions is incurred. \* \* \* ." (Opinion of Chief Justice Bond, 175 Md. at 265.)

Upon an examination of judicial opinions on the subject by the highest courts of more than thirty states, I find only two such courts which have expressed a contrary view (*Miller v. Buhl*, 48 Idaho 668, 284 Pac. 843; *Zachary v. Wagoner*, 146 Okla. 268, 292 Pac. 345), and one of these has subsequently reversed itself. *Baker v. Carter*, 165 Okla. 116, 25 Pac. (2d) 747. See cases collected in the following annotations and lists of citations supplemental thereto. Note (1931) 72 A. L. R. 687; Note (1935) 96 A. L. R. 1385; Note (1936) 100 A. L. R. 900.

Attention should be called to the fact that legislation authorizing the issuance of similar revenue bonds has been standing unchallenged on the statute books of Virginia for several years—*e. g.*, Chapter 49 of the Acts of the Extra Session of 1933, authorizing various State institutions to issue "revenue bonds" for the financing of various construction projects under the Federal Public Works Administration. Clearly the legislature could not authorize these institutions to incur any "debt" prohibited by sections 184-184-b of the Constitution, since such institutions are uniformly held to be State agencies against whom claims and judgments are, in legal and practical effect, claims and judgments against the State. *Commonwealth v. Chilton Malting Co.*, 154 Va. 28, 152 S. E. 336. Yet bonds aggregating several millions of dollars have been issued under the Act of 1933 and have been freely accepted by both private and public investors, including the Reconstruction Finance Corporation of the Federal Government. It is reasonable to assume that such investments would not have been made except upon a most careful examination into the constitutional question here presented, or if such examination had disclosed substantial grounds for doubting the validity of such legislation or of revenue bonds issued thereunder.

In reply to your request, therefore, I will advise that according to the overwhelming weight of authority a statute in the language of Senate Bill 126 is not prohibited by constitutional limitations on public indebtedness such as are contained in sections 184-184-b of the Virginia Constitution, and that such a statute would, in my opinion, be clearly constitutional.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

## CONSTITUTIONAL LAW—Freedom of Speech—Limitations.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL.  
RICHMOND, VA., March 25, 1940.

SENATOR E. GLENN JORDAN,  
*Member of the Senate of Virginia,*  
*Grace-American Building,*  
*Richmond, Virginia.*

DEAR SENATOR JORDAN:

I have your letter of March 23, requesting my opinion upon two questions arising in connection with Senate Bill 25, as amended and finally passed by the General Assembly at its 1940 session.

The enrolled bill is in the following language:

"A BILL To declare the public policy of Virginia with respect to persons advocating, advising or teaching the doctrine that government should be overthrown by force, violence or any unlawful means, and the use of certain public buildings for such purposes.

"Section 1. It is hereby declared to be contrary to the public policy of Virginia for any person by word of mouth, or writing, to willfully and deliberately advocate, advise, or teach the doctrine that the government of the United States or the Commonwealth of Virginia, or any political subdivision thereof, should be overthrown or overturned by force, violence, or any unlawful means, provided, however, that any citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right.

"Section 2. It shall be the duty of the custodians of all public buildings in Virginia, whether owned by the State or a political subdivision thereof, or a State department or institution, to cooperate in the carrying out of this public policy, and to deny the use of public buildings contrary to said policy."

You first ask my opinion as to whether a statute in these terms would be constitutional.

It is suggested that such a law might violate the privilege of free speech which is guaranteed by both the Virginia Bill of Rights and the Federal Constitution. Constitution of Virginia, section 12; Constitution of the United States, Amendment XIV, as construed in *Gitlow v. New York*, 268 U. S. 652, 666.

There may be, of course, such a thing as an abuse of free speech—the Bill of Rights itself, in guaranteeing the privilege, expressly recognizes that it is not unlimited:

" \* \* \* any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

The question is, therefore, whether a statute in the language of Senate Bill 25 would impair the constitutional privilege of free speech or whether, on the other hand, such a statute would be a valid definition of and restriction upon "the abuse thereof".

The law is well settled that one has an inalienable right to criticize his government and to advocate that it be changed or abolished altogether by the methods provided in the organic law or pursuant thereto, and any State legislation inconsistent with this privilege is invalid. *Stromberg v. California*, 283 U. S. 359.

It is equally well settled that one cannot claim under Federal or State Constitutions the privilege of inciting violations of the very laws ordained by those same instruments; that a State may, as an incident of its general police powers, *prohibit altogether* the advocacy of any doctrine which proposes overthrow of the government by violence or any unlawful means. *Gitlow v. New York*, *supra*; *Whitney v. California*, 274 U. S. 357; *Gitlow v. People*, 234 N. Y. 132, 136 N. E. 317; *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295; *People v. Ruthenberg*, 229 Mich. 315, 201 N. W. 358.

As stated by Mr. Justice Sanford in the *Whitney Case*, *supra*:

" \* \* \* that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question." (274 U. S. at 371).

I find no authority whatever to the contrary, Senate Bill 25 expressly reaffirms the constitutional principle of free speech in the language of the Bill of Rights itself, and its other provisions would merely prevent the use of government buildings for the commission of acts which, as decided in the cases just referred to, the State has power to prohibit altogether.

It is my opinion, therefore, that such a statute would be immune to attack on constitutional grounds, unless it can be said to delegate an arbitrary power or authority to an agent or officer of the State or one of its subdivisions. In this connection, you request my opinion as to the proper construction of the term "custodian" as used in the second section of this bill.

Since this section simply purports to define one of the conditions on which the "custodian" shall give or deny permission for the use of a building, it is my opinion that the legislature had reference only to persons having lawful authority to grant or refuse such permission.

As suggested in your letter, the broad term "custodian" may be and frequently is used to connote mere physical guardianship, and if thus construed in the present connection Senate Bill 25 would require every watchman, caretaker, etc., of a public building to exclude persons from the premises according to its provisions, independently of any instructions from the officer or board having legal control of the building. This, however, would be an unreasonable construction of the word as used in the bill. No person or persons could lawfully use a public building for purposes of conducting a meeting without the permission of the officer or board authorized to grant such permission. A mere caretaker or janitor possesses no such authority, and it would be a most unnatural construction of the bill to interpret it as conferring any such authority on him. In my opinion, no court would impute such an intention to the legislature, and the term "custodian" should be construed as meaning only the officer or board possessing authority to permit or deny the use of public buildings in response to requests for such permission.

Upon the question whether the bill delegates an unreasonable power or discretion in the custodial authority to determine whether it is being advocated that the government should be "overthrown or overturned by force, violence or any unlawful means", I am of opinion that the power delegated is not unreasonable or arbitrary. Both the Federal and State Constitutions provide clear and well known methods for changing the form of government by constitutional amendments, and for changing statutes by enactments of the legislative bodies. It should be no more difficult to determine whether advocated changes of government are within the fundamental structures of our Constitution than for a sheriff or police officer who makes an arrest to determine whether the arrested person has committed a crime. It may be added that the bill has no relation whatever to advocating religious doctrines and in no way impairs religious liberty.

In my opinion the bill is without constitutional objection.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**CONTRACTORS, REGISTRATION BOARD FOR—Refund of Applicant's Fee Where Certificate Denied.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 6, 1939.

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

MY DEAR MR. BIGGER:

I am in receipt of your letter of October 4th in which you ask if the fee of thirty dollars required by section 9, Acts of 1938, regulating the practice of general contracting in Virginia (Acts of 1938, page 971) may be refunded to an applicant whose application for a certificate is denied, I presume on account of his failure to pass the examination.

While the section does permit the applicant to take another examination without an additional fee, I can find no authority in the Act for returning the fee to an unsuccessful applicant. I am, therefore, of the opinion that it may not be refunded.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CONTRACTORS—Housing Authority Projects—Exemption from Acts  
1938, Chap. 431.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 1, 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 August 28, requesting my opinion as to whether a contractor bidding upon a housing project under the United States Housing Authority is exempted from the operation of Acts 1938, chapter 431, Virginia Code (Michie 1936) chapter 175E.

You point out that such projects are made possible through long term loans made by the United States Housing Authority to a local housing authority, repayable out of revenue derived from the operation of the project, and refer to that portion of section 15-a of the Act, Virginia Code (Michie 1936) section 4359(118), which provides that the "provisions of this chapter shall not apply to" persons bidding on projects or works "where any such project or work is financed wholly or in part with funds furnished by the United States of America or any of its instrumentalities or agencies" (etc.).

Your attention is called to the fact that the section last cited also exempts contractors bidding on projects "financed wholly or in part with funds furnished by \* \* \* the Commonwealth of Virginia \* \* \* or by any county, city, town or other political subdivision of \* \* \* the State of Virginia."

By the terms of Acts 1938, chapter 310, section 8, Virginia Code (Michie 1936) section 3145(8), a local housing authority is expressly constituted "a political subdivision of the Commonwealth".

Without passing upon the question whether a housing project conducted under this Act is financed with funds "furnished by" a Federal agency within the meaning of the statute, it seems clear that it is a project financed with funds furnished by the local housing authority—a political subdivision of the State—and hence that bidders on such projects are exempt from the operation of Acts 1938, chapter 431.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**CONTRACTS—Personal Interest—Use of Text Book Published by Faculty Member.**  
**State Colleges—Contracts—Personal Interest of Faculty.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 6, 1939.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,*  
*Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of October 31, from which I quote as follows:

"According to section 708 of the Virginia Code, certain conditions are set up prohibiting division superintendents, State Board members, principals, teachers, and other officers of the schools from having any pecuniary interest, directly or indirectly, in certain contracts in connection with the public school system of the State.

"A question has arisen whether or not a member of the faculty of an institution of higher learning, such as one of the teachers' colleges, is covered by this section if he happens to use in his classes a textbook which he himself has written and published. The whole matter appears to hinge upon whether or not the teachers' colleges are regarded as an integral part of the public school system."

I have examined section 708 of the Code, prohibiting among other things certain officers and teachers to be interested in contracts for furnishing books to the public schools of the State. After careful consideration, I am of opinion that this section is restricted to the public free schools of the State, as distinguished from the State institutions of higher learning. Indeed, the section several times uses the expression "public schools". I am of the opinion, therefore, that the section does not apply in terms to the case you present. However, I do think that, pursuant to well recognized principles, the selection of this textbook written and published by a member of the faculty should be approved by the governing body of the institution.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**COURTS—CORPORATION AND CIRCUIT—Concurrent Jurisdiction of.**  
**CONSTITUTIONAL LAW—Change of Court Jurisdiction.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 8, 1940.

HONORABLE GEORGE M. WARREN,  
*House of Delegates,*  
*Richmond, Virginia.*

MY DEAR MR. WARREN:

I am in receipt of your letter of February 6, in which you refer to House Bill No. 129 introduced by you and state that "some question has been raised as to the effect this bill might have on the local police justice and magistrates as to their right to try any matters."

The bill amends section 5910 of the Code, prescribing the jurisdiction of corporation courts generally, and the new language in the bill is: "provided that, within the territorial limits of the city of Bristol, the corporation court of said

city shall have exclusive original jurisdiction in all actions at law and suits in equity."

Section 98 of the Constitution provides that in cities of the second class (Bristol falling within this classification) the corporation or hustings court and the circuit court of the county in which the city is situated have concurrent jurisdiction in actions at law and suits in equity. In view of this, it seems to me reasonably plain that the real intent of the new language is to confer upon the corporation court exclusive jurisdiction in actions at law and suits in equity, thus ousting the circuit court of the concurrent jurisdiction it would have but for the amendment. The first part of the section proposed to be amended prescribes that the jurisdiction of the corporation courts shall be the same as that which the circuit courts have in counties. The jurisdiction of the circuit courts is fixed by section 5890 of the Code and provides, among other things, that these courts shall have jurisdiction of all chancery and civil cases at law, "except such cases as are assigned to some other tribunal". This latter provision, of course, takes care of the cases over which the trial justice of a county has original jurisdiction. I think it proper to reason, therefore, that the purpose of the new language is simply to deprive the circuit court of the original jurisdiction which it would otherwise have in Bristol, and not to take away from the police justice the jurisdiction which that officer has in civil cases.

Of course, I cannot say beyond all doubt that the interpretation I am placing upon the new language is the interpretation that would be placed thereon by the court, for certainly, if the new language should be literally construed, strong argument could be advanced to support the theory that it confers upon the corporation court of Bristol jurisdiction in all actions at law and suits in equity, thus ousting not only the circuit court of jurisdiction, but also the police justice. However, as above stated, I do not think this is a reasonable interpretation of the new language.

I think it proper, however, that I should bring to your attention another and more serious question. Section 63 of the Constitution, subsection 3 thereof, provides that the General Assembly shall not enact any local, special or private law regulating the jurisdiction of courts. See in this connection the recent case of *Shulman Company v. Sawyer*, 167 Va. 386. The effect of your amendment is to make it a special law dealing with the jurisdiction of the corporation court of Bristol. It may be entirely true that it does not increase the jurisdiction of this court, yet it does directly deal with it in the sense that it deprives another court of concurrent jurisdiction.

It may be that the constitutionality of the amendment would be saved by the last sentence of section 98 of the Constitution, reading as follows:

"During the existence of the corporation or hustings court, the circuit court of the county in which such city is situated shall have concurrent jurisdiction with said corporation or hustings court, in actions at law and suits in equity, unless otherwise provided by law."

I think that there is considerable strength in the view that this sentence might be construed to support the validity of your amendment. You will observe that the words "county", "city" and "court" in this sentence are all in the singular and the sentence ends with the proviso "unless otherwise provided by law" and not "by general law".

I am not attempting to express any final opinion on the constitutional question, since you have not raised it, nor have I been able to give this important matter the study I would give it if it were actually before me. However, in view of the serious consequences of an invalid amendment dealing with the jurisdiction of your corporation court, I think that I should point out that at least a doubt exists.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

**COURTHOUSE—Use of Lot for Library.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 25, 1940.

HON. A. S. HARRISON, JR.,  
*Commonwealth's Attorney,  
Brunswick County,  
Lawrenceville, Virginia.*

DEAR MR. HARRISON :

This is in reply to your letter of January 23, in which you state that someone is interested in making a gift of a public library to Brunswick County, and that the Board of Supervisors desires to have this building located on the courthouse square. You ask if section 2854 of the Code prohibits the location of the proposed building upon this square.

This section provides, in part, as follows :

" \* \* \* the supervisors of the county \* \* \* may purchase so much land, as, with what it has, will make two acres, whereof what may be necessary for the purpose, shall be occupied with the courthouse, clerk's office and jail and the residue planted with trees and kept as a place for the people of the county or city to meet and confer together. \* \* \* "

I call your attention to the fact that in the case of *County of Alleghany v. Parrish*, 93 Va. 615, it was held that this provision was mandatory and that the two acre lot, in so far as it was not occupied by the courthouse, clerk's office and jail, was required to be planted with trees and kept as a place for people to meet and confer.

However, since that case was decided this section has been amended in several particulars and the last sentence in the section as it now reads has been added. This sentence authorizes the board of supervisors to use buildings which may have been on the land when it was acquired, or which have been since constructed thereon, for other purposes when the same are not required for a courthouse, clerk's office or jail.

It is possible and even probable that it would be held that this sentence would authorize the construction of a public library upon the courthouse square. However, since this question is not free from all doubt, I believe that it would be wise to do as you suggest and seek the passage of a bill authorizing the proposed move at this session of the Legislature.

Sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**DAIRY AND FOOD DIVISION—Scope of Jurisdiction.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 22, 1940.

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

DEAR MR. SMITH :

I am in receipt of your letter of March 20 which I quote as follows :

"I will appreciate it very much if you can advise me as to the correct construction of the definitions of condimental stock and poultry foods and powders which you will find in Sections 1245 and 1246 of the Code.

"The particular question in which I am interested is whether or not preparations which otherwise come within these definitions but which are intended for use by dogs or cats would be subject to the provisions of this law."

You have also informed me that the foods and powders in question are advertised as being dog and cat food and that the packages make it plain that it is food only for dogs and cats.

I have examined sections 1245 and 1246 of the Code and do not find that these sections give you any jurisdiction over dog and cat foods, these sections dealing only with stock and poultry foods. It does not seem to me it is material that a food for dogs and cats is the same as food for stock and poultry so long as it is not advertised or packed as stock and poultry food.

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

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#### DIVISION OF THE BUDGET—Authority Over Printing of Legal Briefs.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 14, 1940.

DR. ROWLAND EGGER, *Director,*  
*Division of the Budget,*  
*Governor's Office,*  
*Richmond, Virginia.*

DEAR DR. EGGER:

I have your letter of June 6, requesting my opinion as to whether the provisions of Code section 397 apply to briefs printed for filing in court.

Code section 397 authorizes and requires the Director of the Division of the Budget to specify the manner and quality of binding "every annual, biennial, or other report or publication of any kind" printed for any State agency at public expense, and to determine the number of copies to be printed. This statute does not expressly except briefs to be filed in court, as is done in Code section 585(60) and former Code section 393a relating to the editing of printed matter by your Division.

Legal briefs printed for this office are necessarily prepared in conformity to the rules of the court in which they are to be filed, which often prescribe specifically the manner in which they are to be bound, and at least the minimum number to be printed. Hence it would hardly seem reasonable to suppose that the Legislature intended section 397 to apply to such briefs.

In any event the language of section 397 seems clearly inadequate to include legal briefs: in no sense can a brief be considered a "report or publication," whether it be printed or not.

It is my opinion, therefore, that the provisions of Code section 397 have no application to legal briefs printed for filing in court.

Sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**DIVISION OF THE BUDGET—Payments to National Guard Officers.  
National Guard—Part of Executive Department.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 19, 1940.

BRIGADIER GENERAL S. GARDNER WALLER,  
*The Adjutant General,  
Richmond, Virginia.*

MY DEAR GENERAL WALLER:

I am in receipt of your letter of February 8, from which I quote as follows:

"Having been notified by Mr. Bradford of the Budget Division that hearings should be held at the State Capitol on January 29, 1940, I ordered the Colonels of Regiments of the Virginia National Guard to appear before the joint session of the Appropriations Committee of the House and the Finance Committee of the Senate, with pay of their rank and actual traveling expenses.

"Mr. Bradford has informed me that, under section 1098 of the Code of Virginia, he does not feel that these accounts can be paid without an opinion from you."

Section 1098 of the Code, to which you refer, is contained in chapter 47 of the Code, dealing with "boards of directors and visitors of State institutions". Since the division of military affairs is in reality part of the executive department and not a state institution within the meaning of chapter 47 of the Code, I am of opinion that the prohibition contained in section 1098 is not applicable in this case.

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**DIVISION OF PURCHASE AND PRINTING—Authority of Director.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 20, 1940.

HONORABLE P. E. KETRON, *Director,  
Division of Purchase and Printing,  
State Office Building,  
Richmond, Virginia.*

DEAR MR. KETRON:

I have your letter of May 17, quoting from one which you have received from Mr. Wilmer L. Hall, Secretary of the State Library Commission.

Mr. Hall requests you to authorize his Commission to enter directly into contracts for the furnishing of the new State Library Building, instead of making any of the purchases involved through your Department. You request my opinion as to whether you may grant Mr. Hall's request.

The provisions of Virginia Code (Michie 1936) section 401d expressly authorize you to grant permission for direct purchases for any reason which, in your judgment, warrants the same. In my opinion, there can be no question as to your authority to grant Mr. Hall's request.

Sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**DOG LICENSE FUND—Payment of—To Someone Other Than Game Warden.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 17, 1940.

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

DEAR MR. JONES:

I have your letter of May 23, in which you state the following question and request my opinion thereon:

"The Board of Supervisors of Powhatan County asked me to secure your opinion on the question of whether or not the Board of Supervisors has a right under the law to pay some one other than the Game Warden out of the Dog License Funds or any other fund available to the Board of Supervisors to look after dogs and make investigations of damages done by dogs."

Virginia Code (Michie 1936) section 3305(81) prescribes the manner in which the Dog Fund shall be used and expressly permits the county to "make therefrom an allowance to the game warden for services." Neither here nor elsewhere in the law do I find express authority for making an allowance out of the Dog Fund to persons other than game wardens, for investigating damage done by dogs or for any other services.

It is my opinion, therefore, that such an allowance cannot be made out of the Dog Fund except to a game warden.

If, however, in the judgment of the Board of Supervisors the Dog Fund is insufficient to provide adequate protection to livestock owners in this respect, including the services required in making necessary investigations, it would seem that the Board of Supervisors has the power to expend additional funds for this purpose out of its general revenues, pursuant to the broad general powers conferred by Code section 2743. In such event, of course, the Board might employ any person it saw fit to select.

Cordially yours,

ABRAM P. STAPLES.  
*Attorney General.*

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**DOGS—Prohibition of German Shepherds in Certain Counties.  
Constitutional Law—Object of Bill Stated in Title.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, V.A., May 10, 1940.

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

DEAR MR. NOLTING:

I am in receipt of your letter of April 29, requesting my opinion upon a question arising in connection with chapter 240, Acts 1940.

Your question arises out of the following circumstances:

The Act in question was intended to be amendatory of chapter 167 of the Acts of 1938, which prohibited the breeding of German Shepherd dogs in the counties of Rappahannock and Culpeper, or the importation of such dogs into these

counties. It was apparently intended to extend the operation of this Act so as to include also the counties of Russell, Caroline, Southampton and Tazewell.

By mistake, however, the amendatory bill was entitled "An Act to prohibit the importation into, or breeding within, the counties of Rappahannock, Russell and Culpeper", etc., "so as to include Caroline, Southampton and Tazewell counties."

The body of the Act then proceeds to prohibit the breeding of such dogs within the counties of Rappahannock, Russell, Southampton, Tazewell, Caroline and Culpeper, or the importation of such dogs into these counties.

The title of the bill, therefore, incorrectly described the previous Act, by presupposing that the latter included Russell county. Likewise, the title failed to state in so many words that the object of the bill was, in part, to extend operation of these prohibitions into Russell county.

Under the constitutional requirement that the object of every bill must be stated in its title (Constitution of Virginia, section 52), these irregularities are sufficient to raise some question as to the validity of the entire Act, and particularly as to the constitutionality of that portion of the Act which extends its operation to Russell county.

In view, however, of the strong presumption in favor of the validity of every statute, it is my opinion that the Commission of Game and Inland Fisheries should treat this entire Act as valid unless and until it is held unconstitutional by a court of competent jurisdiction.

Cordially yours,

ABRAM P. STAPLES.  
*Attorney General.*

#### DOGS—Chasing Deer or Elk by—Territorial Scope of Act.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 20, 1940.

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

DEAR MR. HART:

This is in reply to your letter of January 18, in which you request the opinion of this office regarding chapter 319, Acts of 1936, page 519.

This Act provides for the destruction of dogs known to have chased deer or elk and for the punishment of the owners thereof for keeping the same after having been informed of such fact. The Act is made effective only in counties having a population of more than 37,000 and not more than 40,000. I understand the effect of this provision is to make the Act applicable to Augusta County but not to the neighboring counties.

You ask if proceedings may be had against the dogs and the owners thereof in cases where a dog from a neighboring county chases deer in Augusta County but is secured by its owner and returned to the neighboring county before proceedings were had under this Act.

While it may have been the intention of the legislature to provide that any dog chasing deer in Augusta County should be killed and that any owner keeping such dog after knowledge that the dog has so chased deer should be punished regardless of the county in which the owner lives and the dog is kept, it is my opinion that the language to accomplish that result was not used.

The Act provides that the provisions thereof shall be effective only in certain counties. It would seem, therefore, that one owning a dog in one county would not violate this Act even though the dog had chased the deer in a county in which the Act was effective. It would also seem that proceedings could not be had in

the other county against such dog since the Act is not effective in such other county.

Sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**DONATIONS—Acceptance of by State Corporation Commission.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 15, 1940.*

HON. H. LESTER HOOKER, *Chairman,*  
*State Corporation Commission,*  
*Richmond, Virginia.*

MY DEAR JUDGE HOOKER:

I am in receipt of your letter of April 10, in which you state that it is the desire of the State Corporation Commission to have its own facilities for checking and assimilating the pertinent data necessary for a determination of a general rate level for fire insurance in this State. You further state that sufficient funds are not now available out of the appropriation for the maintenance of the State Corporation Commission's Bureau of Insurance. You advise me that the Virginia Insurance Rating Bureau proposed to donate the sum of \$3,000 a year to defray the additional expense which would be involved and that, if this donation is accepted, it will be paid into the State treasury and only paid out on properly approved vouchers through the Comptroller's office.

You call my attention to section 35 of the Appropriation Act of 1938 (Acts 1938, page 594), reading as follows:

"With the written consent and approval of the Governor first obtained, any department, institution, or other agency of the State government may expend, in addition to the appropriation herein made to such department, institution or agency, any money, revenue or funds paid in to the State treasury to the credit of said department, institution or agency, in excess of such appropriation as proceeds of donations, gifts or Federal grants, when later developments are believed to make such expenditure necessary, such expenditure to be in accordance with the purpose for which said gift, grant or donation was made."

You then ask my opinion on these two questions:

"1. Would it be legal, under the provisions of Chapter 428, quoted above, or under any other provisions of the law, to accept, with the consent of the Governor, this money to be used for the purposes mentioned?"

"2. Could the State Corporation Commission, with the approval of the Governor, use a portion of this money for supplementing the salaries of employees of the Bureau of Insurance charged with the additional responsibilities in excess of the amount of salary provided in the budget?"

After careful consideration, I am of the opinion that the quoted provision of the Appropriation Act of 1938 clearly covers the situation and is authority for your accepting and expending the donation for the purposes indicated by you. My conclusion is, therefore, that both of your questions may be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Answering Questions After Ballot Delivered.  
Id—Posting Copy of Voting Statute.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 18, 1939.*

MR. JULIAN R. MCALLISTER,  
*Judge of Election,  
Covington, Virginia.*

MY DEAR MR. MCALLISTER:

I am in receipt of your letter of October 16, in which you ask if you may answer the following question put to you by an elector after he has received his ballot:

"Do you put X or check mark in said block for the one you want to vote for?"

Section 163 of the Code provides, among other things:

" \* \* \* Except as provided by section one hundred and sixty-six, no person shall advise, counsel, or assist any elector, by writing, word or gesture, as to how he shall vote or mark his ballot after the same has been delivered to him by the judges of election. \* \* \* "

In my opinion, this provision of the statute prohibits you from answering the question put to you by the elector. Section 166, referred to in the quoted language, deals only with those persons registered prior to January 1, 1904, and to those registered after January 1, 1904, who are physically unable to prepare their ballots.

You next ask:

"Would it be legal to copy section 162, first paragraph, and tack one in each voting booth, so that they could have this information?"

This office has previously expressed the opinion in answer to a similar question that there is no authority in the statutes for taking action about which you inquire.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Democratic Primary Plan—Moral Obligations.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 30, 1939.*

MR. W. W. FINLEY,  
*Win Wilkes Farm,  
Route No. 1,  
Free Union, Virginia.*

DEAR SIR:

This is in reply to your letter of October 25, in which you request my opinion upon the question whether or not a person who voted in a party primary is morally bound to vote in the general election for all of the nominees of that party, whether their names were printed upon the primary ballot or whether they were declared

the nominees of the party by reason of the fact that no other candidate filed against them in the primary.

This office has frequently expressed the opinion that it does not make any difference, so far as the status of a candidate as a party nominee is concerned, whether he had opposition or not in the primary, and that he is just as much a party nominee if his name was not printed upon the ballot as if it had been so printed, provided he was declared nominated pursuant to the provisions of the statute by the party executive committee.

I call your attention to a provision contained in the Primary Plan of the Democratic Party, which was adopted June 9, 1932, and is as follows:

"Whenever a Democratic Committee, either State, district, city or county, shall, by resolution so direct, then the judges of the primary election within the jurisdiction of said party committee shall require of each person offering to vote that he shall subscribe to the following pledge of honor: 'I, . . . . ., do state on my sacred honor that I am a member of the Democratic party and believe in its principles; that I voted for all of the nominees of said party at the next preceding general election in which I voted and in which the Democratic nominee or nominees had opposition; and that I shall support and vote for *all of the nominees* of said party in the next ensuing general election. Given under my hand this . . . . day of . . . . ., 19. . . .'. In such event no person not subscribing to said pledge shall be permitted to vote in said primary election.

"Whenever a party committee shall adopt such a resolution it shall be the duty of the chairman of the said committee to see that the judges of election within his jurisdiction shall be supplied with a sufficient number of forms of said pledge to permit one to be furnished to each person offering to vote. \* \* \*

You will observe from the foregoing requirement that it is contemplated by the Democratic Party Primary Plan that all persons voting in any primary of that party shall be morally obligated to support all of the nominees of said party in the next general election, regardless of the manner in which such nominee may have been nominated.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Democratic Primary—Who May Vote.

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

HONORABLE WILLIAM A. WRIGHT,  
*State Senator,*  
*Tappahannock, Virginia.*

MY DEAR SENATOR WRIGHT:

I am in receipt of your letter of July 19, asking "who can participate in the coming Primary."

As you know, the right to vote in a Democratic primary is controlled by section 228 of the Code. Summarizing the provisions of this section, I beg to advise that the qualifications of a voter in the coming primary are as follows:

1. He must be qualified to vote at the election for which the primary is held;
2. He must be a member of the Democratic Party;

3. In the last preceding general election in which such person participated he must have voted for the nominees of the Democratic Party;

4. If the person has never voted before, then requirement 3 above is not applicable, but requirements 1 and 2 are applicable, and in addition such person shall support the nominees of the Democratic Party in the ensuing election.

I take it that you only desire a statement of the general requirements applicable and it seems to me that what I have written covers the situation generally.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## ELECTIONS—Democratic Primary Plan—Obligation of Voter.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 2, 1939.

HONORABLE B. S. UTZ,  
*Treasurer of Madison County*  
*Madison, Virginia.*

MY DEAR MR. UTZ:

This is in reply to your letter of September 29, in which you request my opinion as to the obligation a voter assumes when he votes in a Democratic Primary election.

Under section 2 of the caption "Members of the Democratic Party", which is contained in the Primary Plan of the Democratic Party which was adopted at the convention held June 9, 1932, the following provision appears:

"Whenever a Democratic Committee, either State, district, city or county, shall, by resolution so direct, then the judges of the primary election within the jurisdiction of said party committee shall require of each person offering to vote that he shall subscribe to the following pledge of honor: 'I, ....., do state on my sacred honor that I am a member of the Democratic party and believe in its principles; that I voted for all of the nominees of said party at the next preceding general election in which I voted and in which the Democratic nominee or nominees had opposition; and that I shall support and vote for all of the nominees of said party in the next ensuing general election. Given under my hand this .... day of ....., 19....' In such event no person not subscribing to said pledge shall be permitted to vote in said primary election.

"Whenever a party committee shall adopt such a resolution it shall be the duty of the chairman of the said committee to see that the judges of election within his jurisdiction shall be supplied with a sufficient number of forms of said pledge to permit one to be furnished to each person offering to vote.  
\* \* \*

While, of course, in the absence of a resolution by the committee, it is not necessary for voters in the primary to subscribe and take the above pledge, nevertheless, it is generally understood that all persons offering to vote shall support and vote for all of the nominees of the party in the next ensuing general election.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Democratic Primary—Who May Vote.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 19, 1939.

HON. W. G. SAFFER, *Chairman,*  
*Loudoun County Democratic Committee,*  
*Leesburg, Virginia.*

MY DEAR MR. SAFFER:

I am in receipt of your letter of July 17, in which you first ask the following question:

"Would a person be entitled to vote in the coming primary who voted the Republican presidential ticket in the last presidential election but who voted for the Democratic nominee for Congress in the last Congressional election?"

I recently had occasion to express my opinion on this question to the late Honorable King E. Harmon, of Pulaski, Virginia, and I enclose for your information a copy of my letter to him.

Your next question is as follows:

"Would such a person who voted for the Republican presidential nominee in the last presidential election and who voted for the Republican nominee for Congress in that election, but who did not vote in the last Congressional election where the Democratic nominee for Congress was not opposed, be entitled to vote in the coming Primary?"

Plainly in this case the person offering to vote in the Primary has not "in the last preceding general election, in which such person participated, \* \* \* voted for the nominees of such party," and I am, therefore, of opinion that this individual is not eligible to vote in the coming Democratic Primary.

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**ELECTIONS—Primaries, Special Elections Distinguished.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 24, 1939.

HON. ROBERT RANDOLPH JONES,  
*Commonwealth's Attorney for Powhatan County,*  
*Powhatan, Virginia.*

MY DEAR MR. JONES:

I am in receipt of your letter of November 21, in which you ask if a primary is a "special election" within the meaning of section 89 of the Code limiting the compensation of members of the electoral board to \$25 per year "unless one or more special elections be held in such year."

In my opinion, a primary is not a special election within the meaning of this section. The term "special election" has a well-defined meaning and, so far as I know, a primary has never been considered to be a special election. For example, section 155 of the Code deals with the duty of the electoral board relating to the printing of ballots. This section expressly recognizes the three separate classes of elections, namely, general elections, primaries, and special elections. If

the Legislature had intended to allow members of the electoral board to receive additional compensation for performing their duties in primary elections, in my opinion, it would have done so in plain terms.

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**ELECTIONS—Duty to Hold.  
Id—Where No Names Printed on Ballot.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 24, 1940.*

HONORABLE JUNIUS W. PULLEY,  
*Commonwealth's Attorney,  
Courtland, Virginia.*

MY DEAR MR. PULLEY:

This is in reply to your letter of April 22, in which you request my opinion upon the question whether or not the law requires an election to be held in towns of the State every two years. You state that no candidates have filed for the purpose of having their names printed upon the ballot as required by section 154 of the Code.

I find that I had an occasion to give an opinion on this identical question to Mr. E. C. Lacy, Clerk of the Circuit Court of Halifax County, on April 25, 1935. I then expressed the opinion that the provision of section 2994 of the Code that "in every town there *shall* be elected every two years on the second Tuesday in June" a mayor and councilmen is mandatory, and that it is the duty of the election officials to hold the election.

Section 155 of the Code imposes on the electoral boards of the several counties of the State the duty of causing to be printed a number of ballots equal to twice the entire registered vote of the county or city. This section also provides that in the magisterial districts of the county or wards of a city only the names of the candidates to be voted for in said district or ward shall be placed on said ballots. While the word "towns" does not appear in this section, it would seem that the number of ballots to be printed would be twice the number of voters in the town.

Where no names are printed on the ballot, I have expressed the opinion that it is the duty of the electoral board to provide blank ballots, so that voters may either write thereon the name of persons for whom they desire to vote or place same thereon with a rubber stamp. When this method of voting is employed, it is necessary for the voter to place a check mark opposite the left side of the name when so written on the ballot. This office has also held that this name may be placed on the ballot by a rubber stamp, and that the rubber stamp may also include the check mark opposite the name. Of course, one rubber stamp may include an entire slate of candidates if desired.

In the event, however, that the election officers do not call an election, and none is held, then, in my opinion, those now in office will hold over under the provisions of section 3001 until their successors have been elected and are qualified. The general provisions with reference to holding town elections are contained in sections 2994-3003, inclusive. In addition to these sections, I am of opinion that sections 154 and 155 are also applicable, except that candidates for town offices are not required to file a petition with the clerk with their declaration of candidacy as is provided for in other elections by section 154.

Sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**ELECTIONS—Judges of—Mileage Allowance.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 1, 1939.

HONORABLE L. R. BARTENSTEIN, *Secretary,*  
*Fauquier County Electoral Board,*  
*Warrenton, Virginia.*

DEAR MR. BARTENSTEIN:

I have your letter of July 28, requesting my advice as to the compensation of election judges for carrying poll books and ballots to the place of voting. You state that it is the practice in your county sometimes to deliver the poll books and ballots to the judges at Warrenton, to be carried by them to the place of voting, and in other cases (as I understand your letter) to deliver them at the place of voting.

As you point out Virginia Code (Michie 1936) section 200, provides that "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 for each mile necessarily traveled. Code section 159, which requires the ballots to be delivered to the election judges, makes no provision as to where delivery shall be made.

It is my opinion that the election judge to whom ballots are delivered should receive a juror's mileage for the distance actually and necessarily traveled by him in conveying the same to the place of voting. Of course, if the ballots are delivered at such voting place, no mileage should be allowed.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Compensation of Judges and Clerks of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 19, 1940.

HONORABLE CARTER GLASS, JR.,  
*Lynchburg, Virginia.*

MY DEAR SENATOR GLASS:

I am in receipt of your letter of March 17, regarding the pay of judges and clerks of election for their services on election day.

The compensation, as you state, seems to be small, but it is definitely fixed by section 200 of the Code at \$3 a day. I have had occasion to express opinions in this matter a number of times within the past few years. You are probably aware of the provision in section 200 that the board of supervisors of a county or the council of a city or town may supplement the compensation prescribed in the section for these officers. Therefore, it would appear that, if the governing body desires that these officers shall receive more compensation, it may so provide in its discretion.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Construction of Voting Place.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 18, 1940.

HONORABLE W. T. HICKS, *Secretary,*  
*Electoral Board of Carroll County,*  
*Hillsville, Virginia.*

DEAR MR. HICKS:

I have your letter of June 17, in which you request my opinion upon the following question:

"When a constituted voting place has not any building to hold the election would it be legal for the electoral board to have a room built and to be paid for as other election expenses?"

I am unable to find that the election laws make any specific provision for such a case, and know of no statute which authorizes the electoral board to construct a room or building at a voting place and to treat the cost thereof as an expense of the election.

It seems clear, however, that the board of supervisors might provide the necessary structure under its general powers with relation to the construction and maintenance of buildings under Code sections 2723 and 2925.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Cure of Irregularity—Secrecy of Ballot.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 3, 1939.

HONORABLE W. POTTER STERNE,  
*Commonwealth's Attorney,*  
*Dinwiddie, Virginia.*

MY DEAR MR. STERNE:

This is in reply to your request for my opinion upon the following question:

It seems that in an election held on August 1 in Dinwiddie County the registrar failed to deliver to the election judges, along with other mail ballots, a certain mail ballot which had become misplaced. During the counting of the ballots the fact that this ballot was missing was discovered and the registrar returned home and brought the envelope containing the letter with the ballot therein and delivered the same to the judges about 9:00 o'clock that night. The election resulted in a tie. The board of election commissioners has requested you to obtain my opinion upon the question whether or not they should proceed under section 240 of the Code to summon the judges of election for the purpose of curing the irregularity above set out. This involves, of course, the question whether or not, if the election judges were summoned by the commissioners, they would have the legal right to count this ballot. Of course, the failure of the registrar to properly return the ballot was an irregularity.

I am of opinion that this is not such an irregularity as can be cured in the manner above indicated. The ballots have all been counted and it would be impossible to open this ballot and count same without revealing the person for whom the voter has cast said ballot.

Section 27 of the Virginia Constitution contains this provision: "So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained." It is obvious that the secrecy of this particular ballot cannot be maintained if same is now counted and, in my opinion, to do so would be in violation of the language above quoted from section 27 of the Constitution.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—CLERK OF CIRCUIT COURT—Duty of, Where Candidate Fails to Comply with Statute.  
Id.—Id.—Duty to Check Candidate's Petition.**

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

HON. WILLIAM H. LOGAN,  
*Attorney for the Commonwealth,  
Woodstock, Virginia.*

MY DEAR MR. LOGAN:

I am in receipt of your letter of September 23, in which you ask, first, if under section 154 of the Code the clerk of the circuit court should certify to the electoral board the name of any candidate who is not a party nominee and who has failed to file with his notice of candidacy a petition signed by fifty qualified voters, as required by the section.

Your question is not easily answered. Certainly the name of such a candidate who has not filed the petition required by section 154 should not be printed on the ballots. It seems to me that the better view is that the petition is really made a part of the notice of candidacy by the section and that, if the petition is not filed where required, a complete notice of candidacy is not filed. In my opinion, therefore, the clerk should not certify to the electoral board the name of any candidate who has not accompanied his notice of candidacy with the petition where the petition is required.

Your next question is whether or not the clerk should check the petition signed by fifty qualified voters to ascertain whether the persons signing the petition are actual qualified voters.

I do not think that the law imposes any such duty as this upon either the clerk or the electoral board. I have previously held that these officers are entitled to rely upon a presumption of the eligibility of the signers to vote. However, I have further held that, in the event, the clerk has actual knowledge of the fact that a sufficient number of the signers of the petition are not qualified so as to reduce the qualified number below the requisite number of fifty, he should regard this as a fatal defect in the petition. I have further recommended that, should the clerk decide that the name should not be so certified, he should immediately notify the candidate whose name is not being certified, so that the candidate may apply to the judge of the circuit court of the county upon motion to certify same.

Specifically answering your question, however, in the absence of absolute knowledge that some of the signers of the petition are not qualified voters, or of a complaint to that effect, I am of the opinion that the clerk may accept a petition signed by fifty individuals as *prima facie* correct.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Ballots—Candidate's Name on—Where Nominated by County but Not by City.**

**Id.—Candidates—Filing Name with Clerk.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 13, 1939.

HONORABLE W. W. McALLISTER, *Chairman,*  
*Republican City Committee,*  
*Staunton, Virginia.*

DEAR MR. McALLISTER:

This is in reply to your letter of November 11, in which you request my opinion upon the question of whether or not the electoral board of the city of Staunton should have printed on the ballot in the recent November election the name of a Republican candidate who was nominated by the Republicans of Augusta County for the House of Delegates, but was not nominated by the Republicans of the city of Staunton. You state that his name was certified by the county Republican Committee to the clerk of the circuit court of the county but was not certified by such Committee to the clerk of the city court.

The situation you present is quite an unusual one, and it seems to me to be very doubtful whether or not the candidate was the nominee for the Republican party for the entire legislative district, since no action was taken by the Republicans living in Staunton, and they apparently did not participate in the mass meeting which nominated the candidate.

However, it does not appear from your letter that the candidate filed any notice with the clerk, and, under these circumstances, this office has ruled that he was not really entitled to have his name printed upon the ballot in the county without filing the notice required by the statute. The statutory provision you refer to with reference to certification by party chairman is restricted to candidates nominated at primary elections, and has no application to candidates nominated at conventions or mass meetings.

I am enclosing you herewith a letter which I wrote on September 12, 1939, to the clerk of the Circuit Court of Lee County, which I think fully covers the Staunton situation. I might add that the candidates in Lee County applied to the court to have their names placed upon the ballot and the court held against them.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Ballots—Check Mark Required.**  
**Id.—Voters—Transfer to Another County.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 20, 1939.

MR. M. W. GIVENS,  
*Judge of Election,*  
*Newport, Virginia.*

MY DEAR MR. GIVENS:

I have your letter of October 18, in which you request my opinion upon whether or not ballots marked in the manner indicated in your letter should be considered as properly voted so as to be counted in the election.

In the first instance you indicate that the voter has merely stricken out the name of the person for whom he does not desire to vote, without making any cross mark, check, plus mark, or line in the square opposite the name of the person for

whom he desires to vote. This office has held that a ballot marked in this way does not comply with the requirements of the statute and is not a valid vote. It is an indispensable requirement that the required mark shall be placed in the square opposite the name of the person for whom the vote is sought to be cast.

In your second illustration, the voter has placed the required mark in the square opposite the name of the person for whom he desires to vote, and, in addition, has stricken out or scratched the name of the other opposing candidate against whom he desires to vote. This office has held that, in a case of this kind, since the required mark is placed in the desired square the vote should be counted. The mere fact that the name or names of the opposing candidate or candidates are scratched is not considered a mutilation of the ballot so as to invalidate same, and, therefore, it should be counted for the person opposite the square in which the mark is placed.

You also inquire whether or not a person who voted in Craig County in the August primary and later was transferred on the registration books to a precinct in Giles County would be permitted to vote in Giles County.

I cannot give a categorical answer to this question, as it would seem to depend upon whether or not the person will have been a resident of Giles County six months prior to the November election. This is a question of fact, and is dependent upon whether or not the person established his legal residence in Giles County six months prior to the election with an intention at that time to make Giles County his permanent place of residence. If this is a fact, he was no doubt entitled to vote in Giles County in the primary, but I doubt if the fact that he voted in the primary in Craig County would necessarily be conclusive of the fact that he had not established his residence at that time in Giles County, although it would be strongly persuasive that he at that time considered himself a resident of Craig County by reason of the fact that he offered to vote in said County. However, this is a question of fact upon which the election judges must decide according to the voter's answer to such questions as may be propounded to him.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Ballots—Voting for One Where Two Candidates to Be Chosen.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 6, 1939.

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

DEAR MR. WHITEHEAD:

I am in receipt of your letter of July 1st in which you ask the following question:

"There are five candidates for the legislature in this county, two of which are to be elected. If a voter votes for only one of the five will this be a valid ballot?"

This office has uniformly expressed the view that where two persons are to be elected under the circumstances stated by you, if a voter votes for only one, his ballot will be a valid ballot. See section 179 of the Code.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Ballots—Reservation of Space for Voter to Write Own Choice.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 12, 1939.*

MR. WILLIAM A. DUKE,  
*Chairman of the Electoral Board,  
Norfolk County,  
Churchland, Virginia.*

MY DEAR MR. DUKE:

With reference to the printing of the ballots, you are advised that section 162 of the Code of Virginia provides as follows:

"It shall be lawful for any voter to place on said official ballot in writing the name or names of any person or persons for any office for which he may desire to vote and mark the same by a check or cross mark or a line immediately preceding the name inserted."

This office has ruled that, since the foregoing provision clearly provides that the voter shall have the privilege therein set out, it is the duty of the electoral board in printing the ballots to leave sufficient space below the names of the candidates whose names are printed on the ballot for the insertion of the name or names of the number of candidates to be voted for for each particular office. This space should be left, of course, under each separate office so that the voter will not have to write in the particular office for which he is voting when he inserts a name or names.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Ballots—Instructions Upon Marking.**

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

MR. G. R. HUMRICKHOUSE,  
*Secretary of Electoral Board,  
Boydton, Virginia.*

MY DEAR MR. HUMRICKHOUSE:

I am in receipt of your letter of September 13, in which you enclose a proposed set of instructions for absentee voters, and ask my opinion as to the validity of the instructions with reference to marking the ballot.

I must advise that, in my opinion, the proposed instruction dealing with the marking of the ballot conflicts with that provision of section 205 of the Code prohibiting "any instructions with regard to the manner of marking the ballot or any information which will give aid to the prospective voter on the preparation of his ballot in contravention of the Constitution of Virginia."

While it is entirely true that section 218 of the Code states that the provisions of the chapter relating to absent voters shall be liberally construed in favor of such voters, yet I cannot possibly see how the voter can be specifically instructed how to mark his ballot without conflicting with the provision I have quoted.

So far as marking the ballot is concerned, I do not think that a person voting by mail should have any advantage over one voting in person, and yet, if the in-

struction you suggest be given, the person voting by mail would have a decided advantage over the one voting in person.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Ballot—Error in Printing Candidate's Name.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 13, 1939.

HONORABLE C. E. PETTIS,  
*Chairman of the Electoral Board,*  
Norfolk, Virginia.

MY DEAR MR. PETTIS:

I have your letter, and that of your associates on the Board, of July 12, which is as follows:

"The electoral board of the city of Norfolk requests a ruling from you on the following question.

"On June 6th, 1939, the Chairman of the City Democratic Committee of the City of Norfolk certified to the Electoral Board the Candidates whose names should appear on the Primary Election Ballots August 1st, 1939.

"Among other names he certified the following name

"James R. Robertson

"This name should have been

"James M. Robertson

"The ballots were printed in accordance with the said certificate on June 14th and approximately One Hundred have been delivered to the voters under the Absent Voters Law.

"You are requested to advise us what we should do under these circumstances.

"If the ballot should stand James R. Robertson and it can be shown that James M. Robertson is the proper candidate, would James M. Robertson be nominated if James R. Robertson receives the proper number of votes or should we reprint the ballots showing the name as James M. Robertson and if we did that what shall we do about the ballots already voted under the Absentee Voters Law."

It is my opinion that, unless there is a person of reasonable prominence in the city of Norfolk by the name of James R. Robertson which would probably result in confusing the minds of the voters as to the identity of the person they are voting for, the clerical error in the printing of the name of the candidate as James R. Robertson instead of James M. Robertson is immaterial and would not affect the validity of the nomination of the person who actually filed his declaration of candidacy and petition with the chairman of the Democratic Committee. It is a fairly general rule of law that the middle initial of a person is not an essential part of his name, although there might be circumstances which would change the application and effect of this rule. (19 R. C. L., Section 4).

Your letter does not mention any request having been made to the electoral board by the chairman of the City Democratic Committee, or by any of the candidates, to correct this error and, unless there is some reason to feel a danger of a

confusion of identity by the voters, it is my opinion that no duty rests upon the Electoral Board to reprint the ballots.

It appears that approximately one hundred persons have already voted under the absent voters' law, and perhaps a large number of others would vote or desire to vote before the corrected ballots could be printed. Thus there might be some question raised as to the effect of mail ballots already cast or hereafter cast, or inability to provide such ballots to persons desiring to vote in the meantime.

Another reason for relaxation of any strict rule which might be applicable is that this is not a general election in which a person is elected, but merely a primary in which a person is nominated.

Under all of the circumstances and in so far as any facts are disclosed in your letter, I am of opinion that the error in the middle initial of the candidate as printed on the ballot is immaterial and will not affect the validity of the nomination of James M. Robertson should a sufficient number of ballots be cast for James R. Robertson to result in a nomination.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **ELECTIONS—Absentee Ballot—Where Affidavit Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 29, 1939.

HONORABLE T. FRANK OSBURN, *Secretary,*  
*Electoral Board of Loudoun County,*  
*Leesburg, Virginia,*

MY DEAR MR. OSBURN:

This is in reply to your letter of July 28, which is as follows:

"As Secretary of the Electoral Board of Loudoun County, I am writing to find out the requirements for voting by mail under section 203. Is a voter living within his City, Town or Precinct who does not make his application in person to the Registrar to vote by mail required to have his application verified by affidavit? In other words, it is my understanding that where such voter deposits the application in the mail he is not required to have the affidavit and that the affidavit is required only for over-the-counter voting. In other words, I want you to construe the words 'in person' as used in section 203."

Section 203 of the Code of Virginia, to which you refer, contains this sentence: "The application may be handed to the registrar in person, or forwarded to him by mail \* \* \* ." The second paragraph of said section provides as follows:

"If such application be made by a voter in person when he is within his city, town or precinct, the same shall be accompanied by an affidavit to the effect that such voter expects to be absent from his city, town or precinct, on the day of the election, for some one of the reasons set forth in the preceding section, or that he will be physically unable to go in person to the polls on the day of election."

Section 205 of the Code provides that upon receipt of the application the registrar shall "forward to the applicant by registered mail or deliver to the said applicant in person \* \* \* an envelope containing the folded ballot, sealed and marked 'ballot within. \* \* \* .' This office had occasion to give an opinion upon this question in 1936, which was as follows:

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

It is my opinion that the provisions of the statute draw a clear distinction in cases where the application is made through the mail, and the ballot is to be delivered through the mail, and in cases where the application is handed to the registrar in person. In all cases where the application is handed to the registrar in person, it is necessary that the affidavit be made. In cases where the application is made through the mails, it is my opinion that no such affidavit is required.

It is frequently the case that a person desiring to vote, and expecting to be absent from his precinct on election day, will go to the registrar in person, make application for the ballot, and receive the same in person from the registrar along with the other papers which section 205 requires to be delivered to him. It is my opinion that this is the only type of case in which the affidavit is required.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Absentee Ballot—Where Voter Died Before Election.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 30, 1939.

MR. JULIAN R. McALLISTER,  
*Judge of Election,  
Covington, Virginia.*

MY DEAR MR. McALLISTER:

I am in receipt of your letter of October 26, in which you ask if an absent voter's ballot should be counted when it is ascertained that the voter died before the election.

I do not think that the law contemplates that the vote of an elector who has died before the election should be counted. However, I think that the judges of election should be sure that the evidence is indisputable that the elector has died.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Absentee Ballot—Where Two Applications Made.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 13, 1939.

HON. J. LIVINGSTONE DILLOW,  
*Attorney for the Commonwealth,  
Pearisburg, Virginia.*

MY DEAR MR. DILLOW:

I am in receipt of your letter of October 12, in which you present the case of an individual who has made two applications for an absent voter's ballot, one on account of being physically unable to go in person to the polls, and the other on account of the intention of the voter to be absent from the precinct on election day. You state that the registrar mailed the ballot pursuant to the application which stated the voter expected to be absent from the precinct. You further state that the voter in question is a hopeless cripple, a fact generally and publicly known.

You do not state why two applications were made, but I assume this was through mistake or oversight and was no intention to perpetrate a fraud.

The voter is clearly entitled to vote by mail, although the ballot may have been sent on an erroneous application. As a matter of fact, however, if the facilities are provided, even a cripple may be absent from the precinct on election day. Be that as it may, however, in the absence of any showing that a fraud or any violation of the election laws was intended, I am of opinion that the voter's ballot should be counted, inasmuch as she is clearly entitled to vote by mail. You will observe that section 218 of the Code provides that the provisions of this chapter shall be construed in favor of the absent voter.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Absentee Ballot—Return of—Requirements.**

**Id.—Re-establishing Virginia Residence—Poll Taxes.**

**Id.—Registration Books—Delivery of, to Judges.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 13, 1939.*

MR. P. B. BECK,  
*Judge of Election,  
Route 1;  
Cambria, Virginia.*

MY DEAR MR. BECK:

I am in receipt of your letter of October 9, in which you ask a number of questions. The first is:

"The absentee voter law says a mail ballot must be returned to the registrar at least (3) three days before an election. Would the time be counted from the time the envelope was stamped by the postmaster or does it mean the mail ballot must be in the registrar's hands three days before an election?"

In my opinion, if the voter either personally returns the ballot or puts it in the mail addressed to the registrar three days before the election, the provisions of section 208 of the Code have been complied with. You will observe that section 208 contemplates that the registrar may strike from the list that he has prepared the names of those returning their ballots, and this list does not have to be posted, according to section 212, until the morning of election day.

Your next question is:

"Would a voter returning his ballot (2) two days before an election have a vote?"

As I have indicated, where a voter does not intend to use his ballot, it must be returned three days before the election, and, if he returns it only two days before the election, I am of opinion that he has not complied with the statute and may not vote in person. By returning it two days before the election, I mean either personally returns it two days before the election or puts it in the mail two days before the election.

Your third question is:

"Would a voter moving from another State to this State, who was formerly a resident and voter in this State, who has resided in this State one year since his removal from another State, be entitled to reregister after paying

one year's poll tax (6) six months prior to an election and be entitled to vote at the next election? Or would he be required to pay (3) three years poll tax or show a treasurer's receipt showing he had paid his poll tax in the State from which he came?"

This office has frequently ruled in similar cases that, where a person re-establishes his residence in this State, he is to be treated as a new resident and is only required to pay, in order to register and vote, such poll taxes as have been actually assessed or are assessable against him for the three years next preceding the year in which he offers to vote. That is to say, if a person re-established his residence in this State, for example, on February 1, 1938, he may register and vote without the payment of any capitation taxes at all.

The fourth question is:

"Is it permissible for someone to take ballot boxes and poll books to the judges of election—say one of the judges of election or anyone else, the registrar being in good health?"

The purport of this last question is not entirely clear to me. Section 104 of the Code provides that the registrar at each place of voting shall deliver to the judges of election his registration books not later than sunrise on the morning of election day. Section 171 of the Code provides that the boxes shall be kept by the judges of election.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Absentee Ballot—Delivery of, to Applicant.  
Id.—Voting List—Conclusiveness of Evidence.**

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

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

MY DEAR MR. BLACKSTONE:

I am in receipt of your letter of July 20, in which you ask a number of questions relating to the construction of the absent voters law.

Three of your questions are hypothetical and deal with the validity of ballots cast under the absent voters law where a registrar or other election officer fails to literally comply with one or more provisions of the statute. The situations you describe may or may not actually become realities. Under these circumstances, I do not think it would be appropriate or advisable for me to attempt to express an opinion. The failure of an election officer to comply with any particular provision of the statute may be due to facts which conceivably could justify the non-compliance. I feel, therefore, that you will agree with me that, in the absence of a specific existing condition, I should not attempt to express an opinion on a hypothetical case.

You also ask:

"Can a registrar deliver in person to anyone except the voter the ballot requested in application or mail to him? In other words, can a person go to a registrar and request one or several ballots to be delivered to divers and sundry persons either without applications or applications presented later?"

Sections 202 and 203 of the Code contemplate that the voter shall make application for an absent voter's ballot either in person or by mail. I think it would be clearly improper for a registrar to furnish an individual with several absent voters' ballots to be used by others without any application therefor whatsoever.

You next ask:

"Can a voter that owed three years capitation tax and only paid one year, 1938—even if on qualified list of voters—vote if that fact is known?"

Sections 109, 110 and 111 of the Code deal with the list of persons who have paid capitation taxes. Section 111 provides that the clerk shall deliver to one of the judges of election of each precinct a "certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting."

In view of this provision, it is my opinion that, if the list shows that the individual has paid his capitation taxes for the last three years, it is conclusive evidence of this fact.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **ELECTIONS—Absentee Ballot—When Affidavit Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 13, 1939.

HON. WRENDO M. GODWIN,  
*Member of House of Delegates,  
Bloxom, Virginia.*

MY DEAR MR. GODWIN:

I have your letter of July 12, in which you state that in construing section 203 of the Code, relating to absent voters, you are of opinion that the applicant for a ballot does not have to make a sworn affidavit that he does not expect to be present on election day, but simply make application in writing that he does not so expect to be present on that day.

The section in question provides in part as follows:

"He shall make application in writing for a ballot to the registrar of his precinct, not less than five nor more than sixty days prior to the primary or general election in which he desires to vote, if he be within the confines of the United States, or not less than sixty days nor more than ninety days, if he be in the Philippines, Hawaii, Porto Rico, the Canal Zone, or in territory over which the United States has no jurisdiction. The application may be handed to the registrar in person, or forwarded to him by mail, and shall contain necessary postage, or the correct amount in legal tender, necessary for registering the ballot to him, and full directions for mailing the same. But the failure to enclose necessary postage shall not render void a vote otherwise legally cast.

"If such application be made by a voter in person when he is within his city, town or precinct, the same shall be accompanied by an affidavit to the effect that such voter expects to be absent from his city, town or precinct, on the day of the election, for some one of the reasons set forth in the preceding section, or that he will be physically unable to go in person to the polls on the day of election."

It seems to me reasonably plain from the above that, if the application be made by a voter in person when he is within his city, town or precinct, such application must be accompanied by an affidavit to the effect that the voter expects to be absent

on election day. However, the affidavit only seems to be required when the application is made by a voter in person. In other words, if the application for a ballot is mailed, it is only necessary that it be made in writing, the affidavit not being required in this case.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Absentee Ballot—Where Person Moves to Another County Before Election.  
Domicile and Residence.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 18, 1939.

JUDGE E. HUGH SMITH,  
*In care of Honorable S. W. Lacy,  
New Kent, Virginia.*

MY DEAR JUDGE:

Major Gibson, one of my assistants, informed me that you asked my opinion upon the following state of facts:

A regularly registered and qualified voter of New Kent County applied sometime prior to an election for an absent voter's ballot, and filled out the ballot and returned the same to the registrar of his precinct. Subsequent to this, but before the election, the voter left New Kent County and went to another county to live.

Your question, as relayed to me by Major Gibson, is as to whether such a person is entitled within the six months required by law for him to have established a voting residence in another county to return to New Kent County and cast his ballot.

In my opinion, the right of the judges of election to count the absent voter's ballot of this person depends upon whether or not when he left New Kent County, he left with the intention of establishing a residence in another county and without the intention of returning to New Kent County. In other words, whether or not when he left New Kent County he abandoned that County as his domicile and in fact established a domicile in the second county. If he left New Kent County with the intention of abandoning that County as his domicile and established a domicile in the second county, he is not entitled to return to New Kent County and vote in an election even though that election takes place within six months from the time of his having left New Kent County.

I may add that the casting of an absent voter's ballot is an offer of the voter to cast such ballot on the day of election, and that, if he is not qualified on the day of election to cast a ballot, the ballot which he votes as an absent voter's ballot should not be counted.

The fact that the Constitution provides that a person changing his residence or domicile from one precinct in a county or town to another is entitled to return and vote within thirty days in his old precinct, the term which is required for a person to obtain a right to vote in another precinct or ward of a city, is persuasive evidence confirmatory of the correctness of the opinion which I have expressed.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Candidate's Petition—To What Candidate Law Applies.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 22, 1939.

HON. J. H. POFF,  
*Attorney for the Commonwealth,  
Floyd, Virginia.*

MY DEAR MR. POFF:

I am in receipt of your letter of August 19, in which you first ask the following question:

"Does section 154 of the Virginia Election Laws requiring candidates other than the party nominees to file a petition signed by fifty qualified voters before name is printed on ballot apply to county supervisors, constables and justices of the peace?"

I find that I have heretofore had occasion to express the opinion that the officers mentioned by you should file notices of their candidacy, accompanied by a petition signed by fifty qualified voters, for the reason that in a sense these officers are county officers.

You next ask:

"In your opinion, would a person be qualified to vote in the November election, 1939, who has moved from another state into the state of Virginia in May, 1938, and who pays his 1939 poll taxes in August, 1939, and registers thirty days before the election?"

I am of opinion that such a person would be qualified to vote even without the payment of the 1939 capitation tax, and this office has heretofore so ruled in a large number of cases.

Yours very sincerely,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Petition of Candidacy—When Required.  
Id.—Party Primary Nominee.**

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

HONORABLE W. B. MASON, *Chairman,  
Orange County Democratic Committee,  
Orange, Virginia.*

DEAR MR. MASON:

I have your letter of August 22, asking my opinion upon certain questions arising under Virginia Code (Michie 1936) section 154.

You first wish to know whether it is necessary for a candidate who is nominated by his party for want of any opposition in the primary to file a petition in support of his candidacy in the general election.

Under the terms of the statute referred to, it seems clear that "a party nominee, nominated by such method as his political party may have chosen for nominating candidates", need not file a petition in support of his candidacy.

Your next question is as follows:

"Secondly, will the candidates who were elected in the August Primary and have been declared the party nominee for the November election have to submit the names of fifty people with their declaration of candidacy for the November election or will they simply have to qualify before the Clerk of Court?"

Under the express terms of the statute, it is not necessary for a party primary nominee to file either a petition or a notice of candidacy in order to have his name printed on the ballots for the general election.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Filing Notice of Candidacy—Primary Nominee.**

**Id.—Petition of Voters—Party Nominee.**

**Id.—Nomination by Democratic Committee.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 31, 1939.

HONORABLE J. F. WYSOR, *Treasurer,*  
*Pulaski, Virginia.*

DEAR MR. WYSOR:

This is in reply to your letter of August 28, in which you request my opinion upon certain questions which have arisen with reference to section 154 of the Virginia Election Laws.

You are advised that this office has ruled as follows:

1. Where a person is a party primary nominee, it is not necessary for him to file either a notice of declaration of candidacy, or to file a petition signed by fifty qualified voters.

2. Where the candidate is a party nominee, but is not a party primary nominee, he is required to file a notice of candidacy, but is not required to file a petition signed by fifty qualified voters as in the case of independent candidates who are not nominated by any party.

In other words, this office has frequently ruled that the requirement for the filing of a petition along with the notice of candidacy applies only to persons who are not party nominees, but who are independent candidates.

I have observed from your letter that you have notified the clerks of the various counties comprising the Ninth Senatorial District that Dr. Caudill is the nominee of the Democratic Party for the State Senate from that District. I think this is a proper notice for you to give, although it is not required.

You further ask whether or not you should give a similar notice to the secretaries of the various county electoral boards. No such notice as this is required by statute, but I see no objection to your furnishing this information to the secretaries of the electoral boards. They should be advised in some manner that the candidate is a party nominee, so as to dispense with the necessity of filing the petition of the qualified voters.

I do not think there is any question about the fact that Dr. Caudill, the Democratic candidate, having been nominated in the manner in which you state, was lawfully nominated. You state that he was the only candidate filing with the Democratic Committee or Committees a notice of candidacy, whereupon the Committee or Committees, by reason of the fact that no candidate filed in opposition to Dr. Caudill, declared him to be the nominee of the party. The general powers of the local party committees, under our statutes and the Democratic Party Plan, are very

broad and, in my opinion, the action taken is in accordance with the powers conferred on said party committees.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Candidates—Filing of Petition—Who Are County Officers.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 10, 1939.

HONORABLE A. R. BEANE, *Treasurer,*  
*Lancaster, Virginia.*

DEAR MR. BEANE:

I have your letter of August 4, requesting my opinion as to the proper construction of Virginia Code (Michie 1936) section 154, in so far as that section relates to the filing of notices by candidates for county and district offices, where such candidates are not party primary nominees.

Code section 154 requires all county officers to file notices of candidacy, together with petitions in support thereof, with the county clerk at least sixty days prior to any general election in which they seek to have their names printed on the ballots, unless such candidates are party primary nominees.

This office has consistently held that justices of the peace, constables and county supervisors, although elected by the voters of their respective magisterial districts only, are county officers within the meaning of Code section 154.

It follows that all such candidates should file notices pursuant to the provisions of Code section 154.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Justice of the Peace—Petition Filed by Candidate.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 10, 1939.

HONORABLE FRANK S. BLACK,  
*Justice of the Peace,*  
*Staunton, Virginia.*

DEAR MR. BLACK:

I have your letter of August 3, requesting my opinion as to whether it is necessary for you to file, with the notice of your candidacy for the office of Justice of the Peace, a petition in support thereof, and, if so, whether such petition should be signed by voters of your magisterial district only.

This office has heretofore expressed the opinion that a Justice of the Peace is a county officer within the meaning of Virginia Code (Michie 1936) section 154, and hence a candidate for that office should file with his notice of candidacy such a petition as is required by that section.

I have also expressed the opinion that the law does not expressly require that the signers of the petition shall be voters of the candidate's magisterial district. However, since this point is not entirely free from doubt, it has been my recom-

mendation that a candidate obtain the necessary signatures from voters of his magisterial district only.

None of these requirements apply, of course, to party primary nominees.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTION—Notice of Candidacy—When Filed.**

**Id.—Petition of Voters—Affidavit Signed by Candidate Himself.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 12, 1939.*

MISS BESSIE BRANNON, *Deputy Clerk,*  
*Circuit Court of Frederick County,*  
*Winchester, Virginia.*

MY DEAR MISS BRANNON:

I am in receipt of your letter of September 8, in which you advise that a candidate in the coming November election, not nominated by any party, filed with you his notice of candidacy on September 8, 1939. You desire to know whether this notice of candidacy was filed within the time prescribed by law.

This office has heretofore expressed the opinion that, pursuant to section 154 of the Code of Virginia, a notice of candidacy in the November election filed on or before September 8, 1939, complies with the requirements that such notice be filed "at least sixty days before such election".

You then state:

"The declaration was accompanied with a petition of more than fifty qualified voters. To the petition was an affidavit signed by the candidate himself that each and every one of the voters whose names were signed to the petition was signed in his presence."

and ask:

"Is it a sufficient compliance with the statute for the candidate himself to make the affidavit that the signatures upon the petition were affixed in his presence?"

The statute provides that the notice of candidacy in such a case shall be accompanied by a petition therefor, signed by fifty qualified voters of the county, "each signature to which has been witnessed by a person whose affidavit to that effect is attached to such petition." The practice of the candidate himself witnessing the signatures of the persons signing the petition is an unusual one, and, in my opinion, for obvious reasons, should be discouraged. However, from a careful examination of the section, I am unable to say that there is anything therein which prohibits this action and, in my opinion, if the other requirements of the section are complied with, you should certify the name of such a candidate to the electoral board. In the last analysis the only tribunal which can finally pass on the validity of such a petition is a court of competent jurisdiction. As above stated, I do not feel that this office can express the official opinion that this practice is prohibitive in any and every case.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Clerk of Circuit Court—Duty of, Where Candidate Fails to Comply With Statute.**  
**Id.—Id.—Duty of, to Check Candidate's Petition.**

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

MR. A. H. GOFF,  
*Clerk of the Court,*  
*Grundy, Virginia.*

MY DEAR MR. GOFF:

This is in reply to your letter of September 19, in which, after quoting the provisions contained in the last part of the first paragraph of section 154 of the Code relating to the requirement of filing a petition with a notice of candidacy in order for a candidate to have his name printed on the official ballot, you request my opinion upon the following situation which you state has arisen in your county.

A petition has been filed with you along with the notice of candidacy of a person who is not a nominee by convention, primary or otherwise of any political party, said person desiring to become a candidate for sheriff of your county and evidently desiring to have his name printed upon the official ballot. You state that the names of the fifty persons signing the said petition are not witnessed and that there is no affidavit to the effect that these have been witnessed attached to said petition, as required by the statutory provisions you quote. You ask my opinion upon the question whether or not it is your duty to certify this candidate's name to the secretary of the electoral board for printing upon the official ballot.

You will note that the last paragraph of said section 154 of the Code makes it the duty of the clerk to immediately certify to the electoral board of his county the name of each and every candidate which has been duly filed, and upon his failure so to do the judge of the circuit court may upon motion of the candidate affected immediately certify same.

It is my opinion that this provision imposes upon the clerk of the court the duty of determining whether the notice and petition are regular on their faces. If there is an obvious irregularity, the clerk should not certify the name of the candidate to the electoral board but should immediately notify the candidate of the fact that he will not certify same, together with his reasons therefor, so as to give the candidate ample opportunity to apply to the court to certify same.

In my opinion, the failure to have the names of those signing the petition witnessed and the affidavit of such witness attached, as required by section 154, is a material irregularity and is not in any sense a substantial compliance with the statute, and this irregularity would justify the clerk of the court in refusing to certify the candidate's name and following the procedure above suggested.

You further request my opinion upon the question whether or not it is the duty of the clerk of the court to examine into and determine the question of whether or not the signers of the petition are qualified voters.

I do not think that the law imposes any such duty as this upon either the clerk or the electoral board. I have previously held that these officers are entitled to rely upon a presumption of the eligibility of the signers to vote. However, I have further held that, in the event that the clerk has actual knowledge of the fact that a sufficient number of the signers of the petition are not qualified to reduce the qualified number below the requisite number of fifty, he should regard this a fatal defect in the petition. Of course, in a case of this kind the candidate should likewise be given the same opportunity to have the court pass upon the question of the eligibility of the signers of the petition. You will note that the statute uses the words "duly filed." I think these words carry with them the implication that the clerk must pass upon the question of the regularity of the petition and notice of candidacy, but does not impose upon him the obligation to investigate all of the

facts, such as payment of poll taxes, time of residence, etc., of the persons who have signed the petition.

The code section above referred to does not impose any duty upon the electoral board to examine into the regularity of the notice and petition, because the clerk is not required to transmit the petition and notice to the electoral board or secretary thereof, but is required to certify the names of the persons whose petitions have been duly filed. This involves the exercise of judgment on the part of the clerk to determine the question whether or not the notice and petition have been duly signed and seems to remove the exercise of any such judgment from the electoral board itself.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Clerk of Circuit Court—Filing Notice of Candidacy With.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 12, 1939.*

HON. D. C. SEWELL, JR., *Clerk,*  
*Circuit Court of Lee County,*  
*Jonesville, Virginia.*

MY DEAR MR. SEWELL:

I am in receipt of your letter of September 9, in which you advise me that the Republican Party in Lee County nominated its candidates for the offices of county treasurer, commissioner of the revenue, and sheriff in a party convention held for the purpose on April 9, 1939. You have been furnished with a notice signed by the chairman of the convention and attested by its secretary giving you the names of the candidates of the Republican Party nominated for these offices. You state that you have not been furnished by any of these three candidates with a notice of candidacy signed by the candidate and attested by two witnesses. Indeed, you say that you have not been furnished with any sort of notice of candidacy signed by any of the three candidates. However, as I have indicated above, you state that there has been filed with you a notice addressed to you advising you of the action of the Republican convention in nominating its candidates for the offices of county treasurer, sheriff, and commissioner of the revenue, the said notice being signed by the chairman of the convention and attested by the secretary, and furnishing the names of the candidates so nominated.

You wish to know whether or not under the conditions set out in the foregoing paragraph it was necessary for the candidates for these three offices to file with you signed notices of candidacy attested by two witnesses, as required by section 154 of the Code.

The first part of section 154 of the Code insofar as it is applicable here provides that a candidate for a county office shall file with the clerk of the circuit court of the county at least sixty days before the election a written notice of candidacy signed by the candidate and attested by two witnesses, designating the office for which he is a candidate. The section then goes on to provide as follows:

“ \* \* \* No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for such election, *unless he be a party primary nominee*; nor shall the name of any candidate for United States Senate or for the House of Representatives, or for any State office, *other than a party nominee, nominated by such methods as his political party may have chosen for nominating candidates*, be printed on the ballots provided for such election, unless he file along with his notice of such candidacy a petition

therefor, signed by two hundred and fifty qualified voters of the State at large, or of his congressional district, as the case may be, each signature to which has been witnessed by a person whose affidavit to that effect is attached to such petition; 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." (Italics supplied.)

It seems to me plain from the quoted language that the only candidate exempt from filing a notice of candidacy is "a party *primary* nominee". The quoted language also requires that a candidate for a county office shall file "along with his notice of candidacy a petition therefor, signed by fifty qualified voters of his county", but this requirement of the petition does not apply to "a party nominee". The statute has in express terms exempted "a party *primary* nominee" from filing even a notice of candidacy, but this exemption, from the plain language of the statute, does not apply to a candidate of a party nominated by some method other than a primary. However, every "party nominee", by whatever method the nomination may have been made, is exempt from filing the petition signed by fifty qualified voters.

It follows that the candidates for the three offices mentioned by you, not having been nominated in a primary, but in a convention, were not relieved from the requirement of filing a notice of candidacy, as required by the statute, but were relieved from filing the petition signed by fifty qualified voters of their county. It further follows that, the proper notices not having been filed by September 8, sixty days before the election, the names of the candidates for the offices of county treasurer, commissioner of the revenue, and sheriff, as set out in the notice filed with you and signed by the chairman of the convention and attested by the secretary of the convention, should not be printed on the ballots provided for the November election.

I call your attention to the fact that section 154 gives to these candidates a speedy method of having determined whether or not their names shall be printed on the ballots, in the following language:

" \* \* \* and upon the failure or refusal of said clerk or clerks to immediately certify to said electoral board the name of each and every candidate which has been duly filed, the judge of the circuit or corporation court may upon motion of any candidate affected immediately certify to said electoral board the name of each and every candidate which has been duly filed. \* \* \* "

While I have expressed my views in some detail in this communication, they are in accordance with opinions heretofore expressed by this office. For example, in a letter under date of August 31, of this year, to Honorable J. F. Wysor, Treasurer of Pulaski County, I wrote:

"You are advised that this office has ruled as follows:

"1. Where a person is a party *primary* nominee, it is not necessary for him to file either a notice or declaration of candidacy, or to file a petition signed by fifty qualified voters.

"2. Where the candidate is a party nominee, but is not a party primary nominee, he is required to file a notice of candidacy, but is not required to file a petition signed by fifty qualified voters as in the case of independent candidates who are not nominated by any party."

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**ELECTIONS—Capitation Tax—Bulk Payment of—  
VOTING LIST—When Closed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 11, 1939.*

MISS MARY SUE FULLER,  
*Treasurer of Russell County,  
Lebanon, Virginia.*

MY DEAR MISS FULLER:

I have your letter of April 8, in which you request my opinion upon four questions therein set out.

You first inquire whether it is lawful for one person to pay the poll tax of other persons in bulk, if he has orders from the individuals to pay taxes for them.

I see no illegality in the payment of the poll tax. The only question which would arise in such a case would be whether or not the persons whose poll taxes have been so paid should be placed upon the treasurer's voting list. The Constitution requires that on this list only the names of persons whose taxes have been personally paid shall be included. If each of the persons whose taxes are paid actually pays the tax himself or herself, the person delivering the money merely acts as their agent in so doing. In such a case, it would be proper to include the names of such persons on said list.

Your second question is as to the position of the treasurer if he accepts payment in accordance with your first question.

As stated, there would be no illegality in the tax being paid, but the treasurer would violate the law if the names of persons are improperly placed on the voting list.

Your third question is as to the last day on which a treasurer may legally accept poll tax payments in order for the persons whose taxes are paid to be eligible to have their names placed on the voting list.

In my opinion, Saturday, May 4, 1940, is the last day on which such taxes can be so paid.

Your fourth question is as to whether or not the recent Act of the General Assembly concerning poll tax payments is now in effect.

This Act will not become effective until about June 23.

For your further information, I am enclosing you herewith a copy of an opinion which I gave on this subject to the treasurer of Montgomery County under date of April 16, 1936.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Eligibility—Poll Taxes.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *July 18, 1939.*

HONORABLE W. HILL BROWN, JR.,  
*Attorney for the Commonwealth,  
Manassas, Virginia.*

MY DEAR MR. BROWN:

I am in receipt of your letter of July 15, in which you ask the following question:

"When one moves into a county from another county and establishes a residence in the county into which he moves, though he be over the age of 21

when he moved into the county, but had not registered or paid any taxes in the county from which he moved, is he not, upon fulfilling the requirements of becoming a resident of the county into which he moved and paying his taxes as assessed against him, entitled to a vote?"

Section 20 of the Constitution and section 93 of the Code require, among other things, that a person may register if he has paid "all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register." If the person whom you describe is over the age of twenty-one and has been a resident of Virginia for the three years next preceding the year in which he offers to register, then he either has been assessed or is assessable with State capitation taxes for those three years. I am of opinion, therefore, that such a person offering to register must satisfy the registrar that he has paid his State capitation taxes for the three years next preceding. If the individual has been living in another county for the three years next preceding that in which he offers to register, then the capitation taxes are legally assessable against him in that county. But, wherever the capitation taxes are assessable, I am of opinion that, pursuant to the mandate of the Constitution and the statute, they must be paid before the individual may register.

This office has frequently ruled that, in the case of a person moving into the State from another State, he may register without paying any capitation taxes if none was assessed or assessable against him for the three years next preceding the year in which he offers to register. However, where a person has been continuously a resident of Virginia, the situation is entirely different, because State capitation taxes are "assessed or assessable against him".

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Voters—Poll Tax—Where Political Disabilities Removed—Registration.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 26, 1939.*

MR. ERNEST SMITH, *Deputy Treasurer,*  
*Grundy, Virginia.*

MY DEAR MR. SMITH:

I am in receipt of your letter of October 21, from which I quote as follows:

"If a person is pardoned from the State prison by the Governor and at a later date his political disabilities are removed, what amount of State capitation tax would he be required to pay in order to vote? Could a person whose disabilities were removed in the past four months vote if he had paid 1938 capitation tax prior to May 6, 1939? Could a person whose disabilities were removed last May pay 1939 taxes, re-register and begin voting again as a new voter? Must a person register again after his voting rights are restored?"

If the individual involved was a resident of Virginia at the time that he was sent to the penitentiary, I am of opinion that his State capitation taxes for the three years last past should be paid in order to qualify him to vote. This office has heretofore ruled that all residents of Virginia are subject to the State capitation tax, and the fact that a person may have been confined in the penitentiary does not relieve him of this obligation.

Replying to your second question, if the name of the person you have in mind has not been stricken from the registration books, I see no reason why he should

register again. If his name does not appear on the books, he should, of course, re-register.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Poll Tax—Payment of, Upon Coming of Age—Registration.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 31, 1939.*

HONORABLE HUGH P. FISHER, *Chairman,*  
*New Kent County Democratic Committee,*  
*Ashland Farm,*  
*Quinton, Virginia.*

MY DEAR MR. FISHER:

This is in reply to your letter of October 30, in which you ask for information as to the status of two persons who have recently become of voting age.

In the case of the first person, you state that he became twenty-one years old in the year 1938. If this was after the 1st day of January, 1938, he was not assessable with a capitation tax for that year. Therefore, in order to pay the necessary capitation taxes to vote, he would be required to pay the tax for the year 1939. However, this office has ruled that the registration books for the November election are closed thirty days before the election, and no new voter may be registered after that time. It is, therefore, too late for this party to register and vote.

The same general rule applies to the second person you mention, who became twenty-one years of age prior to October 7, during the year 1939. The first year's capitation tax assessable against this person, if he became twenty-one years of age after the 1st day of January, 1939, will be for the year 1940 and, if he had paid his 1940 capitation tax and registered thirty days prior to the election, he would have been qualified to vote on November 7.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voting—Sick Persons.  
Id.—Registration Books—When Closed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 6, 1940.*

MR. JESS WHITE,  
*Member of Electoral Board,*  
*Richlands, Virginia.*

MY DEAR MR. WHITE:

I am in receipt of your letter of May 2, in which you ask the following question:

"What is the proper procedure in voting people who get sick after 5 days before elections? Are they allowed a vote and how are they voted?"

Unless the voter has filed his application for a ballot within the time required by the absent voters' law, he can only vote in person. In other words, if the voter

should become sick immediately before the election and not able to attend the polls, the statute makes no provision for him to cast his ballot.

In reply to your second question, I might advise that, pursuant to section 98 of the Code of Virginia, this office has frequently ruled that the registration books are closed after the third Tuesday in May and after thirty days prior to the November election, and that no person may register between those days and the election. This has been the ruling of this office for many years.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Registrar—Appointment of—Time.**

**Id.—Id.—One Not a Registered Voter.**

**Id.—Removal of.**

**Id.—Office—In Non-Municipal Building.**

**VOTERS—Registration—Card System.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 25, 1940.

MR. CHARLES D. SANFORD,  
*Secretary of Electoral Board,*  
*Petersburg, Virginia.*

MY DEAR MR. SANFORD:

I am in receipt of your letter of June 13, in which you state that the electoral board for the city of Petersburg has been giving consideration to the advisability of appointing a general registrar for Petersburg under the authority of the Act, as amended, authorizing such board in cities having a population of 15,000 or more to appoint such general registrar. The Act was originally passed in 1920 (Acts 1920, page 578) and has been several times amended. It is now found in a compilation of the Virginia election laws issued by the Secretary of the Commonwealth in 1938, on page 100 thereof.

I shall endeavor to answer your questions in the order in which they are asked.

"(1) Should the board decide to appoint a general registrar, could such an appointment be lawfully made any time in 1940 or would we have to wait until an odd year some time prior to the first day of April of that year?"

I am of opinion that the express provision of the Act must be followed, namely, that the registrar, if appointed, shall be appointed prior to the first day of April, 1941, for the term of two years from the first day of May, 1941. I do not think that under the Act the appointment can be made this year.

My answer to your first question makes it unnecessary to answer your second question.

Although it would be rather unusual for a person to be appointed a registrar for the purpose of registering voters when he himself is not a qualified voter, I cannot say that the appointment of a person who is not a qualified voter would be invalid.

"(4) Could the city of Petersburg—through its electoral board—use the card system similar to that used in Richmond under our present laws, including the 1940 amendments, or would the electoral board be forced to use the bound books now generally used?"

I can find no statute authorizing the use of the card system in Petersburg. The Act of 1940 to which you refer applies to cities having a population of 165,000 or more inhabitants and to counties.

"(5) May the board lawfully permit the general registrar when appointed use his place of business if that be in any other building than the city hall or other municipal building for the purpose of registering voters?"

The Act expressly requires the general registrar to maintain his office in the city hall or other municipal building of the city for which he is appointed. I am of opinion that this requirement is mandatory.

"(6) May the board, in the event a general registrar is appointed, remove him for cause prior to the expiration of his two-year term?"

The Act does not give to the electoral board authority to remove the general registrar. I am of opinion that he may be removed from office in the manner provided by section 2705 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Registrar—Certificate of Transfer—When Granted.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 2, 1939.*

HONORABLE C. M. SELLS,  
*Registrar,*  
*Volney, Virginia.*

MY DEAR MR. SELLS:

I am in receipt of your letter of September 26th in which you ask whether you should grant a transfer to parties who live in Smyth County, Virginia, who have not paid their capitation taxes for 1937-1938.

If the voter is duly registered at your precinct, I am of the opinion that you may issue a certificate as prescribed by section 100 of the Code without inquiry as to payment of the capitation taxes by the voter requesting the certificate. Of course, the person who has not paid the capitation taxes required by law to render him eligible to vote, may not vote, but the payment of the proper capitation taxes is a matter to be ascertained by the election officials at the time the person offers to vote. I do not see that section 100 places on the Registrar issuing the certificate the duty of inquiring into the payment of capitation taxes of a person otherwise duly registered.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Voters—Registration Books—When Closed—Transfers.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 31, 1939.*

HONORABLE H. T. HOWARD, *Secretary,*  
*Montgomery County Electoral Board,*  
*Childress, Virginia.*

MY DEAR MR. HOWARD:

This is in reply to your letter of October 31, in which you request my opinion upon the question whether or not persons *transferring* from the voting *registration*

*books* of another county to Montgomery County may have their names entered upon the registration books of Montgomery County after the expiration of thirty days preceding the November election.

This office has held that the last day on which a person could be properly registered by a registrar preceding the election to be held on November 7, 1939, was on October 7.

Section 98 of the Code has been construed by this office to prohibit the registration of voters after the regular registration day provided for, which must be thirty days previous to the November election.

Section 100 of the Election Laws was thus construed by this office in an opinion given October 27, 1936, appearing in the annual report of the Attorney General for the year 1936-1937, at page 76:

"Where the change of residence is from one county or city to another county or city the name of the person so transferring cannot be entered after the close of the registration books thirty days prior to the election (section 100 Election Laws)."

It follows from the foregoing that I am of the opinion that no person could be legally transferred to the registration books of any precinct in Montgomery County from the precinct in any other county or city after the 7th day of October, 1939.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Domicile and Residence.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 6, 1939.

HON. R. J. BOLTON,  
*Treasurer of Montgomery County,  
Christiansburg, Virginia.*

MY DEAR MR. BOLTON:

I am in receipt of your letter of December 6, in which you ask several questions as to the qualifications of persons to vote, the answers to which questions depend upon the legal residence of the individuals involved.

If a person lives in a town and subsequently moves his physical residence beyond the limits of the town, the question of his legal residence is largely controlled by the intention of the individual involved. If, when he moved from the town, he intended to establish his legal residence in the county, then, of course, he may not continue to vote in the town. If, however, he is temporarily residing in the county, even though such residence may be of long duration, yet, if he has the intention of retaining his legal residence in the town with the further intention of returning at some future time, he may continue to vote there.

The principles outlined above, of course, would apply if the situation were reversed. I do not think that the fact that a person still has a business in the town is of any legal significance except that, of course, it may be considered in ascertaining his intention.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Resident Less Than One Year.**

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

MRS. CLAYTON HIGGINS,  
*Registrar,  
Oldtown, Virginia.*

MY DEAR MRS. HIGGINS:

I have your letter of October 17, in which you request my opinion upon the eligibility of a person becoming a resident of the State of Virginia after January 1, 1939, to register and vote in the elections being held during this year.

Section 18 of the Constitution requires that in order to be eligible to vote a person must have been a resident of the State of Virginia for one year prior thereto. It is clear, therefore, that a person in the class you refer to is not entitled to vote in this year's elections.

If a person moved into Virginia after January 1, 1938, and during said year prior to November 7, 1938, then such a person is entitled to register and vote in the November election without the prepayment of any capitation tax, as he will have then been a resident of Virginia for more than one year, and will have paid all capitation taxes assessed or assessable against him for the three preceding years. In other words, no capitation taxes are assessable against him for any such years, therefore none are required to be paid.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Registration Books—Replacement of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 18, 1939.*

MISS DAISY O. BROWN, *Registrar,*  
*P. O. Box 623,  
Buena Vista, Virginia.*

MY DEAR MISS BROWN:

I am in receipt of your letter of October 16, from which I gather that the registration books at your precinct are so defaced or otherwise in such condition as to render it difficult, troublesome or unsafe to use them longer. You inquire what should be done under these circumstances.

This is a matter in which the electoral board can take action pursuant to section 91 of the Code of Virginia, which I quote below:

"Whenever the registration books in any election district are so mutilated, blotted, defaced, or otherwise in such condition as to render it difficult, troublesome or unsafe to use them longer, the electoral board shall order that the said books shall be copied, and in such case it shall be the duty of the registrar for such election district to cause fair copies to be made of the old registration books, and they shall take the place of the old books, which shall be filed and preserved in the office of the registrar as the other books are kept but said registrar shall not destroy the old books."

Section 94 of the Code provides that the Secretary of the Commonwealth shall furnish registration books to the clerk of the court, who shall in turn distribute

them to the registrars. You should, therefore, obtain your books from the clerk of the court. If he has none on hand, he may request them from the Secretary of the Commonwealth at Richmond.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Registrar—Delivery of Registration Books.  
Id.—Id.—Delivery of Absentee Ballots.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 30, 1939.*

MR. P. B. BECK,  
*Judge of Election,  
Route 1,  
Cambria, Virginia.*

MY DEAR MR. BECK:

I am in receipt of your letter of October 24, in which you refer to section 104 of the Code, providing for the delivery of the registration books to judges of election, and ask if it is mandatory that this delivery be made by the registrar in person or whether the registrar may deliver the books to one of the judges of election who happens to live nearby.

The section stipulates that the books shall be delivered to the judges of election not later than sunrise on the morning of election day. The case might arise where the registrar would have to deliver books at a number of precincts in an election district. Manifestly, if the registrar had to go in person to a sufficient number of voting places, it would be practically a physical impossibility for him to get to all of these voting places by sunrise on election day. In my opinion, therefore, if the registrar delivers his books to a judge of election the night before the election, it will constitute a substantial compliance with the statute.

You also ask if it is the duty of the registrar to come to the polls for his registration books after the polls are closed.

The same statute provides that the judges of election shall turn over the registration books to the registrar after the election. In my opinion, the duty of turning over the books to the registrar is upon the judges of election.

You next ask if, pursuant to section 213 of the Code, the registrar shall personally deliver to the judges of election the box containing the absent voters ballots.

This duty, of course, may be performed any time during the day of election, and I am of opinion that the registrar should personally deliver the box to the judges of election. You will observe that the section contemplates that the registrar shall take "their receipt therefor", referring to the receipt of the judges of election.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Registrar—Registration Books—Purging of—Compensation.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 10, 1939.*

HONORABLE O. B. WATSON, *Treasurer,*  
*Orange, Virginia.*

DEAR MR. WATSON:

I have your letter of August 4, requesting my opinion on certain questions arising under the election laws.

You first wish to know what agency—whether the county board of supervisors or the electoral board—is authorized to require the registrar to purge his registration books.

Under section 107 of the Code of Virginia (Michie 1936), it is expressly provided that the electoral board of the county may require the purging of the registration books, and shall do so at least once every six years. This Code section is found on pages 30-31 of the Virginia Election Laws as published in pamphlet form in 1936.

You next ask me to advise how the compensation for such work is fixed.

Code section 200, found at page 66 of the pamphlet mentioned above, provides in terms that registrars "shall receive as compensation for their services the sum of three dollars each for each day's service rendered, \* \* \* to be paid out of the treasury of the county, city or town in which the election is held." It is not entirely clear, however, that this section applies to the services rendered by the registrar in purging his registration books, or in copying the same, and I do not find any provisions elsewhere in the law plainly covering this question.

For these reasons, this office has heretofore expressed the opinion that it would be wise for county registrars to seek an agreement in advance with the electoral board as to compensation for these services. In this connection, the electoral board should obtain the approval of the county board of supervisors, which must appropriate the necessary funds.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **ELECTIONS—Registrar—Registration Books—Transfer of Names.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 22, 1940.*

MR. C. J. SUTHERLAND,  
*Registrar, Town of Galax,  
Galax, Virginia.*

MY DEAR MR. SUTHERLAND:

I am in receipt of your letter of April 19.

Pursuant to the provisions of section 2995 of the Code, it seems to me entirely proper for you to transfer to the town registration books those residents of Galax whose names appear on the county registration books. As an aid to you in this work you will have available the treasurer's list furnished to the clerk of the court of the residents of Galax who have paid their State capitation taxes. This list is furnished pursuant to section 114 of the Code of Virginia.

Of course, you may also register up to and including the third Tuesday in May those who have not previously registered and who are qualified so to do.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Registration of Persons Coming of Age.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 7, 1940.

HONORABLE MARCUS A. COGBILL,  
*Commonwealth's Attorney,*  
*Chesterfield C. H., Virginia.*

MY DEAR COGBILL:

I have your letter of May 31, in which you request my opinion upon the following question:

"A person becoming of age on the 26th day of May 1940, appears before the Registrar with the request that she be permitted to register in order to vote on the 11th day of June in the town election. The appearance was made subsequent to the third Tuesday in May 1940. The Town of Colonial Heights has a population of more than twenty-five hundred inhabitants. Should the Registrar allow the applicant to register and vote in the town election which will be held on the 11th day of June 1940?"

This office has frequently ruled that the registration books for general elections must be closed thirty days prior to the election.

In the case you present, the person to whom you refer, not having registered before the closing of the registration books, in my opinion is not eligible to register at this time.

It is true that this person was not twenty-one years of age prior to the closing of the registration books. However, section 93 of the Code provides that any person is entitled to register "who shall be twenty-one years of age at the next election, \* \* \* , and if he come of age at such time that no poll taxes shall be assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the first year's poll tax assessable against him, \* \* \* ". The party you refer to, therefore, could have paid his 1941 capitation tax prior to the closing of the registration books and, upon application to register, if otherwise qualified, should have been permitted to register.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Registration—Under Laws of 1902-3.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 19, 1939.

HON. W. BARTON MASON,  
*Chairman Electoral Board,*  
*Orange, Virginia.*

MY DEAR MR. MASON:

I am in receipt of your letter of July 18, from which I quote as follows:

"A man who is now seventy-five years old registered in Powhatan County prior to 1904. He moved from Powhatan to another part of the State and had a transfer to that point to vote. Several years later he again moved to another part of the State and had another transfer. Later he moved into the State of West Virginia and while he was there he voted. His taxes are all

paid and he has complied with the law in that respect. But, as he is unable to write his name he cannot make out an application to re-register. The last place in the State at which he voted the precinct has been abandoned and there are no records of it. The point I would like to know is if that party could be registered by presenting an affidavit to the effect that he had voted in Virginia prior to 1904 or did he lose his citizenship when he went to West Virginia and would now have to register under the present mode of registration."

Section 19 of the Constitution reads as follows:

"Persons registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, whose names were required to be certified by the officers of registration for filing, record and preservation in the clerks' offices of the several circuit and corporation courts, shall not be required to register again, unless they have ceased to be residents of the State, or become disqualified by section twenty-three."

You will observe that persons registered under the general registration of voters during the years 1902 and 1903 shall not be required to register again "unless they have ceased to be residents of the State." The person you describe ceased to be a resident of the State, and I can find nothing in the statutes that can be construed to authorize any officer to place his name on the registration books unless he re-registers as a new resident. I am of opinion, therefore, that such an individual desiring to vote would have to register under the present statutes dealing with registration.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ELECTIONS—Domicile and Residence—Capitation Tax.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 20, 1940.*

HON. ROBERT C. SULLIVAN,  
*City Treasurer,*  
*Alexandria, Virginia.*

MY DEAR MR. SULLIVAN:

I thank you for your letter of February 19.

I am sure that you have not made the statement that a person is liable to capitation taxes in Virginia because of ownership of property here.

You will note from Colonel Moore's letter that he states he is living in Texarkana, Texas, votes there, and that his wife comes to Virginia and stays a month or more in the property they own in Alexandria, but that they only come to Virginia on vacation. Under this state of facts I do not think that either Colonel Moore or his wife is a resident of Virginia within the meaning of section 22 of the Tax Code imposing capitation tax on residents. I do not think that the fact that Colonel Moore's name is listed in the city directory and the phone book is conclusive of his residence.

Please understand that I am not attempting to pass on the facts in this case, but am basing my views entirely upon the facts stated by Colonel Moore, which facts apparently are not contrary to any stated in your letter.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Electoral Board—Compensation for Attending—Printing of Ballots.****Id.—Id.—For Causing Seal to Be Affixed to Ballots.**

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

HON. G. R. HUMRICKHOUSE, *Secretary,*  
*Electoral Board of Mecklenburg County,*  
*Boydton, Virginia.*

MY DEAR MR. HUMRICKHOUSE:

I am in receipt of your letter of October 3rd in which you ask what compensation shall be paid the member of the Electoral Board who attends the printing of the ballots as described by section 156 of the Code. This section provides that "for the faithful discharge of said duty he shall receive the compensation of two dollars". In my opinion this is the entire compensation that the member shall receive for this service. It appears small, but under the language of the section, it seems that it is contemplated that this shall be his entire compensation.

You also inquire as to the compensation to be paid a member of the Electoral Board who causes the seal of the Electoral Board to be affixed to the ballots as set out in section 158. The section provides that "for his services in causing the seal to be affixed to said ballots, the said member of the board shall receive two dollars". Again it seems to me from the language of the statute that it is contemplated that this shall be the entire compensation for this service.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Eligibility—Married Woman Registered in Maiden Name.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 20, 1939.

HONORABLE H. B. SHUFFLEBARGER,  
*Treasurer of Bland County,*  
*Bland, Virginia.*

MY DEAR MR. SHUFFLEBARGER:

This is in reply to your letter of October 19, in which you request my opinion upon the question whether or not a married woman who has separated from her husband and is using her maiden name, and has registered in her maiden name and paid her capitation taxes in this name, is eligible to vote without having her name changed on the registration books.

Generally speaking, a married woman has the right to resume her maiden name if she so desires without any court order to that effect, although it is frequently the case that a provision is incorporated in the decree prohibiting the use of such maiden name. However, in my opinion, this is not necessary, and I therefore am of opinion that the person is entitled to vote without any change in name on the registration books.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Transfer for Purpose of Voting.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 27, 1939.

HONORABLE E. BLACKBURN MOORE,  
*Berryville, Virginia.*

MY DEAR MR. MOORE:

I have your letter of July 26, which is as follows:

"Clarke County has four magisterial districts; can a former resident of Greenway district who has transferred his voting precinct and residence to Battletown district—has been assessed and paid his taxes as a resident of Battletown district—is now a resident of Battletown district—his name is on the voting list for Battletown district for this primary—under the above conditions can he transfer back to Greenway district for the purpose of voting in this primary without changing his residence back to Greenway district?"

It is my opinion that the person to whom you refer may not change his voting residence from Battletown district to Greenway district without actually moving to Greenway district and there establishing a place of abode.

This office has repeatedly expressed the opinion that a residence once established continues until there has been a change of the place of abode, coupled with an intention to make the last place of abode a permanent residence.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Eligibility—To Vote in County of Former Residence.**

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

HONORABLE E. BLACKBURN MOORE,  
*Berryville, Virginia.*

DEAR MR. MOORE:

I am in receipt of your letter of July 6th in which you ask the following question:

"I want to know if someone who has paid their 1936 and 1937 taxes in Clarke County, where they are registered, and paid their 1938 taxes in Arlington County, where they are now living, but have not transferred, and want to vote in Clarke County. Can they vote in Clarke County by displaying their tax receipt to the Judge of Election?"

If the individual involved moved to Arlington County in 1938 and established his domicile in that County, I know of no way by which he can vote in Clarke County. If, however, the individual is only temporarily living in Arlington County and has not abandoned his legal residence in Clarke County, then he may vote in the latter County, provided the other requirements of the statutes are met. I must say, however, if this person has not abandoned his legal residence in Clarke County, then his 1938 capitation tax should have been paid in that County and was erroneously paid in Arlington County. Therefore, it would appear that under no circumstances can the individual vote in Clarke County this year.

If the voter, however, has established his domicile in Arlington County, he may, of course, register and vote in that County.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Voters—Eligibility of—Person Residing in Other State.  
Domicile and Residence**

COMMONWEALTH OF VIRGINIA,  
ABRAM P. STAPLES,  
RICHMOND, VA., *October 13, 1939.*

HON. J. LIVINGSTONE DILLOW,  
*Attorney for the Commonwealth,  
Pearisburg, Virginia.*

MY DEAR MR. DILLOW:

I am in receipt of your letter of October 12, in which you ask if a person may vote in Virginia under the following circumstances:

"A voter who previously resided in Giles County, Virginia, moves from Giles County, Virginia, to the State of West Virginia, and there establishes a home and there continues to reside. Is a person, under such circumstances, entitled to continue to vote in Giles County, Virginia?"

If the individual involved, when he moved to West Virginia, intended to abandon his residence in Virginia and establish a new domicile in West Virginia, manifestly he may not continue to vote in Virginia. If, however, the person is merely temporarily residing in West Virginia, with no intention of establishing his legal domicile there, but with the intention of retaining it in Virginia and eventually returning to it, I am of opinion that he may vote in Virginia. As you will see, the answer to your question is entirely dependent upon the facts in the particular case and the intention of the individual involved.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**ELECTIONS—Voters—U. S. Citizenship—Naturalization.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 19, 1939.*

MR. H. R. DUNNAGAN,  
*Registrar of Warm Springs District,  
Warm Springs, Virginia.*

MY DEAR MR. DUNNAGAN:

This is in reply to your letter of October 16, in which you inquire whether or not a person born outside of the United States, but whose parents emigrated to the United States and became naturalized while the said person was a minor, is entitled to vote in Virginia.

The Constitution of Virginia, sections 18 and 20, provide that every citizen of the United States possessing other qualifications prescribed by Virginia statutes shall be entitled to register and vote in the elections of Virginia.

A Federal statute designated as section 8 under Title 8 of the United States

Code Annotated, defining certain persons as citizens of the United States, provides as follows:

"A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American Citizenship by the father or the mother: Provided, That such a naturalization or resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

It is clear, therefore, from the foregoing provision that the person you refer to is a citizen of the United States, and, if he possesses the qualifications of residence and the other qualifications prescribed by Virginia laws, he is entitled to vote in the elections of this State.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ELECTIONS—Voters—Eligibility—Where Registered Prior to Payment  
of Poll Tax**

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

HONORABLE RICHARD S. WRIGHT, JR.,  
*Attorney at Law,  
Woodstock, Virginia.*

MY DEAR MR. WRIGHT:

This is in reply to your letter of October 20, in which you state that you have been requested for a ruling from me upon the questions hereafter set out by one of the registrars of Shenandoah County.

It appears that the registrar has registered two persons who became of age since January 1, 1939, without requiring any evidence of the fact that they had paid their capitation taxes for the year 1940, which is the first year assessable against them. Since they were registered, they have both paid their capitation taxes and the question has arisen whether or not they are entitled to vote in the November election.

This office has heretofore ruled that under the provisions of section 98 of the Code, which requires the registrar to register voters at any time previous to the regular days of registration, which regular days are thirty days prior to the general election, it is implied that no person shall be registered after that time. Quite a number of different statutory provisions were considered in reaching this conclusion which it is not necessary now to review. However, that was the ruling by my predecessor in office for many years.

It seems to me, however, that the question which controls the right of these persons to vote is not so much whether the registrar made an error in registering them as it is whether this error may now be corrected. Obviously, if the registrar had called the attention of these young men to the fact that it was necessary to pay their capitation taxes before they could register, they would have paid same, and they would not have been misled into their present situation by reason of failure of the registrar to advise them of this fact. Under these circumstances, I do not believe the registrar could now be permitted to remove their names from the registration list, particularly after they have paid the required tax and there is no limitation provided in the statute as to the time prior to the election within which such tax shall be paid.

Nor do I believe that the judges of election have any jurisdiction to inquire into the regularity of a registration. You can well understand that, if judges of election were permitted to review all of the facts incident to the registration of voters and decide upon the legality of such registration, endless investigations might result on election day which would obstruct the election, and in some cases, due to the time consumed, might make it impossible for many qualified voters to cast their votes.

Under these circumstances, it is my opinion that the persons you refer to are entitled to vote in the coming election. It is the general rule that election laws are to be construed favorably to the preservations of the right to vote in the absence of actual fraud or misconduct. No such element of improper conduct is present in these cases to which you refer.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

### EMPLOYMENT AGENCY—Taxing Statutes—"Laborer" Defined.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 17, 1939.*

HONORABLE C. H. MORRISSETT,  
*State Tax Commissioner,*  
*Richmond, Virginia.*

MY DEAR MR. MORRISSETT:

In your letter of July 31, 1939, you request my opinion upon whether section 183 of the Tax Code of Virginia, which imposes license taxes upon "labor and emigrant agents" is applicable to employment agencies which restrict their business to the seeking of employment for clerical and domestic help.

Section 183 defines a labor agent as any person who solicits, hires, or contracts with laborers, male or female, to be employed by persons other than himself. An emigrant agent is one engaged in hiring laborers or soliciting emigrants in this State to be employed beyond the limits of this State.

Your question, then, depends upon the construction of the word "laborers" and whether or not clerical and domestic help is included within this term as it is used within this section. A study of the context and history of this statute indicates that the term "laborers" was not intended to include clerical and domestic help, but was intended to include only manual laborers engaged in industry and farming.

The Act provides that it shall not apply to representatives of labor organizations within this State in cases where, because of need of employment, they may direct their members to employment in other States. Nor does it apply to Virginia contractors temporarily engaged on contracts in other States when themselves employing labor for their own work. Moreover, in 1916, when the tax was raised from \$25 to \$500, and when the statute contained no special reference to those who hired laborers to be employed in other States, but applied to them only because they were included within the term "labor agent", the Legislature provided (Acts of Assembly, 1916, chapter 517, page 880):

"2. An emergency existing by reason of the fact that industries are being crippled by the employment of laborers by irresponsible and itinerant labor agents to be transported to other States, this act shall be in force from its passage."

These considerations indicate that the term "laborers" applies not to clerical and domestic help, but rather to those who perform manual labor in industry.

In *Farinholt v. Luckhard*, 90 Va. 936, 937, Judge Hinton stated:

"Bouvier defines 'laborer' as a 'servant in husbandry or manufacture, not living *intra moenia*,' and no doubt this was the original technical meaning of the word. It was usually applied to those employed in toilsome out-door work as distinguished from domestic servants. \* \* \*"

See also *Sullivan's Appeal*, 77 Pa. 107, in which case a cook was held not to be a laborer as that term was used in a Pennsylvania statute.

While etymologically the term "laborer" designated one who performs labor of any kind, mental or physical, in its popular or restricted meaning it is much more limited, and excludes anyone whose employment is associated with mental labor and skill. The following passage from the case of *Rountree v. Brown*, 95 S. E. (Ga.) 375, is quoted with approval in Words and Phrases:

"One who is employed merely to labor as a clerk in a store is not such a laborer as is contemplated by section 1974 of the Code (Civ. Code 1910, §3334), giving a lien to a laborer on the property of his employer. 'Laborer', as used in the statute, means what was generally known as a laborer at the time of the passage of the act, and clerks, agents, cashiers of banks, and like employees, whose employment is associated with mental labor and skill, were not included in the statute as such.' \* \* \* " 4 Words & Phrases (Third Series), page 712.

Section 183 was under consideration on another point in *Watts v. Commonwealth*, 106 Va. 851. The court there pointed out that it, being a taxing statute, should be construed most strongly against the State and in favor of the citizen.

It is my opinion, therefore, in view of the considerations stated above and the long administrative construction of section 183 of the Tax Code, that it should not be construed as applicable to employment agencies which restrict their business to the seeking of employment for clerical and domestic help.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ENGINEERS, ARCHITECTS, AND SURVEYORS—Return of Fee Where Application not Granted.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 5, 1940.

MR. C. G. MASSIE, *Secretary,*  
*State Board for the Examination and*  
*Certification of Professional Engineers,*  
*Architects and Land Surveyors,*  
*Lynchburg, Virginia.*

DEAR MR. MASSIE:

I am in receipt of your letter of February 3, in which you ask what portion of the fee of \$25 should be returned to an applicant for a certificate from your board whose application is not granted.

It seems to me that section 3145-e of the Code (Michie 1936) plainly answers your question wherein it is stated that "Five dollars of this fee should be returned if the certificate is not granted." I know of no authority for returning any greater amount in such a case.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**EVIDENCE—Sufficiency of—House of Ill Fame.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 9, 1940.

MR. T. A. OSBORNE, *Trial Justice,*  
*Bluefield, Virginia.*

DEAR MR. OSBORNE:

In your letter of March 8, you state that you have been asked to issue a warrant charging a woman with running a house of ill fame, but that there is a question in your mind as to whether the evidence is sufficient.

The law provides that a justice, upon a complaint of a criminal offense being made to him, shall examine on oath the complainant and any other witnesses, and that, if he sees good reason to believe that an offense has been committed, he may issue a warrant for the arrest of the party charged with the offense. From the facts recited in your letter, it is my opinion that you have good reason to believe that the offense has been committed and may properly issue the warrant.

Whether the evidence that the complainant and others may be able to introduce at the trial of the case will be sufficient to sustain a conviction is, of course, a matter which I cannot now pass upon.

Section 4548 of the Code provides that the general reputation of the house may be proved. But before there can be a conviction there must be proof warranting the conclusion that the house was actually resorted to for immoral purposes. See *Wilson v. Commonwealth*, 132 Va. 824. However, as was held in the above case, it is not necessary to have direct testimony of an immoral act. This case gives a clear idea of the type of evidence considered necessary by the Supreme Court to sustain a conviction on this charge.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**EXECUTION—Issue of, Where Appeal Noted.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 24, 1939.

HONORABLE WILLIAM D. PRINCE,  
*Trial Justice,*  
*Stony Creek, Virginia.*

DEAR MR. PRINCE

In your letter of August 24, you ask if a trial justice may issue execution immediately upon a civil judgment in cases where the attorney for the defendant notes an appeal, but states his intention to avail himself of the full ten days allowed to perfect this appeal.

Section 6029 of the Code provides that the justice rendering any judgment may issue a writ of *fiery facias* thereon immediately, if there be not a new trial granted, nor an appeal allowed, nor a stay of execution. Section 6027 provides that from any such judgment the justice rendering it may, within ten days, on such security being given as he approves for the payment of such judgment, etc., allow an appeal.

Since execution may be issued immediately if an appeal has not been allowed, and since an appeal is not actually allowed until proper security has been given,

in my opinion the trial justice may issue execution immediately even though an attorney states his intention to perfect his appeal within the ten days.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**EXECUTION—Issuance by Trial Justice—Where No Stay Requested.  
Id.—Id.—After One Year from Judgment.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 25, 1940.

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

DEAR MR. McNEIL:

I have your letter of June 18, requesting my opinion on two questions, the first of which you state as follows:

"Is it the mandatory duty of the Trial Justice to issue execution on a judgment promptly after judgment is rendered, provided the plaintiff does not request a stay of execution. In other words, should the Trial Justice *ex mero moto* issue execution on all judgments where no written order is given by the plaintiff to withhold issuance of execution?"

The Trial Justice Act itself makes no specific provision in this respect, but your attention is called to subsection 8 of Code section 4987-f which provides that the laws governing procedure, appeals, etc., in connection with civil and police justices shall apply to trial justices.

Code section 3105, provides that

" \* \* \* The civil and police justice rendering any judgment may immediately issue a writ of *feri facias* thereon, and shall as a matter of course issue a writ of *feri facias* thereon, after ten days from the rendition thereof, if there be not a new trial granted, nor an appeal allowed, nor a stay of execution; \* \* \* "

It is my opinion, therefore, that the trial justice should of his own motion issue execution on every judgment rendered by him after ten days from the entry of judgment, subject to the exceptions mentioned in the statute.

Your next question is as follows:

"Does the Trial Justice have any authority to issue executions either as original or alias executions after the expiration of one year from the date of judgment?"

This office has heretofore expressed the opinion that, in view of the provisions of Code section 4987-j, a trial justice may not issue execution on a judgment rendered by him except within one year from the date thereof.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**EXECUTION—Issue of, After One Year—How Done.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 8, 1940.*

MR. JAMES ASHBY, JR.,  
*Trial Justice*  
*Stafford, Virginia.*

DEAR MR. ASHBY:

In your letter of March 4, you state the following:

"On January 7, 1938, The Hyde Company, Incorporated, secured a judgment in the Trial Justice Court of Stafford County against Kenneth J. Winfield, in the sum of \$300.00. No execution was issued upon this judgment, and at the expiration of one year as the law then provided, the papers in the case were filed in the clerk's office of Stafford County, and no execution issued from the clerk's office after that filing. The judgment was not docketed."

You ask whether or not this judgment can now be docketed and execution issued, and by whom such execution, if any, should be issued.

In the opinion of this office, to which you refer, which was rendered to the Honorable W. W. Birchfield on May 22, 1939, it was held that a trial justice has no authority to issue execution upon a judgment rendered by him after one year from the date of the judgment, but that, since at the end of such period the judgment is required by section 4987-j of the Code to be returned to and filed in the clerk's office of the circuit court, such clerk may thereafter issue execution thereon.

Of course, where no execution was issued within one year from the date of the judgment, the judgment must be first revived by writ of *scire facias* before execution may properly issue thereon. See section 6477 of the Code. Since, after one year after the judgment, the judgment is returned to and filed in the clerk's office of the circuit court, it is my opinion that such proceeding should be had in the circuit court and not before the trial justice, and that the executions issuing thereafter should be issued by the clerk of the circuit court.

It is also my opinion that, in the situation you describe, the judgment may be docketed by the clerk of the circuit court.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**FEDERAL PROPERTY—Proposal for Reservation of Partial State Jurisdiction.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 12, 1939,*

HONORABLE W. B. WOODSON,  
*Judge Advocate General of the Navy,*  
*Washington, D. C.*

MY DEAR MR. JUDGE ADVOCATE GENERAL:

I have received your letter of December 6, replying to mine of October 24, 1939, in relation to the governmental powers which it is appropriate should be exercised by the United States and Virginia, respectively, over certain lands in the City of Norfolk, comprising, as I understand, a tract of about eleven hundred acres, and another large tract near Dahlgren. You state that the tentative draft of a proposed

bill whereby Virginia would cede certain powers to the United States and retain certain powers over private industries and businesses which may be conducted within the areas is not acceptable to the Navy for two reasons:

First, because section 355 of the Revised Statutes of the United States, as construed by the Attorney General of the United States, prohibits the expenditure of public money on the lands for buildings or other improvements unless Virginia cede exclusive governmental jurisdiction over said lands to the United States. I thought it was made clear at our conference in October that the proposed Virginia legislation would not be helpful, and therefore would not be introduced, unless the Congress passes the pending bill conferring discretionary authority on the Secretary of the Navy to make such expenditures on lands where exclusive jurisdiction is not vested in the United States. At least, I so understood, and thought the purpose of the conference was to reach an understanding as to what powers might be exercised by the State without interfering with the desired naval purposes.

The second reason you give why the proposed Virginia legislation is not acceptable is that "certain rights reserved therein to the Commonwealth are wholly incompatible with the full and effectual use of the lands for National Defense purposes". You also say the exercise of these State powers "would impair, hinder and curtail the effective uses of the properties for the purposes of National Defense, and would result in vexation and frictions, embarrassing alike to both the Federal and State authorities". But you do not point out the reasons for your conclusions, nor can I, with my very limited experience in naval affairs, conceive why the regulation and taxation by the State of private enterprises conducted by private individuals or corporations on these lands in the City of Norfolk should or could have the effect of which you are apprehensive.

You state very correctly that the benefit from the public money which will be expended in this naval activity will more than offset the loss in taxes which will result from the lands being exempted from taxation. But this loss of tax revenue is but a minor consideration. The chief evil which has resulted in the past from the State's grant of exclusive jurisdiction has been unfair competition, in favor of those who conduct their private businesses on these lands and against those nearby who are subject to State license and property taxes and State regulations. The merchant on the reservation does not confine his sales to those residing thereon, but sells to any one who offers to buy. There will probably be a general sales tax on articles of merchandise in the near future, and the merchant on this Norfolk reservation could sell his wares at a decidedly lower price than the Norfolk City merchant, because his sales would not be subject to the tax, nor would he pay the ordinary license and property taxes which his competitors in Norfolk would have to pay. The disastrous effect on the Norfolk merchant is obvious. This same situation now exists as to merchants and others conducting businesses on the present reservation at Old Point Comfort, and has been the cause of much complaint and dissatisfaction on the part of their Phoebus, Hampton, and Newport News competitors. If there should be a general sales tax, the situation would be a great deal worse.

Similar situations have arisen at Old Point, (and may well arise on this proposed Norfolk reservation), with respect to the sale of gasoline and alcoholic beverages by filling stations, restaurants and hotels, over which the State has no authority whatever.

The State's efforts to regulate the price of milk has been in some cases almost demoralized by transactions on these reservations which are not subject to the regulations.

I hope you have not gotten the impression that this effort on my part to arrive at an appropriate adjustment of the respective powers of the State and Federal Governments over these areas is in any sense arbitrary or reflects an unfriendly attitude towards the Navy or the Federal Government. Carving eleven hundred acres of land out of the second largest city of the State and relinquishing all State jurisdiction over same is a very serious matter, as I believe you will realize. In *Collins v. Yosemite Park & C. Co.*, 304 U. S. 1505, the Supreme Court denied the

right of California to regulate the sale of alcoholic beverages by private corporations in the National Park because the State had not reserved this power. The Court referred to the complications often resulting from our dual system of government and said "the respective sovereignties should be able to adjust their jurisdictions".

In my opinion, the best interests of both governments will be promoted by preserving uniform regulation and taxation of private businesses conducted on these reservations. Certainly Virginia has no desire to in any way obstruct the activities of the Navy. She desires only to avoid the dislocation and disruption of her internal affairs. May I not enlist your sincere cooperation in endeavoring to reach an appropriate adjustment of this obviously difficult situation.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**F. H. A. LOANS—Acceptance of as Security.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 19, 1940.*

HON. J. F. WYSOR,  
*County Treasurer,  
Pulaski, Virginia.*

MY DEAR MR. WYSOR:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has referred to this office your letter of March 11, relative to your authority to accept as security for county deposits "first mortgage F. H. A. loans". You desire to know the extent to which these first mortgage real estate loans may be used as security for county deposits under section 350 of the Tax Code of Virginia.

My information is, in fact I am so advised by Mr. C. C. Barksdale, head of the Federal Housing Administration in Richmond, that these first mortgage real estate loans are insured 100 per cent by the Federal Housing Administration and not 80 per cent, as you suggest.

As you know, securities of the character described in section 5431 of the Code may be used. Subsection 19 of section 5431 expressly includes "first mortgage real estate loans insured by the Federal Housing Administrator". In my opinion, therefore, these first mortgage real estate loans, so insured, may be used as collateral, and there is no limitation on the amount that may be used and they may be valued at par.

I presume that you raise the question in view of the fourth numbered paragraph of subsection (f) of section 350 of the Tax Code. However, I am of opinion that this paragraph is not applicable to these securities, inasmuch as they are not securities described in "subsection six of section fifty-four hundred and thirty-one of the Code of Virginia".

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEEBLEMINDED—Acceptance by State Hospital of Domicile and Residence—Rules Governing.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 21, 1940.

HONORABLE JAMES W. PHILLIPS,  
*Assistant Commissioner,  
Department of Public Welfare,  
Richmond, Virginia.*

MY DEAR MR. PHILLIPS:

I am in receipt of your letter of May 10 from which I quote as follows:

"The patient is a woman who was married in 1921. At that time the patient and her husband were living in New York. In 1927 the patient was admitted to a New York hospital and remained there for a short period. She was released from New York hospital to the parents of the patient who live in New Jersey, and lived with her parents in New Jersey for nine years. During all this period the husband had maintained residence in New York and actually lived and conducted his business there. In February, 1936, the husband, after making another attempt to establish a home for his wife, had her committed to a New York state hospital again. She stayed in the New York hospital for approximately fourteen months. The New York hospital again paroled the patient to her father who was living in New Jersey.

"In September 1937 the husband moved to Alexandria, bringing with him his two children. He has continuously since that date maintained himself and established residence in the City of Alexandria. New Jersey is now contending that the woman never having been divorced from her husband has the settlement and residence of her husband and, therefore, should be admitted to a Virginia hospital by transfer from New Jersey.

"The City of Alexandria, according to the usual procedure which is followed by this Department, after investigating the facts and verifying the residence of the man as previously set forth, refuses to authorize the patient's transfer to either Alexandria or to a Virginia hospital, on the ground that the patient 'was a legal resident of New York State at the time she became a public charge and was committed to a Brooklyn hospital and has never lived in the State of Virginia to gain legal residence'".

You desire my opinion on the question of whether this woman should now be accepted in one of the State Hospitals for a mental disease, as a resident of Virginia.

It is unquestionably the general rule that by operation of law the domicile of a wife follows that of her husband. However, in Virginia a wife may acquire a separate domicile of her own choice even though living amicably with her husband (*Commonwealth v. Rutherford*, 160 Va. 524).

I have carefully considered chapter 46 of the Code of Virginia dealing with the insane, epileptic, feeble-minded and inebriate, and the institutions established for their care, and cannot say that it is the intention of these statutes that the individual you mention should be accepted in one of our institutions as a resident of Virginia. This woman has never been in Virginia and apparently has never really lived with her husband since 1927. Each time she has been released from the New York institution, she has been paroled to her parents in New Jersey. She seems to have acquired a status as an incompetent in a state other than Virginia, and, in my opinion, our laws do not contemplate that Virginia is obligated to receive her purely on account of a domicile by operation of law, especially when it is considered that our court has gone far in departing from this rule.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEEBLEMINDED—Guardianship Of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 4, 1940.

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

DEAR MR. WATTS:

This is in reply to your letter of May 20, in which you ask if the parent or parents are the legal guardians of a child who is over twenty-one years of age but who is definitely feeble-minded.

In my opinion, the parents of such child are not its legal guardians unless they have been appointed as such by the proper court. Section 5320 of the Code of Virginia (Michie 1936), which designates who shall be the guardian of minor children (in most instances the parents), provides " \* \* \* Unless the guardian shall sooner die, be removed, or resign his trust, he shall continue in office until the minor, being a male, shall attain the age of twenty-one years, or being a female, shall attain that age, or a receiver be appointed under section fifty-one hundred and thirty-six to hold her property for her, \* \* \* ." No provision is made for the continuation of the parents in the capacity of guardians in cases where the child is not mentally competent.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Arrest—Number Allowed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 6, 1940.

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

MY DEAR MR. COMPTON:

I am in receipt of your letter of March 2, which I quote as follows:

"The question of arrest fees for sheriffs and other officers making arrests is being very much discussed. Auditors now engaged in auditing sheriff's office advise that only one fee be allowed on an arrest warrant, the arresting officers persist in making returns on warrants of arrest for two officers. I will appreciate your opinion on the question of fees allowed in taxing up costs on arrest warrants."

Where two officers actually participate in making an arrest, I am of opinion that the fee therefor may be allowed to each officer, but fees for making an arrest in any particular case may be allowed to only two officers. See Acts 1938, 796, at page 805.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Coroner's—For Autopsy.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 10, 1940.

HONORABLE A. O. LYNCH,  
*Commonwealth's Attorney,  
Norfolk, Virginia.*

DEAR MR. LYNCH:

I have your letter of April 30, requesting my opinion upon the following question:

"A resident of Norfolk County feloniously wounded in the county is taken to a hospital in Norfolk City where he subsequently dies as a result of the injury. The coroner of the city is notified, and after viewing the body deems it necessary to make an autopsy and does make an autopsy. Under these circumstances, is Norfolk County liable for the fee for making the autopsy?"

Virginia Code (Michie 1936) section 4814 provides, as to cases in which the decedent's residence is known:

" \* \* \* the expense of the coroner's proceedings shall be paid \* \* \* out of the treasury of the county or corporation of which he was resident at the time of death. \* \* \* "

In my opinion, this provision controls the question which you present.

It is true that section 4818, in prescribing the amounts to be allowed the coroner for various services, provides that his fee for performing an autopsy shall be approved by the circuit or corporation court of the county or city wherein the autopsy is performed. It might be considered anomalous that a statute should require one court to approve a fee which is to be allowed out of the treasury of a different county or corporation.

Nevertheless, the quoted language of section 4814 is entirely unambiguous and has never been repealed. It is my opinion, therefore, that the fee allowed for making such an autopsy should be paid out of the treasury of the county in which the deceased resided.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Commonwealth's Attorney—Disposition Of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 6, 1939.

HONORABLE L. BROOKS SMITH,  
*Trial Justice,  
Accomac, Virginia.*

MY DEAR MR. SMITH:

I am in receipt of your letter of July 3rd in which you ask the following question:

"Will you be kind enough to advise me as to who is entitled to the Commonwealth's Attorney's fee taxed by the Trial Justice in cases in which the Commonwealth's Attorney appears as required by law."

Your question is in terms answered by sub-section (d) of section 4987m of the Code which provides that one-half of the Commonwealth's Attorney's fees collected by a Trial Justice shall be turned promptly into the treasury of the county or city, and the remaining one-half of the Commonwealth's Attorney's fees shall be paid to the Clerk of the Circuit Court, who shall pay the same to the treasury of the State.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—For Milk Weighing and Sampling License.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 15, 1940.

MR. N. L. 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 May 10, from which I quote as follows:

"Chapter 278, page 443, Acts 1940, amends sections 1207 and 1208 of the Code by adding to the licensing provisions which formerly included only the operation of the Babcock Test, the operations also of sampling and weighing milk or cream as a basis for determining the value in buying and selling. At the present time, and until the amendment becomes effective, all of the testers in the State hold licenses for the operation of the Babcock test for which they have paid a fee of \$1 at the time of issuance of such license. You will observe that the amendment provides for the issuance of a license authorizing not only the operation of the Babcock test but also the operations of sampling and weighing. I shall be glad to have you advise me with reference to testers now holding licenses under the old law for which they paid a fee of \$1 in each case whether or not when such testers have qualified also to perform the function of sampling and weighing an additional fee of \$1 should be required of them."

The fee provided for in section 1207 is, of course, not a revenue measure, but simply a fee intended to cover the expense of issuing the permit. Formerly the only permit required by the section was the one for manipulating the Babcock machine. Now a permit is also necessary for sampling and weighing milk or cream as a basis for determining the value in buying and selling. Those holding a permit to manipulate the Babcock machine do not have a permit for sampling and weighing. If they wish to secure such a permit, it will be necessary to make application therefor to the Commissioner of Agriculture and Immigration and, when that officer issues such a permit, I am of opinion that the fee of \$1 should be paid.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FEES—Sergeant—for Service in a Criminal Case.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 19, 1940.*

MR. A. W. TURNER,  
*Town Sergeant,  
Ashland, Virginia.*

MY DEAR MR. TURNER:

I am in receipt of your letter of February 14, and must advise that from the facts stated by you I am of opinion that the Comptroller was correct in the conclusion reached in your case. Section 3511 of the Code provides that no sergeant "who receives a salary or allowance for general services out of the treasury of his county or corporation shall receive any fees for services in a criminal case from the State \* \* \* but all such fees to said officer shall be paid by the party against whom judgment is rendered." You will see from this that, if the fees can be collected from the defendant, you are entitled to them, but apparently the section expressly forbids the payment of these fees out of the State treasury. From a reading of the whole section, I should say that the fees that may not be paid you out of the treasury are those which are taxed as part of the costs in a criminal case. You will see, for example, that a sheriff or sergeant may be paid out of the treasury the fee for receiving a person in jail when first committed.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**FEES—On Appeal Bonds in Civil Cases.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 29, 1940.*

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

MY DEAR MR. COMPTON:

I am in receipt of your letter of March 27, in which you ask if there is authority for a trial justice "taking a fee from the defendant on an appeal bond in civil cases". I presume you refer to a fee for approving the bond.

Section 4987-m of the Code expressly provides for a fee for the trial justice in a civil case "for approving any bond, fifty cents".

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**FEES—Sheriffs—For Attendance Upon Coroner's Inquest.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 11, 1939.*

MR. CHAS. C. CURTIS,  
*Sheriff of Elizabeth City County,  
Hampton, Virginia.*

MY DEAR MR. CURTIS:

I am in receipt of your letter of December 8, in which you inquire concerning the fees of a sheriff for attendance upon a coroner's inquest and for summoning a witness to appear before such an inquest.

Section 3487 of the Code provides that a sheriff's fee for attendance in such a case shall be \$2, and that his fee for summoning a witness is 50 cents.

Section 4814 of the Code provides that, if the deceased person be a stranger, the expenses of the coroner's inquest shall be paid out of the State treasury, and, if not a stranger, such expenses shall be paid out of the treasury of the county or corporation of which the deceased was a resident at the time of death. You also, of course, are familiar with the provision in section 4814 which stipulates that no expense in connection with the coroner's inquest shall be paid "until allowed by the court of the coroner's county or corporation to which his return is properly to be made."

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### FEES—For Collecting Delinquent Taxes.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 29, 1940.

HONORABLE T. FREEMAN EPES,  
*Attorney for the Commonwealth,  
Blackstone, Virginia.*

MY DEAR MR. EPES:

I am in receipt of your letter of May 28, in which you inquire if a county may pay clerk's fees and sheriff's fees in cases where suits are brought by the county for collection of delinquent taxes.

I am of opinion that these fees may be paid by the county. This office has heretofore held that these fee officers may receive these fees from the State in civil cases. The statutes providing for clerks' and sheriffs' fees do not make any exception in favor of the State, and this is also true of the county. In my view, the salary allowances made to these officers cover services rendered of a general nature and are not intended to be in lieu of fees which are expressly provided by statute. As you suggest, in most cases the county will not lose anything, for fees, of course, will be taxed as a part of the costs and, where the property brings sufficient money, the county will be reimbursed.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### FEES—Recordation.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 7, 1940.

HON. CHAS. L. HUTCHINS, *Clerk,*  
*Circuit Court of City of Suffolk,*  
*Suffolk, Virginia.*

MY DEAR MR. HUTCHINS:

I am in receipt of your letter of June 3, and agree with you that chapter 303 of the Acts of 1922 only relieves of the clerk's fee for recording notices of Federal tax liens. The statute does not relieve of the clerk's fee for recording a certificate of discharge of tax lien.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**FINES AND COSTS—Confinement for Non-Payment of—Where Convicted in Separate and Distinct Proceedings.**

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

HON. THOS. B. FANNIN,  
*Sheriff Sussex County,  
Stony Creek, Virginia.*

DEAR MR. FANNIN:

I have your letter of November 29, requesting my opinion as to the maximum period of imprisonment for non-payment of fines and costs in cases where the same prisoner has been convicted and fined in distinct proceedings for several offenses.

The limitations on imprisonment for non-payment of fines and costs are set forth as follows in Virginia Code (Michie 1936) section 4953:

“ \* \* \* such confinement shall not exceed five days when the fine and costs, or costs where there is no fine, are less than five dollars, when less than ten dollars it shall not exceed ten days, when less than twenty-five dollars it shall not exceed fifteen days, when less than fifty dollars it shall not exceed thirty days, and in no case shall the confinement exceed two months. The jailer, upon commitment, shall note the amount of fine and costs, or costs where there is no fine, and the date of commitment, and shall, without further order or direction, release the defendant from jail promptly upon the expiration of the limitation above prescribed, and said defendant shall not thereafter be imprisoned for failure to pay the fine and costs, or costs, in that case; \* \* \* .”

Under the terms of this statute it is my opinion that a prisoner who is committed to jail for non-payment of the fines and costs assessed in several distinct proceedings may be held for the maximum period appropriate to each sentence, regardless of the total period of continuous imprisonment.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**FENCE LAWS—ANIMALS—Damage by Straying.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 27, 1940.

MR. M. B. COMPTON,  
*Trial Justice,  
Gate City, Virginia.*

DEAR MR. COMPTON:

In your letter of May 11, you ask if a land-owner may recover for damages done to his crops by the sheep of the adjoining land-owner that creep through the division fence which has fallen into disrepair and which has been permitted to remain in that state without any effort by either party to repair the same.

The answer to this question depends upon whether a “no fence” law is in force in that section of Scott County in which the land lies. If such a law is not in effect then there is no obligation upon the owner of the animals to restrain his animals and he is not liable for damages done in consequence of their straying upon lands of another not enclosed by a lawful fence, as defined by section 3538 of the Code of Virginia. If, however, the boundary line of each tract of land has

been declared to be a lawful fence, in accordance with the provisionse of section 3547 of the Code, the owner or manager of the animals would be liable for damages resulting from the trespass of the animals upon the lands of another. See sections 3538-3562 of the Code.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**GAMBLING—Lottery—What Constitutes.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 29, 1940.*

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

MY DEAR MR. BROADDUS:

This is in reply to your letter of April 27, in which you inquire whether or not the giving of an automobile as a prize by the Bassett Horse Show Association to the person guessing the nearest number of people in attendance at one of the performances constitutes a lottery in violation of the Virginia Constitution and statutes. You state that any person who desires can guess the number of people in attendance and is eligible to win the automobile without actually attending the performance or purchasing a ticket.

The case of *Maughs v. Porter*, 157 Va., at page 420, *et seq.*, is the nearest case I can find to that presented by your letter. In that case, the Court held that attendance at the land auction sale was necessary in order to win the automobile. Also, the case did not present any element of skill, such as in estimating the number of persons who might be in the crowd, which is perhaps present here. The Court, at page 424, quoted with approval from the case of *Glover v. Malloska*, 52 A. L. R. 77, to the effect that a consideration is one of the necessary elements of a lottery.

While this question is a close one, I do not see that there is any element of consideration passing from the person who makes a guess, and I am inclined to the view that because of the lack of this element of consideration, and of the fact that there appears to be some element of skill present in making the guess or estimate, the giving away of the automobile in the manner and under the circumstances described does not constitute a lottery.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**GAMBLING—Slot Machines—Element of Chance.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 9, 1940.*

HON. W. HILL BROWN, JR.,  
*Attorney for the Commonwealth,*  
*Manassas, Virginia.*

MY DEAR MR. BROWN:

I am in receipt of your letter of January 5, from which I quote as follows:

"Please inform me as to whether or not it is proper under the existing statutes of this State to license a machine which does not dispense money, but informs the player in advance how many slugs he will receive and in addition dispenses to the player a package of mints."

I presume that the slugs may be used to play the machine again.

While the player may know what he will get the first time he plays the machine, yet, from the information I have received on the type of machine that you describe, he does not know what he will get the second time he plays the machine, and in this respect it seems to me that an element of chance is present.

I refer you to paragraph (b) of section 4694-a of the Code, as amended. Applying the facts as I understand them to the provisions of this section, I am of opinion that the machines you describe come within the prohibition of the section.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**GAMBLING—Slot Machine—Disposition of Money Seized.  
SHERIFFS—Seizure of Gaming Devices—Forfeiture of Money.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 13, 1939.*

JUDGE W. E. HOGG,  
*Trial Justice,  
Yorktown, Virginia.*

MY DEAR JUDGE HOGG:

This is in reply to your letter of November 6, in which you request my opinion upon the question whether or not money seized along with slot machines and confiscated as a violation of chapter 357 of the Acts of 1938 should be turned over to the State, or whether half of same should be regarded as forfeited to the sheriff who seized same under the provisions of Code section 4676.

This office has heretofore ruled that this money should all be paid into the State Treasury. You will note that the provision for forfeiture of one-half of money seized in connection with a gaming table, bank, or wheel of fortune, does not include money seized in a slot machine. Even if it did, however, the express provisions contained in the 1938 statute must be regarded as controlling where it is in conflict with legislation enacted prior thereto.

I do not see any escape, therefore, from the conclusion that the provisions of subsection 2(d) of section 4694a of the Code, as amended by chapter 357 of the Acts of 1938, must control the disposition of this money.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**GAME AND INLAND FISHERIES COMMISSION—Agreements by—  
Necessity of Posting.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 12, 1940.*

HONORABLE R. H. L. CHICHESTER,  
*Commonwealth's Attorney,  
Stafford, Virginia.*

DEAR MR. CHICHESTER:

I am in receipt of your letter of April 10, asking my opinion as to the necessity to publish and post, as provided in section 3305(34) of the Code, jurisdictional

agreements between the Tidal Fisheries Commission and the Game and Inland Fisheries Commission, as authorized by section 3154a of the Code.

In my opinion, it is not necessary to publish or post the agreement between the two Commissions. I call your attention to the fact that the action of the Commission of Game and Inland Fisheries is authorized by the General Assembly and is contained in the 1939 pamphlet issued by that Commission, pages 71, 72 and 73.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME AND INLAND FISH—Authority of Board of Supervisors to Regulate.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 10, 1940.

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

DEAR MR. MAHON:

I have your letter of May 22, requesting my opinion as to whether the Board of Supervisors of your county may adopt an ordinance the effect of which would be to shorten the open season for hunting squirrels in your county.

By chapter 247 of the Acts of 1930, which included the Game, Inland Fish and Dog Code, the Legislature expressly repealed that portion of Code section 2743 which authorized counties to adopt ordinances or other measures for the protection of game and inland fish. See Acts 1930, at page 664. This being true and there being no express authority for such an ordinance elsewhere in the law, I do not think that any other general powers conferred on county Boards of Supervisors should be construed to include the power to adopt game conservation measures.

It is my opinion, therefore, that an ordinance such as you describe is not authorized by law.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME AND INLAND FISH—Issuance of Summons for Violation of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 11, 1939.

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

DEAR MR. NOLTING:

I have considered your letter of June 1, enclosing one dated May 31 from the Honorable J. Callaway Brown, together with forms of summonses proposed to be used by game wardens. These summonses are substantially like those issued by State motor vehicle police officers pursuant to the provisions of Virginia Code (Michie 1936) section 2154(167) and are intended to take the place of a warrant or summons issued by a justice, so that any person receiving and accepting service

of the proposed summons could be tried in his absence in case of his failure to appear.

As Judge Brown points out, such a procedure would undoubtedly be helpful in enforcing the provisions of the Game, Inland Fish and Dog Code. I must advise you, however, that so far as I can discover the Legislature has not authorized game wardens to issue any summons or other form of legal process which, whether service be accepted or not, could be the basis of a valid prosecution and conviction in the defendant's absence.

It is my opinion, therefore, that the use of these forms will not serve to obviate the legal necessity for swearing out a warrant or summons and duly executing the same in cases where the accused failed to appear.

I suggest that it would be proper to have your wardens, in making arrests, advise the defendant that, if he fails to appear pursuant to the terms of such a notice, it will be necessary to obtain either a summons or a warrant for his arrest, in which case the costs would be increased. The forms which you have submitted might be amended by the addition of such a warning.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### GAME AND INLAND FISH—Soft Shell Crabs—Sale of.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 18, 1940.

MR. J. T. MEYER, *Inspector,*  
*District No. 19-A,*  
*913 West Main Street,*  
*Richmond, Virginia.*

DEAR MR. MEYER:

This is in reply to your letter of June 5, requesting the opinion of this office as to whether subsection (9) of section 3265 of the Code of Virginia applies to soft shell crabs shipped into Virginia from other States.

In general, it may be stated that statutes prohibiting the sale or possession of game, which do not in express terms apply solely to game caught in this State, should be construed as prohibiting the sale or possession of such game regardless of where caught and even though the same were shipped into Virginia from another state.

It might be contended that, since other provisions of section 3265 apply to the taking of crabs in the waters of this State only, subsection (9) should also be of such limited application, though its literal terms would forbid the sale of crabs of a certain size wherever taken.

However, I have been informed that it has been the consistent administrative practice of the Commission of Fisheries, the agency charged with the enforcement of this act, to construe subsection (9) of section 3265 as applying to the sale and possession of crabs of a certain size wherever they may have been taken. In view of this fact and the literal language of this subsection, it is my opinion that you would be amply justified in taking legal proceedings thereunder.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**GAME AND INLAND FISHERIES—Trapping by Non-Resident—When License Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 27, 1940.

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

MY DEAR MR. HART:

I have your letter of January 25, requesting my opinion as to whether a non-resident of the State of Virginia may legally trap upon lands on which he has leased trapping rights without a license to do so.

The Virginia Code (Michie 1936) section 3305(19) makes it unlawful for any person to hunt, fish or trap within the State without having first obtained the license required by other provisions of the Game Code, subject to certain exemptions set out in this section. The only exemption made in this statute for the benefit of lessees is that set out in paragraph number two, which permits a *bona fide* tenant or lessee to hunt, fish or trap upon the land on which he resides without a license.

I can find no other provision of law which would exempt the party to whom you refer, and it is, therefore, my opinion that he cannot legally trap on the land in question without first having obtained the license required of other non-residents of the State.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**GARNISHMENT—Venue—Where Judgment Obtained in City, Garnishee and Judgment Debtor Reside in County.**

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

HONORABLE ERNEST L. SAWYER,  
*Justice of the Peace,*  
*429 Williams Street,*  
*Norfolk, Virginia.*

DEAR MR. SAWYER:

Since receiving your letter of October 20, I have made a careful and extensive examination into the subject of venue in garnishment proceedings.

As indicated in my letter of November 5, 1936, to the Honorable Robert T. Winston, proceedings in garnishment are covered by the literal terms of the general venue statute governing civil justices (Virginia Code (Michie 1936) section 3105(a), made applicable to civil justices by section 3114), and hence it would seem that such proceedings may be had before a civil justice only when they fall within one of the classes enumerated in that statute.

You ask my opinion upon the application of this statute to the facts of a specific case in which a judgment has been obtained in the Civil Justice Court of the City of Norfolk, and a summons in garnishment is sought against a garnishee who resides in Northampton County. The judgment debtor also resides in Northampton County. More specifically, you inquire whether venue in such proceedings may properly be laid in the Civil Justice Court of the City of Norfolk

on the ground that the "cause of action or any part thereof arose therein," within the meaning of Code section 3105(a).

On this subject I find no decision or expression by our own Supreme Court of Appeals, and only the most inconclusive authority elsewhere since in most states the subject is adequately covered by legislation.

For purposes of your inquiry, suffice it to say that there are at least reasonable grounds on which it might be held that the Civil Justice Court of the City of Norfolk, wherein the judgment was had, may properly entertain these proceedings regardless of the residence of the judgment debtor and the garnishee. This might be held either on the ground that "the cause of action" in garnishment proceedings consists of the judgment entered and execution issued, and hence in this case arose in Norfolk, or on the grounds that garnishment proceedings are merely ancillary to the principal suit, and may always be brought before the court in which the principal suit is. See *Trombly v. Clark*, 13 Vt. 118; *Sherwood v. Stevenson*, 25 Conn. 431.

This being true, in my opinion, it would be proper for you to issue a summons in garnishment, based upon judgment and execution by the Civil Justices of the City of Norfolk, returnable before that court regardless of the residence of the judgment debtor and the garnishee, even though it cannot be said that such procedure is clearly and definitely authorized by the statutes.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### GENERAL ASSEMBLY—Compensation—Death of Member.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 31, 1940.

HONORABLE BERNARD C. GOODWIN,  
*Member of the House of Delegates,*  
*Richmond, Virginia.*

MY DEAR MR. GOODWIN:

This is in reply to your request for my opinion upon the question whether or not the estate of the late lamented Senator Thos. J. Wilson, Jr., is entitled to receive payment of any fund on account of compensation to Senator Wilson.

It appears that Senator Wilson was re-elected in November, 1939, for the term beginning January 10, 1940, but that, before the beginning of the term and before he was able to qualify as a member for said term, he died and Senator Loving was elected to succeed him.

Section 3454 of the Code prescribes the compensation of the members of the Senate and House of Delegates. It provides that if, during a session of the General Assembly, any member shall die, or otherwise vacate his seat, and his successor be elected, a personal representative of the deceased member shall receive the uncollected compensation up to the date of his death, and the successor of said deceased member shall receive said *per diem* beginning from the date of his election.

I can find no provision which could be construed as authorizing any compensation to be paid in the case of Senator Wilson, as the compensation of a member of the General Assembly begins only when he qualifies and enters upon the duties of his office, or is elected during the session of the General Assembly to succeed a former member as above set out.

Since Senator Wilson's unfortunate death occurred prior to the convening of the General Assembly, there is no law providing for any compensation to his estate.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**GENERAL ASSEMBLY—Law Increasing Compensation of Member of Domicile and Residence.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 11, 1940.

HONORABLE C. G. QUESENBERY,  
*Member House of Delegates,  
Waynesboro, Virginia.*

MY DEAR MR. QUESENBERY:

I am in receipt of your letter of June 7, in which you ask the following question:

"At the last session of the Legislature an act was passed which provides for the payment of a *per diem* to members of the State Hospital Board. Since I was a member of the Legislature enacting this law, I am wondering whether it would be proper for me to receive the *per diem* provided in this new act. I recall some provision in the law which prevents a member of the Legislature from increasing his compensation. To be on the safe side, I would like your formal opinion."

I presume you refer to section 45 of the Constitution, which reads as follows:

"The members of the General Assembly shall receive for their services a salary to be fixed by law and paid from the public treasury; but no act increasing such salary shall take effect until after the end of the term for which the members voting thereon were elected; and no member during the term for which he shall have been elected shall be elected by the General Assembly to any civil office of profit in the State."

In my opinion, it is entirely proper for you to accept a *per diem* provided by law as a member of the State Hospital Board. This *per diem* could not possibly be considered as a part of your salary as a member of the General Assembly.

The second question presented in your letter is one that can only be satisfactorily answered when the facts in each particular case have been determined. There is no legal reason, for example, why a resident of Waynesboro may not live in Richmond for an indefinite period and yet retain his legal domicile in Waynesboro so long as it was not his intention when he left Waynesboro to abandon his domicile there. Of course, if a person leaves Waynesboro with the intention of abandoning his legal residence there and establishing it somewhere else, he may not continue to vote in Waynesboro. You will see that the question is primarily dependent upon the intention of the individual involved.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**GEORGE WASHINGTON MEMORIAL PARKWAY—Appropriation Authority of Governor.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 28, 1940.

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

DEAR GOVERNOR PRICE:

I am in receipt of your letter of March 26, with reference to the construction of an item in the General Appropriation Bill (House Bill No. 46) recently passed

by the General Assembly. For purposes of reply, I am quoting your letter in full:

"The General Appropriation Bill (House Bill No. 46) passed by the General Assembly during the recent session contains the following provisions:

"For acquisition of land for use in the development of the George Washington Memorial Parkway in Virginia, to be paid only out of the proceeds of the motor vehicle fuel tax collected and paid into the State treasury to the credit of the State highway fund, and not out of the general fund of the State treasury .....\$50,000.

"It is provided that this appropriation of \$50,000 may be expended with the approval of the Governor, for the acquisition by purchase, gift or condemnation of lands lying within the State of Virginia and within the boundaries of the proposed George Washington Memorial Parkway as designated by the National Capital Park and Planning Commission. It is further provided that this appropriation, with the approval of the Governor may be either expended directly for the acquisition of such lands, or the Governor may place the entire appropriation, or any part thereof, at the disposal of the United States of America, or the officers or agents duly authorized to act for the United States of America, for the acquisition of said lands for the establishment of the proposed George Washington Memorial Parkway.

"It is further provided, however, that this appropriation shall be expended or placed at the disposal of the United States of America or its duly authorized officers or agents for the acquisition of said lands only when satisfactory proof is furnished the Governor that an equivalent sum has been provided for the same purpose by the political subdivisions adjacent to the proposed George Washington Memorial Parkway; and provided, further, that this appropriation is not to be considered as obligating the State to make further appropriations for the establishment of the aforesaid parkway except as future General Assemblies may deem it wise to do so."

"I am advised that Arlington County proposes to make available for the acquisition of lands for the George Washington Memorial Parkway the sum of \$45,000, the purpose being to release \$45,000 of the \$50,000 appropriation referred to in the provisions quoted above from the general Appropriation Bill for the biennium beginning July 1, 1940.

"I shall appreciate your advising me whether under the terms of the foregoing provisions a portion of the \$50,000 appropriation may be released, or whether it will be necessary for political subdivisions adjacent to the parkway to provide the entire sum of \$50,000 before any release of the State appropriation may be made."

In my opinion, the provisions referred to in your letter give you entire discretion as to the release of the entire amount appropriated as well as any part thereof. You may, therefore, release to the United States of America the entire appropriation, provided the amount released is met dollar for dollar, or any part of such appropriation so met as in your judgment you may deem wise.

Very truly yours,

ABRAM P. STAPLES.  
*Attorney General.*

**HAMPTON—Law Creating City of—Magisterial Districts  
CITIES—Constitutional Provisions for Creating.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 18, 1940.

HONORABLE ROLAND D. COCK,  
*Commonwealth's Attorney,*  
*Hampton, Virginia.*

MY DEAR MR. COCK:

In your letter of January 6, 1940, you make certain inquiries regarding the validity of chapter 364 of the Acts of Assembly, 1936, page 581, and the referendum held pursuant thereto.

This Act, which was to become effective when adopted by the voters of the city of Hampton, provided for the amendment of that city's charter so that the city would become a full-fledged city of the second class and would no longer constitute a magisterial district of Elizabeth City county. You state that the referendum, held pursuant to this Act, resulted in a vote in favor of the proposed amendments.

As you point out, the separation of the city from the county involves radical changes in the political and financial set up of both the county and the city. Moreover, certain constitutional officers of the county, duly elected, are vitally affected thereby. However, it is to be remembered that all doubts are to be resolved in favor of the constitutionality of an Act of the General Assembly.

Whenever there exists room for differences of opinion regarding the constitutionality of a legislative enactment, it serves no useful purpose to express any dogmatic opinion one way or the other, since, in the final analysis, it is a question which can be decided only by the courts. I will, therefore, without expressing any general opinion upon the validity of chapter 364 of the Acts of Assembly, 1936, confine my remarks to the statutory and constitutional provisions you mention in your letter.

You refer to section 111 of the Constitution of Virginia, which provides that magisterial districts shall, until changed by law, remain as constituted, and that no new district shall be made containing less than thirty square miles. You point out that section 2688 of the Code of Virginia (Michie 1936) provides the method by which magisterial districts may be rearranged, and that this section also provides that in any one county there shall not be less than three nor more than eleven such districts.

The amendment of the charter of the city of Hampton, under the 1936 Act, would have the effect of leaving only two magisterial districts in Elizabeth City county, and would leave the county of such size that if a new district of thirty square miles was created, the other two districts would be of very small size. However, section 111 of the Constitution merely provides that the magisterial districts shall remain as constituted until changed by law. It does not require that such change be by a general law.

While the special Act of 1936 cannot be reconciled with the provisions of section 2688 of the Code, it does not conflict with the provisions of section 111 of the Constitution. As a general rule, a general law is amended by a special law enacted at a later date to the extent that the two are in conflict. In so far as Elizabeth City county is concerned, it would seem that section 2688 was amended by the special Act of 1936. In my opinion, no constitutional objection is presented to this by section 111 of the Constitution.

In your letter you also refer to the provision regarding the allocation of road funds, which is included in the special Act amending the charter of the city of Hampton. You ask what effect this provision has upon the entire Act, which, you point out, contains no "saving clause." Apparently, your thought is that this particular clause may be invalid. However, you mention no provision of the Constitution with which it is thought that this clause may conflict, and none comes

readily to my mind. If you will clarify your question concerning this provision, I shall be glad to advise you further.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**HARRISONBURG—Jurisdiction of Circuit Court in.  
CITIES—First Class—Courts.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 18, 1940.*

SENATOR AUBREY G. WEAVER,  
*Senate Chamber,  
Richmond, Virginia.*

MY DEAR SENATOR WEAVER:

This is in reply to your request that I investigate the Constitution and statutes relating to the effect upon courts, Commonwealth's attorney and clerk of a court of the twenty-fifth judicial circuit, in the event that the 1940 United States census should show that the city of Harrisonburg, in Rockingham County, contains a population greater than 10,000, so as to bring same within the classification of a city of the first class.

Section 98 of the Constitution contains this provision:

"In each city of the first class, *there may be*, in addition to the circuit court, a corporation court."

It will be noted that this reference to the circuit court does not necessarily imply that there shall be a separate circuit court for the city in addition to the circuit court of the county in which the city is located. Nor do I construe the Constitution as necessitating a separate circuit court, or as excluding the general jurisdiction of the circuit court of Rockingham County over the city of Harrisonburg if same be a first class city, provided there is legislation to assure said jurisdiction. Of course, if there is a separate circuit court established in the city of Harrisonburg, or if there is a corporation or hustings court established therein, the effect will be to require the election in said city of a Commonwealth's attorney and clerk of said court.

Section 118 of the Constitution provides that "In each city which has a court in the office of which deeds are admitted to record, there shall be elected, for a term of eight years, by the qualified voters of such city, a clerk of said court, \* \* \* ." Section 119 of the Constitution provides that "In every city, so long as it has a corporation court, or a separate circuit court, there shall be elected for a term of four years by the qualified voters of such city, one attorney for the Commonwealth, \* \* \* ."

Section 94 of the Constitution provides that "The judicial circuits of the State shall continue as at present until changed as hereinafter provided", while section 95 provides that "The General Assembly may rearrange the said circuits and increase or diminish the number thereof".

It is my opinion that the General Assembly possesses the power to confer on the circuit court of Rockingham County, and all counties similarly situated, jurisdiction over the city of Harrisonburg, and all cities similarly situated which do not have a separate circuit court or a corporation court, and that it is not incumbent upon the General Assembly to provide any such separate court. There is no mandatory distinction, in so far as the jurisdiction of circuit courts is concerned, over cities located in their territorial jurisdiction, between first class cities and cities of the second class, and it will be observed that section 98 of the Constitution

provides that "In case of the abolition of the corporation or hustings court of any city of the second class such city shall thereupon come in every respect within the jurisdiction of the circuit court of the county wherein it is situated until otherwise provided by law, \* \* \*."

The legislative history of the twenty-fifth judicial circuit, in so far as same relates to the city of Harrisonburg, is quite interesting. It seems that no separate circuit court had ever been established by the General Assembly for the city of Harrisonburg until the Code of 1919, when the revisers inserted in section 5887 a provision showing such a circuit court, and in section 5888 the twenty-fifth circuit is constituted as consisting of the counties of Rockingham and Page and the city of Harrisonburg. Apparently the creation of this separate circuit court was overlooked and no judge was ever elected for same, nor was any such legislation ever carried into effect because section 5887 was amended by Acts 1922, page 6, so as to omit Harrisonburg from the cities in which separate circuit courts were established. Also, the following provision was inserted:

"Any action or proceeding taken or had in the circuit court of Rockingham county or in the clerk's office thereof, since the twelfth day of January, nineteen hundred and twenty, which under the provisions of this section as it appears in the Code of nineteen hundred and nineteen should have been taken or had in the circuit court of the city of Harrisonburg, or in the clerk's office thereof, shall be as valid and effectual in all respects as if no separate circuit court for the city of Harrisonburg had been created or provided for by the said Code; \* \* \*".

At the same time section 5888 of the Code was amended so as to constitute the twenty-fifth judicial circuit of the counties of Rockingham and Page, without mention being made of the city of Harrisonburg. At the present time, therefore, the city of Harrisonburg is within the general jurisdiction of the circuit court of Rockingham County.

There is some doubt in my mind, however, as to whether or not the circuit court of Rockingham County would have jurisdiction over the city of Harrisonburg if same should become a first class city unless there is legislation to that effect. I believe, therefore, that it would be advisable to enact a statute expressly conferring such jurisdiction, and, if a court house is to be established in said city, authorizing this to be done.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### HIGHWAYS—Cities—Williamsburg.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 17, 1939.

HONORABLE H. G. SHIRLEY,  
*State Highway Commissioner,  
Richmond, Virginia.*

MY DEAR MR. SHIRLEY:

This has reference to your letter of July 6, in which you stated that you were in a quandary over just how to handle the situation in Williamsburg, and that you desired to be advised as to the status of Williamsburg in its relation to the State Highway Commission.

Williamsburg was chartered as a city in 1699 and a Continuing Act was passed in 1705. See Acts XIV (11th William III) and Chapter XLIII (4th Anne) found in Hennings Statutes at Large, Vol. 3, pp. 197 and 419, respectively. It is

by virtue of these Acts that it is claimed for Williamsburg that she has a royal charter. In these Acts Williamsburg is designated as a city. By Chapter 507, Acts 1884, the city of Williamsburg was granted a charter. The language there employed recognizes the theretofore corporate existence of Williamsburg as a city and as a continuing effect as to the original corporate character.

The charter of 1884 was amended on numerous occasions and the final amendment is found in Chapter 393, Acts of 1932, but always language was employed whereby the continuing existence of Williamsburg as a city was preserved.

Section 116 of the Constitution of 1902 (now in effect) states that those incorporated communities with inhabitants of more than 5,000, when the population was determined by the last census, shall be known as cities, and those with inhabitants of less than 5,000 shall be known as towns. However, this section states further that:

“ \* \* \* nothing in this section shall be construed to repeal the charter of an incorporated community of less than five thousand inhabitants having a city charter at the time of the adoption of this Constitution \* \* \* .”

Therefore, since Williamsburg had a city charter in 1902, it was by the Constitution continued as a city.

Clause 16 of section 5 of the Code defines city as follows:

“ \* \* \* The word ‘city’ shall be construed to mean an incorporated community, having within defined boundaries a population of five thousand or more, or any incorporated community containing less than five thousand inhabitants which had a city charter at the time of the adoption of the Constitution \* \* \* .”

From section 9 of the Byrd Road Law, which was last amended by Chapter 317, Acts 1936, I quote:

“The State Highway Commissioner, subject to the approval of the State Highway Commission, shall select such streets and roads, or portions thereof, in incorporated towns and cities having more than thirty-five hundred (3,500) inhabitants according to the census of nineteen hundred and twenty, and in all towns situate within one mile of the corporate limits of a city of the first class, and having a population in excess of thirty-five hundred (3,500) inhabitants according to the census of nineteen hundred and thirty, and in all cities operating under a charter designating them as cities of the first class notwithstanding the number of inhabitants, and in all towns having a population in excess of thirty-five hundred (3,500) inhabitants according to the last preceding United States census through which pass any primary road in the State Highway system directly connecting and over which moves a substantial portion of the traffic between two cities of the State each of which has a population in excess of forty thousand (40,000) inhabitants according to the said census, as may, in his judgment, be best for the handling of traffic in such towns and cities, from or to any road in the State highway system, and from time to time make such changes in the selection thereof as may be reasonable and proper.”

Williamsburg is situated on U. S. Route 60, midway between Richmond and Norfolk. It operates under a charter designating it as a city, notwithstanding the number of inhabitants, and through it passes a primary road in the State highway system over which moves a substantial portion of the traffic between two cities of the State each of which has a population in excess of 40,000 inhabitants according to the 1930 census.

I am of the opinion, therefore, that Williamsburg should be treated by the State Highway Commission as a city operating under a charter designating it as a city of the first class, through which passes a primary road in the State highway system connecting and over which moves a substantial portion of the traffic be-

tween two cities of the State each of which has a population in excess of 40,000 inhabitants according to the last census (1930).

I think the foregoing properly classifies Williamsburg in its relation to the State Highway Commission.

Very cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### HIGHWAYS—Riding Horseback on.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 24, 1939.*

MR. E. D. HELMS,  
*State Trooper,  
Galax, Virginia.*

DEAR MR. HELMS:

In your letter of October 23, you ask upon which side of the highway is a person riding horseback supposed to travel.

Section 2154(98) of the Code provides:

"Every person riding a bicycle or an animal upon a roadway and every person driving any animal shall be subject to the provisions of this article applicable to the driver of a vehicle, except those provisions which by their very nature can have no application."

Since vehicles are required to drive upon the right side of the highway, it is my opinion that a person upon horseback should do likewise.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### HIGHWAYS—Sidewalks as Part of—Road Funds.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 23, 1940.*

HONORABLE HAROLD M. RATCLIFFE,  
*Commonwealth's Attorney,  
Travelers Building,  
Richmond, Virginia.*

MY DEAR MR. RATCLIFFE:

I am in receipt of your letter of March 18 from which I quote as follows:

"Under the secondary road system which was adopted in 1932, Henrico County voted to maintain and operate its own roads. The Board of Supervisors desire to construct sidewalks in certain thickly developed sections of the county, the county to pay one-half and the abutting property owner to contribute one-half.

"Would sidewalks be considered a portion of the highway to such an extent that the county could construct its half out of the gasoline tax money paid to the county for the construction of roads."

It is well recognized that a road may be used by pedestrians in the absence of

a sidewalk. In fact, section 2154(126), subsection (f), of the Code (Michie, 1936), expressly provides that:

"Pedestrians shall not use the highways, other than the side-walks thereof, for travel, except when obliged to do so by the absence of side-walk, reasonable, suitable and passable for their use, in which case they shall keep as near as reasonably possible to the extreme left side or edge of same."

Where conditions are such in certain thickly developed sections of a county that it is unsafe for pedestrians to use the roads, it seems to me reasonable and supported by sound logic, to say that a county may use road funds for the purpose of constructing a sidewalk as an auxiliary to the road. If a pedestrian is entitled to use the road and the traffic hazard is such that it is unsafe for him to do so, I think it clearly follows that a walk constructed along the road may be considered a part thereof.

The Legislature in 1938 passed an act authorizing the State Highway Commission to construct sidewalks or walkways for pedestrian traffic on the roads and highways of the State Highway System, one-half of the cost of such sidewalks and walkways to be borne by the county. It seems to me that this is legislative recognition of the fact that a sidewalk is a part of the road. If it is proper for the State to spend its road money in the construction of sidewalks, I think it undoubtedly follows that the county may do the same.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**INSANE, EPILEPTIC, ETC.—Lunacy Proceedings—Sheriffs Fees—Mileage.  
FEES—Demand of, in Advance—For Summoning Witness in Criminal Case.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., September 20, 1939.

MR. CHAS. C. CURTIS,  
*Sheriff of Elizabeth City County,  
Hampton, Virginia.*

MY DEAR MR. CURTIS:

I am in receipt of your letter of September 18, in which you first ask the following question:

"What fee is an officer entitled to in executing warrant for insanity, summoning the commission, witnesses, and, if mileage, how much?"

Section 1021 of the Code provides that "the officer making the arrest and summoning the commission and witnesses shall receive the same fees as are allowed for like service in a felony case."

Section 3508 provides as to officer's fees in felony cases as follows: in case of an arrest the fee is \$1.50; the fee for summoning each witness is forty cents; the fee for serving a summons other than on a witness is sixty cents.

I cannot find any provision in section 1021 which can be reasonably construed to allow mileage in the case of bringing before the Commission a person suspected of being insane, epileptic or inebriate. From the quoted portion of section 1021 above you will observe that it is confined to *fees*. Section 1021 does provide allowance for mileage for a witness and, in the absence of such a provision for an

officer, I am inclined to be of the opinion that no mileage allowance is contemplated.

Your next question reads as follows:

"Can an officer demand his witness fees in advance for summoning defense witnesses in appeal cases to the circuit court or other court in criminal cases?"

I find that my predecessor, the Honorable John R. Saunders, expressed the opinion some years ago that an officer could not demand in advance his fee for summoning a witness for the defendant in a criminal case. After consideration, I concur in the opinion expressed by Colonel Saunders. That this is the correct conclusion is, I think, strengthened by section 3502 of the Code, which sets out certain cases where an officer may demand his fee in advance. The case you put is not included within the scope of the section, and I think that the reasonable inference is, therefore, that it was not intended to be included.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### INSANE PERSONS—Discharge of—Determination of Sanity.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 16, 1940.*

DR. H. C. HENRY,  
*Director of State Hospitals,  
309 North 12th Street,  
Richmond, Virginia.*

DEAR DR. HENRY:

I have your letter of April 5, enclosing your file of correspondence with reference to one Sidney Peele, a patient at the Southwestern State Hospital, and requesting my opinion upon the question covered by this correspondence.

The question is whether a person charged with a criminal offense and committed to a State hospital for observation should be deemed to have been "adjudged insane" within the meaning of Code section 1045.

This section deals with the discharge from the Department of Criminal Insane of patients who have been charged with or tried for criminal offenses.

It is first provided that any such patient who has been actually convicted, or who is under indictment and subject to trial, shall be discharged only after notice to the clerk of the court by whose order he was committed.

It is next required that, if such patient has been actually convicted of a capital offense, he shall be discharged, and delivered into the proper custody for execution of his sentence only after the superintendent of some other State hospital has concurred in the opinion that he is restored to sanity.

Finally, it is required that persons who have been "adjudged insane," both at the time of the alleged crime and at the time when, but for such insanity, they would have been tried, such patients shall be discharged and set free only with the concurrence of superintendents from two other State hospitals.

Under the terms of this section, it seems to me clear that the legislative intent was to require the precaution of calling in two additional superintendents only in the case of a patient who, but for his insanity, was actually or allegedly guilty of some capital offense, but who could not be afterwards apprehended and tried therefor because of a binding adjudication of insanity.

It is my opinion, therefore, that the phrase "adjudged insane" as used in this statute should be given its ordinary connotation, and applies only to a final judicial

determination that the person in question is immune from punishment because of his mental condition.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**INSURANCE—Authority of Corporation to Issue Hospitalization Insurance.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 22, 1939.

HONORABLE GEORGE A. BOWLES,  
*Commissioner of Insurance,  
Bureau of Insurance,  
State Corporation Commission,  
Richmond, Virginia.*

DEAR MR. BOWLES:

In your letter of August 18, 1939, you request my opinion as to whether a corporation organized under chapter 151 of the Code of Virginia (1919) and Acts of the General Assembly of Virginia amendatory thereof and supplemental thereto, as a non-stock corporation not organized for profit, is authorized by its charter to issue hospitalization certificates up to \$300 to its members under section 4304(13) of the Code of Virginia.

I have studied the provisions of the charter of this corporation, which appears to have been secured in 1934, and find the applicable charter provisions to be:

"1. To establish, conduct and engage in the business of an Assessment or Co-operative Life and Casualty Company, under and subject to the provisions of Chapter 170 of the Code of Virginia (1919) and the Acts of the General Assembly of Virginia amendatory thereof and supplemental thereto, particularly Chapter 348 of the Acts of the General Assembly of Virginia for the year 1932; and

"2. To issue certificates, policies and/or other evidence of interest to its members," etc.

"4. The corporation shall have and enjoy all of the rights, powers and privileges conferred upon corporations of like character by the general laws of the Commonwealth of Virginia, to the same extent as if each of such general laws were copied into and made a part of this certificate of incorporation."

The charter of the corporation was secured at a time when chapter 171a of the Code of Virginia (of which section 4304(13) is but a part), as well as chapter 170, was a part of the law of Virginia. Since the charter expressly states that the corporation was organized to engage in the business of an Assessment or Co-operative Life and Casualty Company, under and subject to the provisions of chapter 170, but makes no reference whatever to chapter 171a, it is my opinion that the corporation is only authorized to engage in business as authorized by chapter 170 of the Code of Virginia and the Acts of the General Assembly amendatory thereof and supplemental thereto. The charter did not state that it was organized to engage in business under the provisions of chapter 171a. Moreover, it is clear that it was not so organized. Section 4304(12) requires that five persons act as incorporators in forming a corporation under chapter 171a, while it appears from the charter of the corporation under consideration that the number of incorporators was only three.

Chapter 171a (Acts of Assembly, 1928, chapter 442) is not amendatory of chapter 170, nor is it supplemental thereto. It is an entirely separate Act defining

and regulating Co-Operative Non-Profit Life Benefit Companies. Such companies differ from other non-stock, non-profit corporations organized under chapter 151, in that they are required to have a Constitution providing for a representative form of government, with or without lodges, with a legislative body elected by the members, which body in turn elects a Board of Directors, etc. For this reason, paragraph 4 of this corporation's charter, quoted above, does not authorize the corporation to engage in business under chapter 171a, since this chapter is not a general law conferring rights, powers, and privileges upon corporations of *like character*, but is one conferring privileges upon those corporations which can qualify as a Co-Operative Non-Profit Life Benefit Company as defined therein. This corporation is not within such definition, as it does not have the representative form of government required by this chapter.

For these reasons, I am of the opinion that the corporation should not be licensed under the provisions of section 4304(13) of the Code of Virginia.

However, since section 4264 of the Code, which is a part of chapter 170, under and subject to which this corporation was authorized by its charter to do business, contemplates the issuance of sickness and other physical disability certificates, it is my opinion that this corporation may be permitted to issue hospitalization certificates to its members, provided it complies with all the regulatory features of chapter 170 of the Code of Virginia.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### JAILS AND JAILORS—Committal Fees.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 10, 1940.*

HON. ERNEST W. GOODRICH,  
*Attorney for the Commonwealth,  
Surry, Virginia.*

MY DEAR MR. GOODRICH:

I am in receipt of your letter of April 2.

In reply to your first question, I know of no statute which provides that a prisoner confined in jail for non-payment of a fine shall have credit on the fine for the time spent in jail prior to his trial.

Your second question is as follows:

"When a person is arrested and committed to jail and then admitted to bail and upon the preliminary hearing before the trial justice the matter is certified to the grand jury and the bondsman refuses to continue in that capacity and the prisoner is recommitted to jail, would the sheriff be entitled to a second committal fee? Also in the case where the prisoner is out on bail awaiting trial and at the trial is sentenced to jail, would the sheriff be entitled to a second committal fee for recommitting the prisoner in jail?"

Section 3510 of the Code provides in part for a fee "for receiving a person in jail when *first* committed, fifty cents". From the quoted language it seems to me plain that the jailor is only entitled to one committal fee in each of the cases you put.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND JAILORS—Compensation for Keep of Prisoners.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 13, 1940.

MR. T. WILSON SEAY,  
*Sheriff of Henrico County,  
Richmond, Virginia.*

MY DEAR MR. SEAY:

I am in receipt of your letter of June 6, from which I quote as follows:

"Under provision of section 3510 of the Code of Virginia, the sheriff of the county is entitled to receive compensation as therein set out for the keep of prisoners confined in jail.

"The Comptroller without any apparent warrant in law does not allow a fee for the support of prisoners on the day in which they are released, regardless of the fact that in many cases the prisoners stay in jail for the entire day and receive three meals on that day. As I see it, I am entitled to receive the fee allowed by law for the prisoners for that day as well as the other days for which he is confined in jail. I am therefore writing to ask that you will furnish me your opinion as to my rights in this matter."

If the records of the sheriff show the precise facts as to the time the prisoner was received and the time he was released, I am of opinion that the sheriff's compensation for boarding the prisoner should be computed on the basis of such facts. However, the State Comptroller advises me that the information furnished him does not show the hour of receiving and discharging prisoners from jail. As a practical matter, therefore, it has been the practice of the Comptroller's office to allow full compensation for the day on which the prisoner is received and not to allow compensation for the day on which he is released. This in the long run, I imagine, would work out equitably. The Comptroller advises me that the practice has been in effect for many, many years, and I am of opinion that this administrative practice should be given great weight in construing the statutes. I should think that the allowance of a full day's compensation for the day on which the prisoner is received in jail would about equalize the failure to allow compensation for the day on which the prisoner is released.

Upon a consideration of the whole matter, I am of the opinion that the long continued administrative practice of the Comptroller should be accepted as a proper construction of the statute.

However, should the sheriff keep a detail account of meals furnished, I am of opinion that he would be entitled to credit for the proper fraction of each day's board for such meals. In other words, if the sheriff serves the prisoner three meals on both the day he receives the prisoner and also on the day he is discharged, he will be entitled to receive pay for board for both days.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**JAILS AND JAILORS—Release of Prisoner—When Certificate Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 17, 1940.

MR. PAUL W. HALL,  
*City Sergeant,  
Newport News, Virginia.*

MY DEAR MR. HALL:

I am in receipt of your letter of January 12, from which I quote as follows:

"In my official capacity as Sergeant for the City of Newport News I have been requested to certify the discharge of a prisoner, who has served his term of confinement and has served full time for his fine and costs to the Clerk of the Corporation Court of the City of Newport News, Virginia, for the purpose of discharging him from any further or other liability on account of said fine and costs, pursuant to section 2095 of the Code of Virginia 1919, as amended."

You inquire whether you should in such a case furnish the certificate specified in section 2095 of the Code.

In my opinion, the section does not in this respect cover the case of the ordinary prisoner confined in jail, as distinguished from the prisoner held to labor in the State convict road force or in a chain gang or State Farm or State Industrial Farm for Women.

I refer you to section 4953 of the Code, which prescribes the time that a person may be confined in jail for the non-payment of fine and costs, or costs where there is no fine. This section further provides that at the expiration of the limitation prescribed by the section the jailer "shall, without further order or direction, release the defendant from jail promptly \* \* \* ." It will be observed that the limitation placed upon the confinement by the two sections is quite different.

It seems clear to me, therefore, that section 2095 is not applicable to the case of ordinary jail prisoners with respect to the certificate you mention.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### JUSTICE OF PEACE—Duty of County to Furnish Supplies.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 10, 1939.

HONORABLE H. M. HEUSER,  
*Trial Justice,*  
*Wytheville, Virginia.*

DEAR JUDGE HEUSER:

I have your letter of June 29, requesting my opinion as to whether you should supply justices of the peace in your county with forms for legal process.

Under Code section 4987i, a county is authorized and required to provide the necessary supplies for the trial justice, but no reference is made to justices of the peace, nor can I find elsewhere in the law any provision for supplying forms, such as you mention, to justices.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### JUDGE—Office Expenses—By Whom Paid. BOARD OF SUPERVISORS—Duty to Provide Courthouse.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 27, 1940.

HON. CHAS. B. GODWIN, JR.,  
*Attorney for the Commonwealth,*  
*Suffolk, Virginia.*

MY DEAR MR. GODWIN:

I am in receipt of your letter of March 22, in which you state that the judge of the circuit court of Nansemond county has secured offices in a building in Suf-

folk, and you ask my opinion on the question whether the State or the county may pay the office rent of the judge, including telephone service.

I can find no authority for the State bearing any portion of this expense. Section 3467-a of the Code (Michie, 1936) authorizes the payment by the State of traveling expenses and hotel bills of circuit judges while holding courts in their circuits, but I can find no authority for the payment by the State of any part of the office expenses or telephone service of the judge.

Section 2854 of the Code requires that the board of supervisors of every county shall provide a court house therefor. I should certainly say that an office for the judge of the circuit court of the county is a necessary part of a court house. If any particular court house does not contain an office adequate and suitable for the judge, it seems to me that the board of supervisors would be justified in paying for the rent of such an office. The question of whether or not any particular room in a court house is an adequate and suitable office for the judge is one of fact on which this office, of course, cannot be expected to pass.

As to the authority of the board of supervisors to pay for telephone service, I should say that in these days a telephone is necessary for the efficient discharge of the duties of a judge and that the board would also be justified in meeting this expense as a necessary incident to providing the office.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## JUDICIAL CIRCUITS—Creation and Rearranging of—Population.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 11, 1939.*

HONORABLE WILLIAM R. SHANDS, *Director,*  
*Division of Statutory Research and Drafting,*  
*Richmond, Virginia.*

DEAR MR. SHANDS:

This is in reply to your letter of December 2, which is as follows:

"Because of the recent developments in Buchanan County, I am advised that there is being considered a move to separate from the 27th Judicial Circuit one of the counties now constituting that circuit and to add such county to one of the adjoining circuits. The two counties remaining, probably Buchanan and Dickenson, have, according to the latest United States census, a total population of 32,903.

"The question has accordingly been raised whether such re-arrangement may be effected under section 95 of the Constitution of Virginia. As I read the section, the prohibition contained therein is aimed at the creation of new circuits and not at the re-arrangement of counties in existing circuits.

"Since the matter will probably reach us at an early date in connection with the preparation of legislation, I shall appreciate your advising me whether there is any constitutional objection to such a change in the circuits as I have referred to above."

Section 95 of the Constitution provides as follows:

"The General Assembly may rearrange the said circuits and increase or diminish the number thereof. But no new circuit shall be created containing, by the last United States census or other census provided by law, less than forty thousand inhabitants, nor when the effect of creating it will be to reduce the number of inhabitants in any existing circuit below forty thousand, according to such census."

The specific question presented is whether the re-arrangement of the present existing circuits has the effect of creating "new" circuits within the meaning of the language quoted.

I am of opinion that the word "new" should be construed as meaning "additional", and that, unless an additional circuit is added,—that is, unless there is an increase in the number of circuits—, the re-arrangement of the existing circuits in the manner suggested in your letter is not in violation of section 95 of the Constitution.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### JURY—Compensation of, as Part of Costs.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 6, 1939.

HON. C. CARTER LEE,  
*Attorney for the Commonwealth,  
Rocky Mount, Virginia.*

MY DEAR MR. LEE:

I am in receipt of your letter of November 27, in which you ask in behalf of the Clerk of the Circuit Court of Franklin County whether or not the compensation of the jury in a civil case should be taxed to either party as a part of the costs.

I have carefully examined the statutes and so far as I can find there is no authority in law for taxing to any litigant the costs of a jury in a civil case, although in criminal cases the compensation of the jury is taxed as a part of the costs.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### JUVENILES AND DOMESTIC RELATIONS—Jurisdiction—Delinquency Proceeding.

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

HONORABLE PRICE GOODSON,  
*Commonwealth's Attorney,  
Galax, Virginia.*

DEAR MR. GOODSON:

In your letter of October 19, you state that two boys under eighteen years of age were tried before the Trial Justice sitting as the Juvenile and Domestic Relations Court for breaking and entering the United States Post Office at Sylvatus; that the case was dismissed because the Justice did not believe the evidence sufficient to identify the defendants as the guilty parties, the only evidence on this point being expert testimony that fingerprints found on scales located inside the private compartment where the general public has no right to be were those of the defendants.

You ask if you have the right, in view of this action of the Trial Justice, to attempt to secure an indictment of these boys by the Grand Jury in case further evidence is obtained, or to take such action without additional evidence.

The Juvenile and Domestic Relations Courts are by statute given exclusive original jurisdiction over all cases, matters and proceedings involving the disposition, custody, or control of delinquent, dependent and neglected children. By section 1906 of the Code, the phrase "delinquent child" is defined as including a child under eighteen years of age who violates a law of this State.

It is my opinion that proceedings under chapter 78 of the Code to adjudicate a child a delinquent, even when the violation of a law is the basis of the action, is not a criminal proceeding. The purpose of the action is not to convict the child of a crime and impose a punishment, but to adjudicate the child a delinquent and to declare him to be a ward of the State and to "make and enter such judgments or orders for (his) custody, discipline, supervision, care, protection and guardianship, as in the judgment of the court will be for the welfare and best interests of such child." Section 1905 provides that, "No adjudication or judgment upon the status of any child under the provisions of this chapter shall operate to impose any of the disabilities ordinarily imposed by a conviction, nor shall any such child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction."

For this reason, I am of the opinion that proceedings before a Juvenile and Domestic Relations Court involving a child who has violated a law would not be considered as putting such child once in jeopardy. This conclusion is bolstered by the fact that section 1918 provides that, if at any time, after thorough investigation or *trial of its various disciplinary measures*, the court is convinced that a delinquent child over fourteen years of age cannot be made to lead a correct life or be properly disciplined under the provisions of chapter 78, such child shall then be proceeded against as if he were over the age of eighteen years and may be committed to jail pending further proceedings. This question, however, is not free from all doubt and is one which, in the final analysis, can only be decided by the courts. I am of the opinion, therefore, that if a further evidence was secured against the boys you mention you would have the right to bring them again before the Juvenile and Domestic Relations Court to be proceeded against as delinquents.

The propriety of presenting the case to the Grand Jury in order to secure an indictment against them presents even a more difficult question involving the right of any court, other than the Juvenile and Domestic Relations Court, to entertain original proceedings against children who may be said to be delinquent within the provisions of chapter 78 of the Code.

The statutes seem to contemplate that children, under the age of eighteen years, who have committed offenses shall first be brought before the Juvenile and Domestic Relations Court with a view of providing them with a proper home and subjecting them to such control of the court as will correct their erring ways and make them proper citizens; and that they should only be subjected to criminal prosecution when it appears that such measures will be unavailing. The Juvenile and Domestic Relations Court is given exclusive original jurisdiction of all cases arising under chapter 78. Section 1911 provides that, when any child under eighteen years of age, who otherwise comes under the provisions of chapter 78, is brought before any other court or justice, such justice or court shall transfer the case to the Juvenile and Domestic Relations Court. Section 1910 provides that, unless the offense is aggravated or the child is of an extremely vicious or unruly disposition, no court, judge, or justice shall sentence or commit a child under the age of eighteen years to a jail, workhouse, or police station, or send such child on to the Grand Jury, nor sentence such child to the penitentiary or to the State convict road force.

However, in the case of *John Piazza, et. als. v. Samuel G. Brent, Judge of the Circuit Court of Prince William County, Virginia*, the Supreme Court of Appeals denied, without opinion, a petition for a writ of prohibition, which was sought in order to prevent the circuit court from trying boys under eighteen who had been arrested and indicted for a felony but who had not been brought before the Juvenile and Domestic Relations Court. It was contended by the defendant, Judge Brent, that children indicted for a serious felony could be tried therefor without

being first submitted to the jurisdiction of the Juvenile and Domestic Relations Court; the contention was also made that prohibition was not the proper remedy.

Since no opinion was written in this case, the reasons for the court's refusal of the writ is left in doubt. The court may have agreed with the first contention of Judge Brent.

In view of this case, and the possible basis of the court's decision, and the fact that this is also a question which can only be decided by the courts, I am of the opinion that, if it be determined that the case is an aggravated one, it would be proper for you to have the boys arrested, indicted and brought before the Circuit Court for trial.

Your second question is in regard to the sufficiency of the evidence concerning fingerprints. I know of no case dealing with the sufficiency of such evidence alone to establish the identity of the guilty parties.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### KEEPER OF ROLLS—Fees for Services.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 3, 1940.

HONORABLE LEROY HODGES,  
*State Comptroller,*  
*Richmond, Virginia.*

MY DEAR COLONEL HODGES:

This is in reply to your letter of May 1, in which you request my opinion upon the question whether or not the Clerk of the House of Delegates and Keeper of the Rolls is entitled to the compensation or fees, from the State or State agencies for certifying or furnishing copies of Acts of the General Assembly, provided for in section 3478 of the Code.

Section 66 of the Virginia Constitution provides that "The Clerk of the House of Delegates shall be Keeper of the Rolls of the State, but shall receive no compensation *from the State* for his services as such".

The question whether the Clerk, therefore, is entitled to be paid by the State for furnishing copies of the Acts would clearly depend upon whether, in furnishing same, he would be acting in his ex-officio capacity as Keeper of the Rolls, or whether he would be acting merely in his capacity as Clerk of the House of Delegates. Section 307 of the Code provides that the Clerk of the House of Delegates shall be the Keeper of the Rolls, and, as such, shall have custody of the Acts of the General Assembly and, when required, shall furnish a copy of them.

In view of the provisions of this section of the Code, it is my opinion that copies of Acts of the General Assembly are furnished by the Clerk of the House of Delegates in his ex-officio capacity as Keeper of the Rolls, and that, therefore under the above quoted provisions of section 66 of the Constitution, he may not receive any fees or compensation from the State for furnishing such copies.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LABOR, COMMISSIONER OF—Power to Take Testimony, Examine Witnesses, Etc.****Id.—Authority Relating to Segregation of Races.****Id.—Schedules Showing Hours of Work—Ownership of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 26, 1939.*

HON. THOS. B. MORTON,  
*Commissioner of Labor,  
Commonwealth of Virginia,  
Richmond, Virginia.*

MY DEAR MR. MORTON:

I am in receipt of your letter of September 21, in which you ask a number of questions, which I shall set out in order, giving in each case my opinion thereon.

Your first question is as follows:

"Section 1799 of the Code states in part as follows:

"The Commissioner of Labor shall have power to take and preserve testimony, examine witnesses, and administer oaths."

The power of the Commissioner of Labor to take and preserve testimony, examine witnesses, etc., as contained in section 1799 of the Code, in my opinion, relates to proceedings before the Commissioner of Labor as distinguished from court proceedings. I, therefore, do not think that the statute contemplates that your inspectors shall have the authority to represent the Commonwealth in case of court proceedings involving violations of the labor laws. Indeed, the same section makes it the duty of the Attorney for the Commonwealth, upon the request of the Commissioner of Labor, to prosecute violators of law which it is made the duty of the Commissioner of Labor to enforce. Of course, your inspectors could take the stand and testify as to any admissible evidence within their knowledge, but for them to examine witnesses would also violate Rule 1 promulgated by the Supreme Court of Appeals for integration of the Virginia State Bar dealing with the practice of law.

Your second question is:

"Under the general statute relating to the segregation of the races, would this Department have authority to require separate toilet facilities for the races?"

There are a number of sections of the Code dealing with a separation of the races in particular cases, such as on common carriers, places of public entertainment, dance halls, etc. However, I can find no general statute requiring separation of races which can be construed so as to authorize your Department to require separate toilet facilities in factories, workshops, mercantile establishments, etc. In fact, section 1822 of the Code prescribes that there shall be separate toilet facilities for each sex in certain factories and workshops, but is silent on the matter of separate facilities for the races. While you do not give the facts in any particular case in which you might think that these separate facilities are necessary, yet I am forced to the conclusion, from my consideration of the pertinent statutes, that no authority is given your Department to require these separate toilet facilities for the races.

You next refer to that portion of section 1808 of the Code requiring employers coming within the section to keep posted in the workroom where females are employed a printed copy of the section and a printed schedule setting forth the number of hours such employees are required to work and certain other details as to their employment. The last paragraph of section 1808 requires the Commissioner of Labor to furnish printed copies of the section to employers.

You desire to know whether or not the printed copies of the section which you furnish to employers are the property of the State and may be seized by your inspectors to be used as evidence when a violation of the law is charged.

I call your attention to the fact that it is only the printed copies of the section that are required to be furnished by the Commissioner of Labor, the section apparently intending that the various schedules shall be prepared by the employer. In view of the language of the section, I do not think it can be said that the copies of the section once furnished by the Commissioner of Labor remain the property of the Commonwealth. Of course, there is a little property value involved. The plain tenor of the statute is that the employer shall be supplied, that is, given these printed copies. If it should become necessary that the schedules posted by the employer be used as evidence, they may be secured or proven in accordance with the recognized rules of legal procedure, with which the Attorney for the Commonwealth who prosecutes any particular case will be thoroughly familiar. I do not think that your inspectors have the authority to seize these schedules where they are of opinion that the law is being violated, nor will this procedure be necessary.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**LEGISLATION—Local and General Law—Constitutionality.**  
**HAMPTON ROADS—Regulation of Sewage Disposal.**

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

HONORABLE W. R. SHANDS, *Director,*  
*Division of Statutory Research and Drafting,*  
*Richmond, Virginia.*

DEAR MR. SHANDS:

In your letter of recent date, you state that a committee appointed by the Council of the City of Norfolk to study the question of pollution of the waters of the Hampton Roads area has recommended the enactment of legislation prohibiting the discharge of untreated sewage and industrial wastes into certain designated waters of this area, the legislation to contain provisions for the use of injunctions to prevent violations and providing penalties where the same may be applicable.

You ask if any constitutional objection may be raised to such legislation under section 63 of the Constitution of Virginia which prohibits the enactment of local, special, and private laws for the punishment of crime.

It appears, from the report of the above mentioned committee, that the condition of pollution in the Hampton Roads area is a serious one occasioned by the discharge of untreated sewage by the large number of cities surrounding this area; and that such condition is harmful to the shell-fish industry in this area and is a condition endangering the public health.

Though the courts have considered the question of whether or not specific legislation is special or local or is of a general nature within the meaning of requirements of the various state constitutions innumerable times, it cannot be stated with any degree of assurance whether any given act is special or local, or not. The principles and tests to be applied are so indefinite and the questions involved are of such fineness that often the problem is one which can be determined only by the courts. In the case of *Martin's Ex'rs. v. Commonwealth*, 126 Va. 603, Judge Kelly quoted the following passage from the opinion of Judge Andrews in *Ferguson v. Ross*, 126 N. Y. 459, 464; 27 N. E. 954, 955:

"It seems impossible to fix any definite rule by which to solve the question whether a law is local or general, and it has been found expedient to leave

the matter, to a considerable extent, open to be determined upon the special circumstances of each case."

Certain general principles have, of course, been well established. Constitutional limitations of this nature are intended, primarily, as a check upon the intentional exercise of legislative power conferring special privileges and immunities, or special restrictions and burdens, upon particular persons or localities to the exclusion of other persons or localities *similarly situated*. They do not prohibit proper and appropriate classification based upon such difference in the situation of the subjects of the different classes as to reasonably justify different requirements in respect to such classes. See *Martin's Ex'rs. v. Commonwealth, supra*.

It may be quite possible that the waters of Hampton Roads belong in a class of their own either because of the nature of the interests to be protected or because of the peculiar conditions there existing creating the evil to be curbed. If so, it is my opinion that proper legislation can undoubtedly be drawn to prohibit the pollution of these waters. This, of course, is a question which depends upon all the facts and circumstances, of which I am not advised.

Even though it could not be said that conditions exist which would justify a separate classification, it is my opinion that there exists another principle upon which the proposed legislation could be sustained. There is substantial authority stating the proposition that statutes of a certain type are "general" and not "local or special," within the meaning of constitutional limitations, though in their execution they operate territorially only upon a particular section of the state. Such statutes are those dealing with a subject matter in which the state itself has an interest as proprietor, or as trustee, or in its governmental capacity, for the benefit or in the interest of the general public.

The cases in which this principle is stated are usually those involving statutes regulating fishing in certain designated streams, regulating the maintenance of state institutions at specified places, etc. It is held that because of the interest which the state holds in the subject matter, legislation relating thereto is of general and state-wide concern to all the citizens of the state and not merely a matter of local concern; and, therefore, that such legislation is not local or special within the meaning of such constitutional limitations though applying only to a specific locality. See *Monka v. Mautkin*, 231 N. W. 273 (Wis.); *State v. Corson*, 67 N. J. Law, 178, 50 A 780.

The case of *Ferguson v. Ross, supra*, to which the Virginia Supreme Court of Appeals referred in *Martin's Ex'rs. Case, supra*, held valid a statute of New York quite similar to the proposed legislation concerning Hampton Roads. By virtue of that statute it was made an offense to deposit dredging in the North River. The purpose of the Act was to protect the Harbor of New York in the interests of navigation and commerce. It was held that, since this was a matter of state-wide interest and concern, the statute was not a local or special one within the meaning of the New York Constitutional provision designating the manner in which such laws should be enacted.

While there is no Virginia case considering the effect of section 63 of the Virginia Constitution upon this type of legislation, the General Assembly has enacted many statutes of this nature. In fact, several statutes forbidding the pollution of designated tidal waters were mentioned in *Commonwealth v. Newport News*, 158 Va. 521, 555, and the implication is strong that the court considers such legislation valid.

In that case the Commonwealth sought to restrain the City of Newport News from discharging untreated sewage into the waters of Hampton Roads. In the course of its opinion the court had this to say concerning the nature of the Commonwealth's interest in her tidal waters:

"As sovereign, the State has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the *jus publicum*. But it also has, as proprietor, the right

of private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign State to whose rights it has succeeded has divested itself. This right of private property is termed the *jus privatum*. Farnham on Waters and Water Rights, section 10, section 36a; *Gough v. Bell*, 21 N. J. Law 156; *City of Oakland v. Oakland, etc., Co.*, 118 Cal. 160, 50 Pac. 227." (158 Va. 546.)

The court held that the Commonwealth has a property right in her tidal waters; that the legislature, in the absence of any constitutional limitation, may suffer such property to be used in a manner which would destroy its use for the purpose of fishing; that the Constitution did not forbid the legislature to permit such waters to be used for sewage purpose; and that the legislature had permitted such use. The court said:

"By Acts 1914, page 528, chapter 307 (section 3290, Code of Va. 1919), it had prohibited the discharge of sewage into Lynnhaven river in order to protect the shell-fish therein from pollution; and by Acts 1930, page 327, it prohibited the discharge of sewage into Chuckatuck creek, Urbanna creek, Bennett creek, Carter's creek and Milford Haven; but it has not enacted any similar legislation with reference to any of the waters which the bill in this case charges are polluted by the sewage discharged by Newport News." (158 Va. 555.)

And again:

"Our conclusion is that the General Assembly has the power to authorize, permit or suffer sewage to be discharged into Hampton Roads and its estuaries, and to subject the discharge of sewage into those waters to no restrictions relative to its injury to fishery therein, or to such restrictions as it may deem proper; that it has authorized and permitted the city of Newport News to discharge the raw, untreated sewage into these waters; and that to what extent these waters may be used for the purpose of sewage disposal, and to what extent they shall be devoted to purposes of fishery, and the restrictions and limitations to be placed on these several uses are questions committed by the Constitution to the discretion of the legislature free from the control or interference of either the executive or judicial department of the government." (158 Va. 556.)

This case is very persuasive authority for the view that the court would sustain legislation applying only to the waters of Hampton Roads and forbidding the discharge of untreated sewage therein. Since, as pointed out by the court, the Commonwealth's interest in her tidal waters is of a proprietary nature, legislation concerning such waters is a matter of general and state-wide concern and not a matter of mere local concern.

It is my opinion, therefore, that the proposed legislation, though in its execution would apply only to designated waters, would not be held "local" legislation in contravention of section 63 of the Virginia Constitution.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### LEGISLATIVE AGENT—Statement of Expenses.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 9, 1940.

HONORABLE RAYMOND L. JACKSON,  
*Secretary of the Commonwealth,*  
*Richmond, Virginia.*

DEAR MR. JACKSON:

This is in reply to your letter of this date, to which you state you desire a

prompt reply as only a short time remains in which expense accounts of legislative agents may be filed.

You enclose with your letter a statement filed by Mr. Mason Manghum, on which he does not show any expenses contracted by him which have been paid or assumed by his employer. Under the heading "Compensation paid Legislative Council or Agent" he has written the words "None to date". You request my opinion upon the question whether or not the use of the words "none to date" is a compliance with the provisions of chapter 85 of the Acts of 1938.

Section 6 of said Act requires every person whose name appears upon the legislative docket to file with the Secretary of the Commonwealth "a complete and detailed statement \* \* \* of all expenses paid or incurred by such person, corporation or association, in connection with promoting or opposing in any manner the passage by the General Assembly of any legislation coming within the terms of this act."

It will be noted that the language quoted is restricted to expenses incurred by the person making the statement. In the case of a person employed as legislative counsel or legislative agent, it would seem to embrace only expenses incurred by him or paid by him in connection with his employment. The item contained in your form relating to the compensation paid the legislative counsel or agent seems to me to be an item which should be supplied and filled out by the employer, and not an item of expense incurred by the employee.

If, however, the legislative agent has incurred any of the expenses referred to in the statement form, whether they have been actually paid or whether he has been reimbursed therefor, it would seem to me that he should provide that information in detail, whereas, the employer would probably state the total amount of compensation and expenses which he had paid to the legislative agent and might not be able to furnish the detail of such expenses.

If you have any doubt as to whether Mr. Manghum has correctly understood the requirement that he should list any expenses which he has incurred on behalf of his employer, it might be well for you to call his attention to that fact.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LEGISLATIVE DISTRICTS—Plan Providing One Representative from City, One from County.  
Id.—Constitutional Law.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 11, 1939.

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

MY DEAR MR. SHANDS:

This is in reply to your letter in which you desire my opinion as to the constitutionality of the following proposals:

"One of our legislative districts, consisting of a county and a city, has a population sufficiently large for two representatives. The population of the county greatly exceeds that of the city. It seems desirable that some arrangement be made whereby one of the representatives may come from the county and one from the city. The first suggestion is that the county constitute one district, and the county and city constitute the other, provided in the latter district it may be specified that the representative shall come from the city.

"The other suggestion is to the effect that the district be left as now constituted, but provision be made that one of the representatives shall come from the county and the other from the city."

Section 44 of the Constitution prescribes the qualifications of members of the House of Delegates and among other things says:

" \* \* \* And any person may be elected a member of the House of Delegates who, at the time of election, is actually a resident of the House District and qualified to vote for members of the General Assembly."

The House District in question, as I understand your letter, consists of "a county and city", and is entitled to two members of the House. In my view, the quoted provision from section 44 of our Constitution affirmatively has prescribed the residential requirement of a member from a district and has said that any person who is a resident of the district is qualified in that respect to be elected a member of the House. The quoted language is mandatory and, in my opinion, for the Legislature to prescribe that one of the members from the district in question should come from any particular portion of the district is clearly in conflict with the qualification prescribed by the Constitution and, therefore, would be invalid.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### LEGISLATURE—Anti-Lobbying Act—Enforcement of.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 4, 1940.

HONORABLE HUNSDON CARY,  
*State Senator,  
Mutual Building,  
Richmond, Virginia.*

MY DEAR SENATOR CARY:

I am in receipt of your letter of April 29, from which I quote as follows:

"There has been a good deal of discussion in the press concerning the enforcement of the anti-lobbying act passed in the 1938 session of the General Assembly, and as the patron of the act I am anxious to see it enforced. Please advise me who is the proper enforcement officer of the act."

Section 9 of the Act regulating lobbying (Acts 1938, p. 148) provides as follows:

"Any legislative counsel or legislative agent, and any employer of such legislative counsel or legislative agent, violating any provision of this act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty nor more than one thousand dollars, or be confined in jail not exceeding twelve months, or both."

The Act itself does not make it the duty of any officer to institute prosecution thereunder. This is true, as you know, of many criminal statutes. It would, therefore, appear that any person having knowledge of a violation of the statute may swear out a warrant against the defendant, or such person may report the alleged violation to the Attorney for the Commonwealth of the county or city in which the offense occurred, which officer may in turn ask for an indictment. In short, the enforcement of this penal statute, as is the case with many others, seems to be left with the regular law enforcement officers of the State.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## LIBRARY BUILDING COMMISSION—Legislative Members.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 6, 1940.

HONORABLE ASHTON DOVELL,  
*Speaker of the House of Delegates,*  
*Richmond, Virginia.*

MY DEAR MR. DOVELL:

This is in response to your request for my opinion upon the question of whether a member of the State Library Building Commission, created by chapter 405 of the Acts of 1938, who was appointed by the Speaker of the House of Delegates from among the membership of the House of Delegates but who is not now a member thereof, is still a member of said Commission, or whether his membership in said Commission is affected by reason of the fact that he is not now a member of the House.

I have carefully examined the Act above referred to and find no provision therein which would require the legislative members of said Commission to continue to be members of the Legislature. In my opinion, unless there is further legislation on the subject of the members who were appointed pursuant to chapter 405 of said Acts of 1938, they will continue to be members of said Commission during the existence thereof, unless and until such a member resigns or unless said Act is amended by the General Assembly.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## LICENSE—Driver's—Suspension of for Non-Payment of Judgment—District of Columbia.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 29, 1940.

HON. M. S. BATTLE, *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

MY DEAR COLONEL BATTLE:

I am in receipt of your letter of March 23, from which I quote as follows:

"This division has been requested to suspend the operation and registration privileges of a Virginia resident pursuant to chapter 272, Acts of the General Assembly of 1932, as amended (Michie's Code 2154-205).

"The judgment creditor has furnished this office with a certificate from the Clerk of the United States District Court of the District of Columbia showing that the judgment was rendered therein against the said defendant, a Virginia resident. I call your attention to the language of the above statute which reads, in part, as follows:

"The operator's or chauffeur's license and all of the motor vehicle registration certificates and motor vehicle licenses of any persons shall in the event of his failure to satisfy any final judgment or judgments rendered against him by any court of competent jurisdiction in *this or any other State*, for damages on account of personal injury, or damage to property, resulting from the ownership or operation of a motor vehicle heretofore or hereafter by him or his agent, be forthwith suspended by the

director of the division of motor vehicles upon receiving a certified copy of such final judgment or judgments from the court in which the same is or are rendered, \* \* \*

"I would like for you to advise me if I would be justified, under the statute, in suspending the privileges of the above mentioned judgment debtor."

The statutory provision to which you refer does not in terms include within its scope judgments rendered against an operator by a court of the District of Columbia. However, I refer you to section 5 of the Code of Virginia, prescribing rules for the construction of statutes unless such construction would be inconsistent with the manifest intent of the Legislature. Subsection 1 of this section prescribes that the word "State" when applied to a part of the United States "shall be construed to extend to and include the District of Columbia \* \* \*."

Manifestly one of the purposes of the statute involved is in the interest of the public to prevent the use of highways by financially irresponsible operators of motor vehicles. When this purpose is considered together with the statutory provision to which I have referred, I am of opinion that the statute should be construed so as to include final judgments rendered by a court of competent jurisdiction of the District of Columbia.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LICENSE—Out of State Peddlers Selling in Virginia.**

**Id.—Where Produce Not Grown by Peddler.**

**CONSTITUTIONAL LAW—Discrimination Against Persons from Out-of-State.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 5, 1940.*

MR. CHARLES N. GRAVES,  
*Commissioner of the Revenue,*  
*Luray, Virginia.*

MY DEAR MR. GRAVES:

I am in receipt of your letter of December 26, relative to the desire of the town of Shenandoah to impose a peddler's license "on an out-of-State grower of fruits and vegetables" without imposing a similar license on the local growers of fruits and vegetables.

I must advise that, in my opinion, an ordinance or a statute for that matter imposing a peddler's license only on out-of-State growers of fruits and vegetables would be invalid because in conflict with the Constitution of the United States. I need not elaborately set out the legal principles involved and the authorities therefor, but I may say that it is well established by the courts that such a discrimination is invalid. In fact, section 296 of the Tax Code of Virginia expressly prohibits any city or town from imposing a license tax on peddlers of farm products where such products are grown by the peddler. The prohibition contained in the section is not limited to Virginia producers, but applies to all.

At times I well realize that local people are subjected to strong competition on account of the inability to reach the out-of-State growers by a license tax, but, as I have said, it is well established that such a license tax is contrary to the Constitution of the United States.

As to peddlers of produce grown by others, section 192 of the Tax Code imposes upon them a State license tax of \$50 for each vehicle, and I am of opinion that the town could impose a similar license. This would reach the person who buys his produce from outside the State as well as one who buys within the State.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**LICENSE—Revocation in Another State—Restoration by Governor.**  
**PARDONS—Effect of, Upon Revoked License.**

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

HONORABLE R. L. JACKSON,  
*Secretary of the Commonwealth,*  
*Richmond, Virginia.*

DEAR MR. JACKSON:

By your inquiry of yesterday you request my opinion as to whether the Governor has power to restore, or to have restored, a motor vehicle operator's license which has been revoked because of the holder's conviction in another state upon charges of driving while under the influence of intoxicants.

The action of the Division of Motor Vehicles in revoking such license is authorized by Virginia Code (Michie 1936) §2154(187), and the only express authority for reviewing or reversing such action is that contained in section 2154(188) of the Code, which provides for an appeal to the Circuit or Corporation Court of the complainant's residence.

It should be observed that your problem does not involve the question whether an executive pardon has the effect of restoring or requiring the restoration of a license which has been revoked on account of the crime pardoned. On this question the law is not entirely clear (see Williston, *Does a Pardon Blot Out Guilt?* (1915) 28 Harv. Law Rev. 647), and I express no opinion here.

In the case which you suggest, there is no question as to the effect of a pardon since obviously the Governor of Virginia cannot pardon an offense which has been committed in another state. This being true, and since the Governor is given no specific power to restore licenses revoked for any cause, it is my opinion that your question must be answered in the negative.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**LOANS—Payment of by Political District.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 13, 1940.*

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

MY DEAR MR. MORTON:

I am in receipt of your letter of May 9.

Without attempting to state in detail the facts that you present, I am of the opinion, in answer to the question contained in the second paragraph of your letter, that Bacon District may repay Roanoke District the money borrowed from the latter district out of the funds that you mention Bacon District now has on hand. I do not think there can be any question about this.

As to whether district funds may be used to pay off county indebtedness, I should say that this depends on whether or not the district in question has any indebtedness of its own of any sort. If the district owes any money, I am of opinion that any available funds that it has should be used to apply on such debt, so that the taxpayers of the district from whom the money was collected may receive the benefit of same. If, however, there is no district indebtedness of any character, I

am of opinion that it would be proper for such balance as you describe to be used in payment of the county indebtedness to the literary fund.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**LOTTERY—Tickets Given by Merchant to Customer.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 27, 1940.

HONORABLE LOVE B. ROUSE,  
*Commonwealth's Attorney,  
Bristol, Virginia.*

MY DEAR MR. ROUSE:

This is in reply to your letter of May 25, in which you request my opinion upon the question whether or not it would be a violation of Virginia statutes, or whether it would be a lottery, for a merchant to give to purchasers at the store a ticket corresponding to one dropped in a box, from which at stated times a ticket is to be drawn, and the person holding the corresponding ticket will receive a certain amount of money or other thing of value.

You inquire first whether this would be a violation of section 4694a of the Code if the ticket should be a part of a sales ticket issued from a cash register. This section deals with slot machines and contemplates that the operation of the machine must be caused by the dropping of a coin in a slot. It is my opinion therefore, that this would not render the cash register a slot machine within the meaning of this section.

I call your attention, however, to section 60 of the Constitution, which provides that the buying, selling, or transferring of tickets or chances in any lottery shall be prohibited. Section 4693 of the Code prohibits a lottery or drawing for money or other thing of value, and provides a heavy punishment therefor. See also section 4704 and section 4986.

Our Supreme Court of Appeals had occasion to render quite an illuminating opinion upon what constitutes a lottery in the case of *Maughs v. Porter*, 157 Va. 415, where a similar scheme for securing attendance at an auction sale was held to constitute a lottery. I am, therefore, of opinion, that under the principles laid down in that case, the proposed plans to which you refer for promoting sales would be construed by the courts as lotteries.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**LUNACY—Costs Allowed for Hearing.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 13, 1939.

MR. E. LEWIS McCUTCHEON,  
*Justice of the Peace,  
Law Building,  
Lynchburg, Virginia.*

MY DEAR MR. McCUTCHEON:

I am in receipt of your letter of October 10, in which you ask me to write you setting out my opinion of the costs of a lunacy hearing as prescribed in section 1021 of the Code

I do not know how I can add much to the provisions of the section itself. The two physicians are entitled to a fee of \$5 each. The justice of the peace sitting is entitled to a fee of \$2. The officer making the arrest and summoning the commission and witnesses receives the same fees as are allowed for a like service in a felony case. These latter fees are set out in section 3508 of the Code. In addition, the justice, each physician and the witnesses are entitled to mileage.

I can very well see how the costs of the commission might vary, depending on the number of witnesses and the amount of mileage.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MARRIAGE LICENSE—Issuance of—Upon Receipt of Certificate of Non-Resident Physician.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 20, 1940.

HONORABLE J. W. BAKER,  
*Clerk of the Circuit Court,  
Winchester, Virginia.*

DEAR MR. BAKER:

I have your letter of June 19, requesting my opinion as to whether the clerk of a court may issue a marriage license on presentation of a certificate issued by a non-resident physician, under the terms of Chapter 102 of the Acts of 1940 [Virginia Code §5073(a)].

This Act provides, in subsection (a), that a marriage license shall be issued only after there has been filed with the clerk, by or on behalf of each of the parties to be married.

“ \* \* \* a statement signed by a physician, stating, without disclosing any medical findings, that as to such person such test, or tests and examination have been made, and such medical history obtained, as are required by this section to determine whether there is evidence of syphilis, and that the information required by sub-section (b) of this section as to each such test, examination and medical history has been filed with or transmitted to the State Department of Health by the said physician. \* \* \* ”

Subsection (h) of the statute provides that the term “physician” includes any physician who holds a license to practice medicine issued by the Medical Examining Board of Virginia, or by any similar board in any other State, or the District of Columbia.

It follows that the marriage license should issue upon presentation of a statement conforming to the requirements above set out, signed by a licensed physician of any State, or of the District of Columbia.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MARRIAGE LICENSE—Minor—Issued to, Upon Consent of Mother.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 2, 1939.*

HONORABLE K. E. FULLER, *Deputy Clerk,*  
*Clintwood, Virginia.*

DEAR MR. FULLER:

I have your letter of August 30, in which you state that it has been customary for you to issue marriage licenses to a minor if either of the minor's parents authorize the same. You ask if I would advise the issuance of a marriage license on the mother's consent alone.

Section 5078 of the Code provides:

"If any person intending to marry be under twenty-one years of age, and has not been previously married, the consent of the father or guardian, or if there be none, of the mother of such person, shall be given \* \* \*."

It is my opinion that, whenever it appears that the father of a minor is living or that a guardian has been appointed in cases where the father is dead, the marriage license should not be issued upon the consent of the mother alone. If, however, you are satisfied that the father is not living, and that no guardian has been appointed, the license may be issued upon the mother's consent.

In view of this statutory requirement, it is my opinion that you should at least make inquiry of the applicant for a license, or the mother who is prepared to give the consent, as to whether the minor's father is living and, if not, whether such minor has a guardian.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MARRIAGE—Where Ceremony Must Take Place—Non-Residents.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 1, 1939.*

HONORABLE ARTHUR H. CRISMOND, *Clerk,*  
*Circuit Court of Spotsylvania County,*  
*Spotsylvania, Virginia.*

DEAR MR. CRISMOND:

I have your letter of July 25, in which you request my opinion on certain questions arising under the marriage laws.

You wish to know whether a marriage commissioner, appointed under Virginia Code (Michie 1936) section 5080 may perform a marriage ceremony between non-residents of the State pursuant to a license issued in a county other than the county or city for which such commissioner has been appointed. Also you inquire whether a commissioner appointed for the city of Fredericksburg may perform a ceremony there pursuant to a license issued from the clerk's office of Spotsylvania County.

Section 5072 of the Code, which prescribes the legal requirement of a license for all marriages to be performed within the State, provides that such license shall be issued in the county or city in which the female to be married usually resides or, in case she is not a resident of the State, "by the clerk of the circuit court of the county, or of the corporation court of the city in which the marriage is to be solemnized".

It appears, therefore, that neither a marriage commissioner nor any other person should perform a ceremony between non-residents except pursuant to a license issued in the county or city in which the ceremony takes place. This would prevent the performance of a ceremony in either of the cases which you suggest.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MEDICAL COLLEGE OF VIRGINIA—Contract With Virginia Electric Power Company.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 5, 1940.

DR. W. T. SANGER, *President,*  
*Medical College of Virginia,*  
*Richmond, Virginia.*

DEAR DR. SANGER:

This is in reply to your letter of January 3, 1940, with which you submitted for consideration by this office the proposed agreement between The Medical College of Virginia and the Virginia Electric and Power Company concerning an easement of right of way for an electric conduit and cable line across the Memorial Hospital property.

I have examined this agreement and the related correspondence. With the exception of the following suggestions, the contract seems to be free from any reasonable objections.

I suggest that the last clause of the paragraph numbered (2) on page two of the agreement be clarified. I understand that the College, at the present time, pays for its electric service at a rate (1 cent per kw hr) which is somewhat less than that paid by the general public. While the language "at the standard rates, terms and conditions of service of the Power Company," which is used in the agreement, is probably intended to mean that the College is to pay for service furnished through the secondary network system at the same rate it pays for service not furnished through such an improved system, it may give rise to a misunderstanding to the effect that the College should pay the rate paid by the general public.

It is my understanding that the purpose of the paragraph numbered (2) was to insure the establishment by the Power Company of its secondary network system in such a manner that the new hospital at Twelfth and Broad Streets could and would be served therefrom, and that there was no intention to fix the rates for such service by this agreement, there being no controversy on this point. If this be true, I am of the opinion that the language "for which said electric service the College agrees to pay at such rates, terms, and conditions of service as may be agreed upon by the College and the Power Company" could be substituted for the last clause of this paragraph and thus carry out the intention of the parties.

If, however, it is desired to fix by this agreement the rates and terms of service, it is my opinion that language which clearly spells out the intention of the parties should be used.

With the exception of the further suggestion that the name of the College, as fixed by the Legislature, "The Medical College of Virginia," be used in the first paragraph and signature of the agreement, it is my opinion that the contract is in proper form and fully protects the rights of the College.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**MILK COMMISSION—Monies Collected—Disposition.**  
**Id.—Withdrawal of Funds from Treasury.**  
**Id.—How Deposited in Treasury.**  
**Id.—Authority of, Over Local Boards.**  
**Id.—Term of Chairman of Local Board.**

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

DR. T. R. SNAVELY, *Chairman,*  
*State Milk Commission,*  
*Richmond, Virginia.*

DEAR DR. SNAVELY:

I have your letter of July 13, delivered by you personally to me, in which you ask six questions and my interpretation of certain provisions of the Milk and Cream Act. These questions I repeat and answer *seriatim*.

"First: Under section 10, should all receipts from assessments levied and collected by the Local Board, including that portion of the assessments levied under section 11, subsection (b), entitled 'Expenses', be paid into the State treasury?"

All monies collected by the Local Milk Boards are payable into the State treasury. Subsection (c) of section 9 of the Reorganization Act (Acts 1927, chapter 33, page 108) provides:

"Every State department, division, officer, board, commission, institution or other agency owned or controlled by the State, whether at the seat of government or not, collecting or receiving public funds, or moneys from any source whatever, belonging to or for the use of the State, or for the use of any State agency, shall hereafter pay the same promptly and directly into the treasury of the State without any deductions \* \* \* provided, however that any State department, division, officer, board, commission, institution or other agency not at the seat of government shall immediately deposit to the credit of the Treasurer of Virginia, all such moneys in a State depository or depositories to be designated by the State Treasurer, and shall send a duplicate deposit slip to the Comptroller \* \* \*."

"Second: 'If the receipts from assessments imposed by the Local Milk Board for its own expenses are paid into the State treasury, how may such funds be withdrawn from the State treasury and for what purposes?'"

In my opinion, the records of the Local Milk Boards should contain itemized statements of receipts and of expenses incurred by such Boards, and these receipts and disbursements should be cleared through the regular channels and paid by the State treasurer just as all other State accounts are paid. Since the only appropriation of moneys under the Milk Control Act is made to the Milk Commission, the invoices sent to the Comptroller should be drawn by the Milk Commission. The funds from assessments made by the Milk Boards for their own use may be expended for payment for services required to perform any duties delegated to the Boards by the Milk Commission.

"Third: Should the receipts from assessments imposed by Local Milk Boards for their own expenses be paid into the State treasury and held as separate accounts for the individual Local Milk Boards and in their name, or should the money so collected and paid into the State treasury be placed in the 'Milk Commission Account' as specified in section 10?"

The records in the Comptrollers' office will reflect all monies paid into the treasury by the Milk Boards and the Milk Commission. The Milk Commission should set up accounts with each Local Milk Board, receive advice as to remittances from each Board to the State treasurer, and charge each Board with the amounts paid upon invoices or payrolls signed by the State Milk Commission or someone by it thereunto duly authorized.

"Fourth: Does the State Milk Commission have authority under the Act to require Local Milk Boards to levy and collect all or such portion of the maximum assessment of two (2c) cents per hundred pounds of milk as provided in section 11, subsection (b) ('The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board as necessary to cover its expenses'), to the extent necessary to perform the duties and functions of such Boards as determined by the State Milk Commission?"

The Milk and Cream Act imposes certain duties upon the Milk Commission. By the provisions of subsection (n) of section 3, the State Milk Commission may delegate "such of the powers given it by this act as it sees fit to the milk board in any particular market area, for the purpose of carrying out the provisions of this act within said market area", and subsection (c) of section 11 provides that "The milk board shall perform such functions as the Milk Commission shall delegate to it."

Under the provisions cited, the Local Milk Boards are under legal obligation to perform such ministerial duties as may be delegated to them by the State Milk Commission. In order for the delegated authority to be successfully carried into effect, I am of the opinion that it is the duty of the Local Milk Boards to levy, from time to time, assessments yielding an amount sufficient to cover all necessary expenses incident to the administration of their duties, not exceeding the amount which the Boards are authorized to levy for the payment of local expenses, as provided in subsection (b) of section 11 of the Milk and Cream Act.

"Fifth: What control does the State Milk Commission have over the employees who are appointed and paid by the Local Board?"

The State Milk Commission has superior and final authority as to the administration of the duties delegated to a Local Milk Board, and the authority of the State Milk Commission is superior to that of a Local Milk Board in the control of employees and personnel appointed by such Board. Although subsection (b) of section 11 of the Milk and Cream Act refers to the "salaries and/or the *per diem* of such personnel as the board finds it necessary to employ to properly carry out its functions under this act", the Local Milk Board is obligated to employ, within the maximum amounts for which it may levy assessments, such personnel as is necessary to perform the duties delegated to it, and all such employees must comply with the requirements of the State Milk Commission should there be a difference of opinion between the Local Milk Board and the Milk Commission as to the duties of any of the employees of the Local Board.

"Sixth: What is the term of appointment of the chairman of the Local Milk Board, appointed by the State Milk Commission under section 11 of the Milk and Cream Act?"

Subsection (a) of section 11, providing for Local Milk Boards, authorizes the State Milk Commission to appoint a member of each Board to represent the consumers and the public interest, this appointee to be chairman of the Board. As the paragraph does not provide a term of office for the chairman, he holds his office at the will and pleasure of the State Milk Commission, and a successor may at any time be appointed by the Commission.

Very truly yours,

ABRAM P. STAPLES,  
Attorney General.

**MOTOR VEHICLES—Licenses—"TH" and "CH"—When Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 12, 1939.

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

DEAR SIR:

I have your letter of July 7 in which you make the following inquiry:

"John Doe hauls crushed stone in a truck carrying TH license to a private road on a farm. Is he violating the law, or does this require CH license?"

For your information, "TH" licenses are issued by the Motor Vehicle Division for those motor vehicles whose owners have been issued warrants or exemption cards by the State Corporation Commission pursuant to Section 19, Chapter 129, Acts of 1938, commonly known as the Motor Vehicle Carriers' Act. Trucks so licensed are permitted to carry only exempt commodities as set forth in Section 2 of the above Act.

"CH" licenses are issued for those motor vehicles whose owners have secured from the State Corporation Commission permits to haul any and all commodities. Under the aforesaid Act, they are termed "contract carriers". (See Section 1 of the Act for definition.) Vehicles bearing "CH" licenses are permitted to haul commodities for as many as two consignors over any public highway.

It would follow from the above that if John Doe is hauling stone for another, he would be required to have a "CH" license on his vehicle, as crushed stone is not among the exempt commodities.

I am requesting the Motor Vehicle Division to forward you under separate cover a pamphlet copy of the Motor Vehicle Laws of Virginia, of which pamphlet, the Motor Vehicle Carriers' Act is Part 3, found on Page 107.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**NATIONAL GUARD—Vacation Allowances—State Employees.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 9, 1940.

HONORABLE S. GARDNER WALLER,  
*Adjutant General of Virginia,*  
*Richmond, Virginia.*

MY DEAR GENERAL WALLER:

I am in receipt of your letter of May 6, in which you call my attention to section 2673 (78) of the Code (Michie, 1936), which reads as follows:

"All officers and employees of the State who shall be members of the national guard or naval militia shall be entitled to leaves of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast defense training, ordered or authorized under the provisions of this act."

You raise the question whether, under this section, an officer or employee of

the State, who is also a member of the National Guard, should have charged against his vacation the time he is absent from his duties while in the field or coast defense training. I understand that in the past there has been a training period of not exceeding fifteen days, and that members of the National Guard who are also in the State employ have been allowed in addition their regular vacation period. You state that this year there will probably be a training period of twenty-one days, and you desire to know what effect, if any, this will have on the vacation period.

The section to which you refer does not make any reference to vacations, nor indeed do I find any statute providing for vacations for State employees, but the practice has been for many, many years to allow vacations. In view of the well established custom of allowing vacations, I am of the opinion that the statute is susceptible of the construction that, when a member of the National Guard is regularly called out for field or coast defense training, he should not on this account be deprived of his vacation period. I do not think the legal situation would be altered by the fact that the training period is twenty-one days instead of fifteen days as in the past, provided the twenty-one day training period is compulsory.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### NOTARIES—Powers and Functions of.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL.  
RICHMOND, VA., *July 10, 1939*

JOHN E. DOAR, ESQ.,  
522 Clay Avenue,  
Norfolk, Virginia.

DEAR MR. DOAR:

I have your letter of July 6, requesting my opinion as to the meaning of chapter 380, Acts 1938 [Virginia Code (Michie 1936) section 2850], in so far as that statute provides that notaries "shall exercise the powers and functions of conservators of the peace." Also, you ask specifically whether this statute gives to a notary the same powers as to enforcing the laws of the State as are possessed by police officers.

The powers and functions of conservators of the peace are prescribed at some length in sections 4789-4791 and sections 4795-4796 of the Code of Virginia (Michie 1936). I regret that the statutes have not been published in pamphlet form, and I can, therefore, only refer you to these citations for their detailed provisions.

I will say, however, that in general the powers conferred on conservators of the peace look primarily to the prevention of crime rather than to the apprehension and punishment of criminals. Accordingly, conservators of the peace are not vested with many of the powers conferred on police officers, such as, for instance, the power to arrest under a warrant.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**NOTARIES—Geographical Extent of Authority—Where City in Two Counties.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 17, 1939.*

MR. J. P. MAGEE,  
*501 Law Building,  
Newport News, Virginia.*

MY DEAR MR. MAGEE:

I am in receipt of your letter of November 14, in which you ask whether, as a duly appointed notary for the City of Newport News, you may act as such notary in Warwick and Elizabeth City Counties.

Section 2850 of the Code provides that notaries in cities and counties in which cities or parts thereof are located shall have authority to act as such in each of the said localities. You state that geographically Newport News is located in Warwick and Elizabeth City Counties, having been formed from parts of those counties. If this is a fact, in my opinion, and I have heretofore so ruled, as a notary public for Newport News, you may act as such notary in each of the said counties.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICERS—Eligibility—Membership in General Assembly—What Constitutes.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 8, 1940.*

SENATOR CHARLES E. BURKS,  
*Hotel Richmond,  
Richmond, Virginia.*

MY DEAR SENATOR:

This is in reply to your letter of this date, in which you request my opinion upon the question whether or not the fact that a person has been elected to the State Senate, but who does not qualify as a member of the Senate, is by reason of his election rendered ineligible to be elected by the next succeeding session of the General Assembly to the position of judge of a court of the Commonwealth.

Section 45 of the Constitution is as follows:

"The members of the General Assembly shall receive for their services a salary to be fixed by law and paid from the public treasury; but no act increasing such salary shall take effect until after the end of the term for which the members voting thereon were elected; and no member during the term for which he shall have been elected shall be elected by the General Assembly to any civil office of profit in the State."

The precise question presented, in view of the foregoing constitutional provisions, is whether or not the election of a person as a member of the General Assembly constitutes him a member without his actually qualifying.

It is my opinion that the mere election does not have this effect, and that no person is a member of the State Senate until he actually qualifies and takes the

oath of office as required by law. That this is the proper interpretation of the Constitution would seem to be clear from the fact that section 44 provides that no person holding the office of Commonwealth's attorney, and certain other designated offices, shall be a member of either house of the General Assembly during his continuance in office, "and the election of any such person to either house of the General Assembly, and *his qualification as a member thereof*, shall vacate any such office held by him; \* \* \* ." The fact that a Commonwealth's attorney, or one of the other designated officers, is elected to the General Assembly does not vacate his prior office, but, in order that same may be vacated, it is necessary that he shall actually qualify as a member of the General Assembly.

Since section 45 of the Constitution renders ineligible only "members", and since a Senator-elect is not a member of the Senate until he actually qualifies, it is my opinion that the mere fact of his election does not render him ineligible to be elected to any civil post of profit in the State.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### OFFICERS—Expense Allowance—"Actual Expenses."

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 9, 1939.

HON. LEROY HODGES,  
*State Comptroller,*  
*Richmond, Virginia.*

MY DEAR COLONEL HODGES:

I am in receipt of your letter of August 3, in which you refer to an order of the Hustings Court of the City of Portsmouth allowing B. E. Andrews, a police officer of the said city, mileage at the rate of 8 cents per mile in certain cases where he traveled beyond the limits of the city to return certain prisoners to Portsmouth. You desire my opinion primarily on the question of whether or not the allowance of 8 cents per mile is proper, and you enclose a letter from Judge Kenneth A. Bain, who entered the order, also suggesting that the question be submitted to this office.

Section 2991 of the Code provides that, when a police officer of a city travels beyond the limits of his city in his capacity as a policeman, "he shall be entitled to his actual expenses, to be allowed and paid as is now provided by law for other expenses in criminal cases." From a consideration of Judge Bain's letter to you of July 28, I take it that he considers that the allowance of 8 cents per mile covers the "actual expenses" of the officer. The question of what are the officer's "actual expenses" is, of course, one of fact and, unless it can be shown that the allowance of 8 cents per mile is more than the officer's "actual expenses", I am of opinion that the allowance is correct. I am assuming, of course, that the officer used his own car, and certainly in computing his expenses the wear and tear on the automobile should be considered along with the actual cash outlay for gasoline and oil. If the officer used an official car, then it is self-evident that his expenses for the operation of the car were only the cash outlay that he made in connection with such operation.

I am not unmindful of the provisions of section 47 of the last appropriation act limiting the allowance to 5 cents per mile in cases where personal automobiles are used, but this provision applies to "appropriations made in this act by any and all of the State institutions, departments, bureaus and agencies." I do not think it could be said that the appropriation for criminal charges is included within the appropriations named in section 47, for it is well known that there are several statutes providing for an allowance of 8 cents per mile to sheriffs and other officers rendering services in criminal cases.

I think it reasonably plain, therefore, as I have already indicated, that the question of actual expenses is one of fact, and, if the Judge of the Court has determined that an allowance of 8 cents per mile covers the actual expenses of this officer, then his finding should be accepted.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICERS—Furnishing Supplies to County—Personal Interest in.**

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

HON. L. H. SHRADER,  
*Trial Justice of Amherst County,  
Amherst, Virginia.*

MY DEAR MR. SHRADER:

I am in receipt of your letter of December 4, from which I quote as follows:

"I have been appointed Trial Justice of Amherst County and also Commissioner of Accounts for Amherst County.

"Under the law the county is supposed to furnish me my stationery, etc. My wife, Bess Willis Shrader, and I own the Amherst Publishing Company jointly. The Amherst Publishing Company has printed the supplies for the office of the Trial Justice and the Commissioner of Accounts to the amount of \$34.70. She presented the bill to the Board of Supervisors and they raised the question as to whether or not they have the right to pay the said bill under section 2707 of the Code of Virginia, in 1936, in that I am a county officer and that I am directly interested in the agreement for the printing of the stationery, etc.

"Please advise whether the Board of Supervisors has the right to approve and pay the bill to the Amherst Publishing Company (which is not a corporation). Also advise me, if Mrs. Shrader owned the Publishing Company in fee simple, whether she would have the right to do the printing for the Trial Justice Court and Commissioner of Accounts as long as I am Trial Justice and Commissioner of Accounts for Amherst County."

The salary of the trial justice is paid in part by the county and, under the conditions as stated in the first quoted paragraph, I am of the opinion that you as trial justice would be "directly or indirectly" interested in "the sale or furnishing of supplies or materials" to the county, which is prohibited by section 2707 of the Code.

I do not think it at all clear that the section is applicable to you as commissioner of accounts, because, as such officer of the court, you are not paid any compensation by the county, and I doubt whether a commissioner of accounts can be considered as a county officer within the meaning of section 2707.

The situation would not be quite so clear if Mrs. Shrader owned the Publishing Company herself. It might still be argued that you would be "indirectly" interested, although I am not at all sure that a court would so hold. Questions of this sort, as you, of course, know, depend so largely upon all of the facts in each particular case that it is extremely difficult to pass on a hypothetical case. While section 2707 is a penal statute, in view of the manifest purpose thereof, I suggest for your consideration that very possibly it would be strictly construed against an officer charged with dealing with his county.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICERS—Removal of—Cause—Notice and Hearing.  
SCHOOL BOARD—Authority of to Remove Superintendent.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 16, 1940.

HONORABLE ROBERT C. VADEN,  
Gretna, Virginia.

MY DEAR SENATOR:

I have your letter of April 4, requesting my opinion as to certain questions concerning the removal of a division superintendent of schools from office.

Section 133 of the Constitution provides for the appointment of division superintendents by local school boards, such superintendents to hold office for a term of four years.

Code section 628 authorizes the State Board of Education to remove division superintendents from office "for neglect of duty, or for any official misconduct." Code section 651 provides that "the office of any division superintendent shall be deemed vacant upon \* \* \* his removal from office by the State board of education, or other appointing power."

You first request my opinion as to whether the local school board may in any case remove a division superintendent from office. It seems to me clear that the local school board is the "other appointing power" referred to in Code section 651 and that this statute confers on such local board the power of removal.

You next ask whether such officer may be removed only for the causes specified in Code Section 628.

Inasmuch as these two statutes are distinctly *in pari materia*, and hence should be read together, I think it clear the provisions of section 628 should apply in cases of removal by the school board—i. e., that both the State Board and the local board may remove a division superintendent for either of these causes. The only question, therefore, is whether such grounds are exclusive.

In other states, it is quite well settled that an officer for whom a specific term is provided by law, and for whose removal specific causes are provided, may be removed only for such causes. 22 R. C. L. 563, §268; 46 C. J. 985-986, §147. While this question has not been directly passed upon by our own Court of Appeals, I know of no reason and find nothing in opinions upon related subjects to indicate a different rule in Virginia.

It is my opinion, therefore, that a division superintendent of schools may be removed from office, either by the local school board or the State Board of Education, only on the grounds specified in Code section 628.

Finally, you ask whether, as a prerequisite to such removal, it is necessary to give the superintendent in question reasonable notice and an opportunity to be heard.

Again the law in other jurisdictions seems well settled, it being consistently held that such notice and opportunity to be heard must be given, whether expressly required by statute or not. 22 R. C. L. 574-575, §286; 46 C. J. 989-990, §160. In Virginia a similar conclusion would seem to follow from the case of *Fugate v. Weston*, 156 Va. 107, 157 S. E. 736, holding unconstitutional a statute which authorized the Governor to remove certain constitutional county officers and denying recourse to the courts for a judicial determination of the existence of proper cause. In any event, there is certainly nothing in this or any other Virginia case inconsistent with the general rule indicated.

It is my opinion, therefore, that neither the local school board nor the State Board of Education should undertake to remove a division superintendent of schools from office without first giving him reasonable notice and an opportunity to be heard.

Cordially yours,

ABRAM P. STAPLES,  
Attorney General.

**OFFICES—Books—Ownership—Recovery.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 29, 1940.

HON. S. B. BARHAM, JR., *Clerk,*  
*Circuit Court of Surry County,*  
*Surry, Virginia.*

MY DEAR MR. BARHAM:

I am in receipt of your letter of February 23, in which you ask "whether or not the Board of Supervisors has any authority to require retiring county and district officers to turn over such law books as they may have in their possession belonging to said offices, to their successors in office."

From what you say, the property involved is the property of the county, and I am of opinion that the county and district officers should turn over these books to their successors. The Board of Supervisors might pass a resolution directing the books to be so turned over, but, if the persons involved refuse to comply with the resolution, the remedy would seem to be to ask the court for a mandatory injunction.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Assistant Comptroller as Employee of Clerk of House of Delegates.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 2, 1939.

HONORABLE LEROY HODGES,  
*State Comptroller,*  
*Richmond, Virginia.*

DEAR COLONEL HODGES:

This is in reply to your letter of November 30, in which you request my opinion upon whether the practice which has prevailed for many years for the Assistant Comptroller, Mr. Sidney C. Day, Jr., to be employed for compensation by the Clerk of the House of Delegates as an enrolling clerk, his work in employment being restricted to hours when he is not on duty and not required to be on duty in the Comptroller's Office, is in violation of any law of the State.

I beg to advise that, in my opinion, the practice is not in any way prohibited by any statute or general law.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—COMPATIBILITY of—Deputy Sheriff as Town Sergeant.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 2, 1940.

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

DEAR GOVERNOR PRICE:

This is in reply to your letter of April 2, in which you request my opinion upon

the question whether or not there is any provision of law which would render a deputy sheriff incompetent to hold the office of town sergeant.

I had occasion on November 13, 1937, to give an opinion on a very similar question to Mr. J. E. Quillin, Sheriff of Scott County, which is as follows:

"This will acknowledge your letter of October 22, in which you state that one of your deputies has been elected town marshal for the town of Dungan-non, and request the opinion of this office as to his right to hold the offices as deputy sheriff and town marshal at the same time.

"Your question seems to be controlled by Virginia Code (Michie 1936) section 2702, which provides that 'No person holding the office of county treasurer, sheriff', etc., 'shall hold any other office, elective or appointive, at the same time, except' (the statute enumerates certain exceptions not germane here).

"In view of the fact that, under Code section 2701, a deputy sheriff may exercise all the powers of his principal, it might be contended that the prohibition against holding another office as quoted above is applicable to deputies as well as to the sheriff himself. The statute quoted, however, does not expressly mention deputies, and, in my opinion, ought not to be extended in its operation beyond the plain requirements of its language. Furthermore, if the Legislature had intended this prohibition to extend to deputies as well as to the principal officers named, it seems that the statute would have followed the language used in section 31 of the Virginia Constitution, which provides that 'No person, *nor the deputy of any person*, holding any office or post of profit or emolument, under the United States government, \* \* \* shall be appointed a member of the electoral board', etc.

"It is the opinion of this office, therefore, that the office of deputy sheriff and town marshal are not incompatible and may be held by the same person at one time."

I can see no distinction in principle between the duties of the office of town marshal and town sergeant, and, applying the principle of the foregoing opinion, I beg to advise that I am of the opinion that there is no provision of law in Virginia which would prevent a deputy sheriff from holding the office of town sergeant.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Member, Board of Welfare as Member, County School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 16, 1939.*

DR. WM. H. STAUFFER,  
*Commissioner of Public Welfare,*  
*Richmond, Virginia.*

MY DEAR DR. STAUFFER:

I am in receipt of your letter of October 13, in which you ask if a member of a local board of public welfare may also be a member of a county school board.

Section 644 (1) of the Code of Virginia (Michie, 1936) provides that no Federal, State, or county officer shall be chosen or allowed to act as a member of a county school board. There are certain exceptions set out in the section, but a member of a local board of public welfare is not included therein. In my opinion, a member of a local board of public welfare is a county officer and, in view of the

provisions of the section to which I have referred, he may not be a member of the county school board.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Substitute Rural Mail Carrier as Member of School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 26, 1940.

HONORABLE C. CARTER LEE,  
*Commonwealth's Attorney,*  
*Rocky Mount, Virginia.*

MY DEAR MR. LEE:

This is in reply to your letter of June 18, in which you ask if section 291 of the Code of Virginia authorizes a substitute United States rural mail carrier to be a member of a County School Board.

Section 290 of the Code provides that United States officers and employees shall not be capable of holding any office of honor or profit under the Constitution of Virginia. Section 291 provides that section 290 shall " \* \* \* not be construed \* \* \* to prevent any United States rural mail carrier \* \* \* from holding any county or district office \* \* \* ." Section 291, then, does not in itself permit any of the persons therein named to hold the specified offices, but merely provides that the general language of section 290 shall not prevent certain persons from holding certain offices.

While a rural mail carrier is excepted from the provisions of section 290, he is not excepted from the provisions of section 644(1), which deals specifically with county school boards and which provides:

"No Federal, State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as member of the county school board, provided that the provisions herein obtained, shall not apply to fourth-class postmaster, county superintendents of the poor, commissioners in chancery, commissioners of accounts, registrars of vital statistics, notary public, clerk and employees of the Federal government in Washington; \* \* \* ."

In my opinion, since rural mail carriers and substitute rural mail carriers are appointed by the Postmaster General, are required to take an oath of office and to execute an official bond, and since their duties are prescribed in detail by the postal rules and regulations, they are officers of the United States and, therefore, are not eligible to act as a member of the County School Board.

See *Blackwood v. Welch*, 18 S. W. (2d) 1023 (Ark.); *United States v. McCrory*, 91 Fed. 295; and *Groves v. Barden*, 84 S. E. 1042 (N. C.).

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Registrar as U. S. Census Enumerator.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 6, 1946.

*Secretary of Electoral Board,  
Neenah, Virginia.*

MY DEAR MR. HUTT:

I am in receipt of your letter of May 2, in which you ask if a registrar automatically vacates his office as such by accepting appointment as U. S. census enumerator.

Section 84 of the Code provides in part as follows:

" \* \* \* No person, nor 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, shall be appointed a member of the electoral board or a registrar or judge of election."

Section 86 of the Code provides that the acceptance of any other office, elective or appointive, by a registrar, except that of precinct judge of election, during his term of office shall "*ipso facto* vacate the office of registrar".

Considering these two sections together, I am constrained to advise that, in my opinion, a registrar vacates his office by accepting a position as U. S. census enumerator.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Mayor of Town as School Trustee.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 25, 1940.

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

MY DEAR MR. WHITEHEAD:

I am in receipt of your letter of June 24, in which you ask if "under section 786 of the 1940 Acts of Assembly the mayor of the town of Chatham is qualified to act as school trustee."

The section to which you refer provides that:

"No State officer, except a notary public, no city officer, no member of council, or any officer thereof, shall during his term of office be chosen or allowed to act as a school trustee; \* \* \*."

I do not have before me the charter of the town of Chatham and so am unable to say whether or not the mayor of the town is a member of the council or an officer thereof. If he is, he is ineligible under the section to act as school trustee. If the mayor is not a member of the council or an officer thereof, then I see nothing in the section to which you refer to prohibit him from serving as a trustee.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Chairman of Conservation Commission as Director of Natural History Institute.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 27, 1940.

HONORABLE N. CLARENCE SMITH, *Chairman,*  
*Virginia Conservation Commission,*  
*Richmond, Virginia.*

DEAR MR. SMITH:

I have your letter of May 11, and brief outline regarding the Virginia Natural History Institute, which the National Park Service, the National Recreation Association, William and Mary College and the Virginia Conservation Commission plan to sponsor.

The purpose of this institute is to conduct a training course for nature leaders in the Swift Creek Recreational Demonstration Area near Richmond. Those desiring to take the course will pay a fee to cover board, lodging and tuition. It is planned that the institute be incorporated or operate as a committee. The organization is to be operated entirely on a non-profit basis.

You ask if the Chairman of the Virginia Conservation Commission would be permitted under the law to serve as a director of this corporation, if the same is formed, or as a member of the committee, if the institute is so operated, his service as such director or committee member being without compensation.

I know of no reason why the Chairman of the Virginia Conservation Commission should not serve as a director of such a corporation or as a member of such a committee in his individual capacity. In my opinion it would be very proper for him to do so.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Highway Foreman as Member of School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 13, 1940.

MR. J. R. SEGAR, *Chairman,*  
*School Trustee Electoral Board,*  
*Stormont, Virginia.*

MY DEAR MR. SEGAR:

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

"I would like your opinion as to whether a senior Highway foreman, whose duties are overseeing road workers, keeping their time, and doing whatever the resident engineer requires, may legally serve on a county school board."

Section 644-a of the Code, as amended in 1940 (Acts 1940, page 284) provides that no Federal, State or county officer, or any deputy of such officer, shall act as a member of the county school board.

In my opinion, a highway foreman is not an officer within the meaning of this section, but simply an employee, and I, therefore, know of no reason why he may not serve on the county school board.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility Of—Member of Board of Supervisors as Tax Assessor.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 27, 1949

HONORABLE WM. RICHARD SAUNDERS,  
*Commonwealth's Attorney,*  
*Bedford, Virginia.*

MY DEAR MR. SAUNDERS:

This is in reply to your letter of May 23, in which you request my opinion upon the question of whether or not a member of the board of supervisors is eligible to act as land assessor pursuant to appointment by the judge of the circuit court under section 242 of the Tax Code of Virginia.

The language of this section of the Tax Code seems to contemplate that a person holding another office might also be designated as an assessor. There may be some question whether or not an assessor is a county officer, although he undoubtedly has very important and far-reaching duties to perform. I am inclined to the view that he would be considered an officer of the county.

Section 2702 of the Code provides that no supervisor shall hold any other office, elective or appointive, at the same time, with certain exceptions not here material, and provides further that, if he shall be elected or appointed to two or more offices, his qualification in one of them shall be a bar to his right to qualify in any of the other offices, and if holding an office, his qualification in the second office shall thereby vacate the one he then holds.

Section 242 of the Tax Code also provides that the compensation of assessors shall be prescribed by the board of supervisors of a county, and shall be paid out of the county treasury. The result of this, of course, would be that, if one member, or even a larger number of members, of the board of supervisors should be appointed, they would occupy a dual position of passing on salaries. The statute does not limit the number of assessors, so it follows that, if one member of the board of supervisors could be appointed, the entire board could be appointed and it would thus be prescribing their own compensation.

There is a further possible incompatibility in the two offices, in that the supervisors levy the taxes and fix the tax rate, while if they were assessors, they would also be fixing the value on which their rates would apply.

You call attention in your letter to section 2707 of the Code, which provides that no supervisor shall be in any way interested in any claim against his county. Of course, he has a claim against the county for his compensation prescribed by the statute which is manifestly excepted from the provisions of section 2707, but, if he were appointed an assessor, he would also have a claim for his compensation in that capacity which might be considered a violation of section 2707. See in this connection the case of *Bristol v. Dominion National Bank*, 153 Va. 71.

It seems to me that the question of the eligibility of a member of the board of supervisors to be appointed assessor is very doubtful, while the consequences of the qualification of the supervisor in the office, if the statute does render him ineligible, would be very severe.

There is nothing in the statutes from which I can express any clearer opinion as to the eligibility of a member of the board of supervisors to hold the office of assessor. If it were not for the language in section 242 of the Tax Code, empowering the judge to appoint such "officer or officers" as assessors, I would not think there would be any doubt at all about the fact that a member of the board of supervisors would not be eligible.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—Town Sergeant as Judge of Elections.**

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

S. O. BOWLES, Esq.,  
*Clerk of Electoral Board,  
Columbia, Virginia.*

DEAR MR. BOWLES:

I have your letter of July 5, requesting my opinion as to whether a sergeant, appointed for the Town of Columbia, is qualified to serve as judge of elections in that precinct.

In my opinion, the appointment of this individual as town sergeant does not affect his qualifications to serve as judge of elections. Section 31 of the Constitution, prohibiting certain officers from serving in this capacity, deals only with elective officers, and I know of no other provision of the Constitution or of any statute which would disqualify a town sergeant who holds his office by appointment.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OFFICES—Compatibility of—W. P. A. Employee as Justice of the Peace.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 15, 1939.

MR. MCGUIRE MORRIS,  
*Powhatan, Virginia.*

MY DEAR MR. MORRIS:

I am in receipt of your letter of December 4, in which you state that you are working on a WPA project in the Clerk's Office of Powhatan county, and that you also have been elected justice of the peace in said county. You desire to know whether you may qualify as justice of the peace and still continue your work on the WPA project. It appears also that the compensation for the work you do on the WPA project is paid in the form of checks of the United States, and my further information is that you are considered an employee of the United States.

Section 290 of the Code provides in effect that no employee of the government of the United States shall be allowed to hold any office of honor, profit, or trust, under the Constitution of Virginia. There are certain exceptions to this prohibition contained in section 291 of the Code of Virginia, but none of these exceptions seems to cover your case. I am, therefore, of opinion that you may not hold the office of justice of the peace and at the same time be an employee of the United States government.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**OPERATORS AND CHAUFFEUR'S LICENSE ACT—Permitting Person to Drive as Violation Of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 1, 1939.*

HONORABLE B. P. HARRISON,  
*Attorney for the Commonwealth,  
Winchester, Virginia.*

MY DEAR MR. HARRISON:

In your letter of November 29, you ask if, in my opinion, a person who knowingly permits a motor vehicle owned or controlled by him to be driven by one who is under the influence of intoxicating drink violates section 27 of the Virginia Operator's and Chauffeur's License Act [Michie's 1936 Code, section 2154(195)], which makes it unlawful for any person to permit a motor vehicle owned or controlled by him "to be driven by any person who has no legal right to do so or in violation of any of the provisions of this Act".

While it is a criminal offense to drive a motor vehicle while under the influence of intoxicants and, though the Virginia Operator's and Chauffeur's License Act refers to such an Act as a crime, the Act, Chapter 144 of the Acts of Assembly, 1934, page 220 (Michie's Code section 4722), by which such action is made a crime is not one of the provisions of the Virginia Operator's and Chauffeur's License Act. Therefore, in my opinion, one who permits his motor vehicle to be driven by an intoxicated person does not permit it to be driven "in violation of any of the provisions of" said Act.

It might be argued that, since it is unlawful to drive a motor vehicle while under the influence of intoxicants, a person in such condition "has no legal right" to drive a motor vehicle. However, the provisions of the Operator's and Chauffeur's License Act are concerned chiefly with the requirements for a license and related subjects. It is my opinion that the language, "who has no legal right to do so", as used in section 27 refers to those who have not been properly licensed to drive a motor vehicle, and that a person who has been properly licensed has a legal right to drive a motor vehicle though, if he drives in a certain manner or under certain conditions, he may be doing an unlawful act.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**OPTOMETRY—Advertising—District of Columbia Practitioner Advertising in Virginia.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 29, 1940.*

HONORABLE ALBERT V. BRYAN,  
*Commonwealth's Attorney,  
Alexandria, Virginia.*

DEAR MR. BRYAN:

This is in reply to your letter of June 25, 1940, in which you ask if, in my opinion, the publisher of a newspaper operated and circulated in Virginia violates section 1637, paragraph (i), of the Code of Virginia (Michie's 1938 supplement) by publishing an advertisement of a firm of optometrists doing business in Washington, D. C., which quotes prices of eye-glasses, etc.

Section 1637 reads, in part, as follows:

"It shall be unlawful for any person :

\* \* \*

"(i) To advertise by print, radio, display or by any other means whatsoever any advertisement which quotes prices of eye-glasses \* \* \* ."

Whether or not the publisher violates this section by publishing such an advertisement of an optometrist doing business outside the State depends upon whether such out-of-State optometrist could be held criminally responsible under this section. While the statute does not, in terms, mention newspaper publishers, they would be criminally liable as aiders and abettors in publishing an advertisement of an illegal nature at the instance of the advertiser.

The purpose of section 1637 is to regulate the profession of optometry for the protection of the public by curbing business practices deemed harmful. While by their nature this and similar statutes are designed chiefly to eliminate harmful practices by those engaged in professions in this State, at the same time it cannot be said that acts done in this State by persons engaged in business elsewhere, particularly in localities near the State line, are not harmful to the Virginia public. The Legislature, of course, has power to forbid such acts.

The literal language of section 1637 is of sufficient breadth to be held to apply to acts done in this State by optometrists whose places of business may be located elsewhere. In view of this fact, it is my opinion that you would be amply justified in instituting proceedings to enforce this Act in such cases if so requested by the State Board of Examiners in Optometry.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ORDINANCES—City—Prohibiting Midwifery—Validity.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 6, 1939.*

DR. W. A. PLECKER, *Registrar,  
Bureau of Vital Statistics,  
Richmond, Virginia.*

MY DEAR DR. PLECKER:

I am in receipt of your letter of December 1, in which you refer to the following ordinance of the City of Roanoke, adopted June 26, 1939, and request my opinion as to the validity of this ordinance:

"Midwives Prohibited. It shall be unlawful for any person to practice midwifery or obstetrics in the city who does not hold a certificate to practice medicine, granted by the State Board of Medical Examiners of Virginia."

You also refer to section 1575 of the Code, which provides among other things that every midwife shall register with the local registrar of vital statistics and thereupon shall "be given without cost a permit to practice her profession from the State Registrar of Vital Statistics, countersigned by the local registrar." The section then goes on to provide how the permit may be revoked by the State Registrar under certain circumstances. Apparently the statute does not prescribe any qualifications for practicing the profession of midwifery. Section 1575 of the Code is in the chapter dealing with the Bureau of Vital Statistics, and it would seem from this and the companion sections that the chief purpose of the requirement of registration of midwives is that the Bureau of Vital Statistics may secure from such persons statistics in connection with births.

Whether or not the City of Roanoke may by ordinance absolutely prohibit the practice of midwifery by others than regular practitioners of medicine, in view of section 1575 of the Code, is not altogether free from doubt and may depend upon the charter of the City of Roanoke, which is not before me. In any event, it would appear that it is not necessary for this office to pass upon this question in order to enable you to perform the duties of your office as Registrar of Vital Statistics, for the reason that chapter 66 of the Code provides that practitioners of medicine shall furnish the same information to you in connection with births as midwives are required to furnish. This being true, your office will receive statistics as to births in Roanoke which the law contemplates that it will receive, irrespective of the validity of the ordinance concerning which you inquire.

The validity of the Roanoke ordinance can only be finally determined by a court of competent jurisdiction. Certainly it cannot be set aside by any opinion of this office. It seems to me that, if the question of the validity of the ordinance is to be raised, this question probably would come up between the City and a registered midwife in Roanoke.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### ORDINANCES—County—Proof of, Where Records Destroyed—Usage and Custom.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 20, 1939.

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

DEAR MR. MAHON:

I have your letter of July 15, with reference to the question whether there is in force in your county a "no fence" ordinance.

As I understand it, for many years it has been simply understood and taken for granted that such an ordinance was adopted by the Board of Supervisors long ago, but it has recently developed that the existing records of the Board do not show its adoption. It is now believed that the ordinance was adopted prior to the War between the States, and the records destroyed when the court house was burned in 1865.

You request my opinion as to "whether by custom or usage the 'no fence' law can be considered in effect in Caroline County, in absence of any record showing that it has been adopted."

While I find no pertinent authorities dealing specifically with the proof of county ordinances, the controlling principles seem to have been well established in cases dealing with the ordinances of municipal corporations, and for purposes of the present inquiry I can see no grounds for a distinction between county ordinances and those of municipal corporations proper.

It seems quite clear that any person asserting a right predicated on an ordinance has the burden of proving its existence. See *Norfolk &c. Traction Co. v. Forrest*, 109 Va. 658, 661, 64 S. E. 1034; 3 McQuillin, *Municipal Corporations* (2d ed. 1928) section 906, and authorities there cited.

Where it appears that the official records have been destroyed, the adoption of an ordinance may be proved by parol evidence. 3 McQuillin, *op. cit. supra*, sections 912, 918. I find no authority, however, which would support an attempt to prove the existence of an ordinance through evidence of "custom or usage."

It is my opinion, therefore, that in any proceedings wherein a litigant asserts a right predicated on the existence of a "no fence" ordinance in your county, the burden will be upon such litigant to prove, according to the general rules of evi-

dence, that such an ordinance has been regularly adopted pursuant to the provisions of Virginia Code (Michie 1936) section 3547, or of some earlier statute of like effect. This would apply, of course, to prosecutions under section 3548 of the Code, where the burden of proving the ordinance would be upon the Commonwealth.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ORDINANCES—Paralleling Laws of Commonwealth—How Prosecuted.  
Id.—Fees for Prosecution by City Attorney.**

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

HON. CHARLES R. PURDY, *Clerk,*  
*Hustings Court, Part II,*  
*Richmond, Virginia.*

MY DEAR MR. PURDY:

I am in receipt of your letter of September 26, in which you state that a number of warrants now pending before your court charge a violation of section 4693 of the Code. You call my attention to an ordinance of the City of Richmond adopted August 17, 1939, substantially paralleling section 4693 of the Code, and then ask if these cases now pending should be treated as Commonwealth cases or as cases charging violation of the city ordinance.

Since the warrants charge a violation of State law, I think it is entirely plain that they should continue to be treated as Commonwealth cases and not as city cases. This is in accordance with the uniform ruling of this office in similar cases.

You next ask:

"Where further warrants are issued in the name of the City of Richmond, and cases are prosecuted by the City Attorney, should we collect an attorney's fee of ten dollars, as provided for under section 4705, and if so, should we remit this item equally to the State and City?"

Section 4705 provides that an attorney's fee of ten dollars shall be taxed "in every case of conviction for an offense under any preceding section of this chapter \* \* \*."

If in future cases the warrant charges a violation of a city ordinance and a conviction is obtained, it is clearly not a conviction for an offense "under any preceding section of this chapter." Therefore, I do not think that section 4705 is authority for taxing an attorney's fee where the prosecution is for a violation of a city ordinance.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PHARMACY—Fees.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 7, 1940.

HONORABLE A. L. I. WINNE, *Secretary,*  
*Board of Pharmacy,*  
*Richmond, Virginia.*

DEAR MR. WINNE:

This is in reply to your letter of June 6, in which you state that a person who

was a registered pharmacist in the State of Virginia and in good standing until 1920 moved to North Carolina, where he was licensed to practice and where he did practice pharmacy until May 1, 1940, at which time he left North Carolina and returned to Virginia. You ask if this person should be reinstated as a pharmacist in Virginia upon the payment of the annual fee for the current year, amounting to \$2.00, or whether he should be required to pay back renewal fees for the years during which he was not in Virginia.

It is my opinion that this person should be granted a license upon the payment of the annual fee for the current year only. Section 1674 of the Code requires the payment of the annual fee only from pharmacists engaged in business in this State. If a person once licensed in Virginia leaves the State for a period of years and later returns, he is not required, by this section, to pay the annual fee for the intervening years.

The person to whom you refer may also be granted a license, upon the payment of the fee for the current year, under section 1680 of the Code, which provides for the licensing of pharmacists, who have been legally registered and licensed in other States, upon the payment of the same fees as are required of other candidates for licenses.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### PILOTS ASSOCIATION—Amendments to By-Laws.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 12, 1940.*

HONORABLE G. ALVIN MASSENBURG,  
*Member of the House of Delegates,  
Hampton, Virginia.*

DEAR MR. MASSENBURG:

This is in reply to your request for my opinion upon the possible effect of certain changes which have been made in the by-laws of the Virginia Pilots Association upon the legal question of the liability of all of the members of the Association for negligent or tortious acts of one of its members.

You call my attention to the case decided by the United States Supreme Court in 1906, styled *Guy v. Donald*, 203 U. S. 399, 51 L. ed. 245. In this case, the Supreme Court held that there was no such liability upon the various members of the Association for the negligent or tortious act of one of its members, and, among other facts, stated in the opinion upon which the conclusion was predicated the following:

1. That seemingly the Virginia Pilots Association could neither select nor discharge its members.
2. That the implication is plain that a condition of the Association being permitted by the board of commissioners is that every pilot belongs to the Association.

You call my attention to an amendment of the by-laws of the Association adopted in 1939, which provides for compulsory retirement of a pilot upon reaching the age of seventy-two years. Under the Virginia statute, such a retired pilot would still have a State branch and would have the right to engage in business as a pilot independent of the Association. Obviously, this brings about a change of status from that upon which the Supreme Court predicated its conclusion that the Association is not a partnership in the decision above referred to. If the Association should be held to have the legal status of a partnership, all of its members would be liable for the tortious acts of each member.

Another amendment to the by-laws, which was also adopted in 1928, provides

that all apprentices shall be selected by the board of directors of the Association. Under the provisions of the statute, only a person who has served as an apprentice five years under a Virginia pilot is eligible to receive a branch. It may well be argued that this provision for the selection of apprentices has the effect of ultimately empowering the board to select the pilot, since only such apprentices can become pilots. This amendment, therefore, brings about a change in the status of the facts upon which the Supreme Court reached its decision in the above mentioned case.

While I would not go so far as to express a clear conviction that these changes would necessarily produce a different result should the matter become again litigated, I would say that it is very much safer where a precedent has been established by a decision of the Supreme Court of the United States to avoid, in so far as possible, any change in the status upon which that decision was based. Even if the Court should adhere to the conclusion reached in the former case, the change in status might invite a suit or suits against the Association which it would be required to defend at considerable expense.

It seems to me, therefore, that it would be a wise course for the Association to adopt to eliminate from its by-laws these two amendments above referred to and restore the status of the Association to that which existed at the time of the above mentioned decision.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

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**POLICE JUSTICES—Authority of—To Admit Persons to Bail.  
Id.—Id.—To Try Civil Warrants.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 8, 1940.

HONORABLE T. W. ROSS,  
*Police Justice,  
Gordonsville, Virginia.*

MY DEAR MR. ROSS:

I have your letter of April 30, asking me to advise whether you have authority to admit persons to bail, or to try civil warrants. In connection with this last question you call my attention to the Acts of 1938, relating to appeals from civil and police justices where the amount in controversy exceeds \$20.

In reply to your first question, your attention is called to Code section 4829-a, which expressly provides that police justices may admit persons to bail, provided an application for such bail has not been acted upon by the circuit or corporation judge.

As to your second question, I will advise that the 1938 Act, to which you refer, deals with civil and police justices elected in certain cities under Chapter 124 of the Code, and has no relation to police justices in cities and towns.

The office which you hold is not provided for by general law, but can be created pursuant to section 14 of your Town Charter. Acts 1932, Chapter 226. Assuming that an appropriate ordinance has been adopted under this section, creating the office of police justice for the Town of Gordonsville, your jurisdiction would be governed by the terms of Code section 3094, and would not include authority to try civil warrants.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General*

**POLICE JUSTICE—Report to Clerk of Corporation Court.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 26, 1940.*

HON. ALBERT V. BRYAN,  
*Attorney for the Commonwealth,  
Alexandria, Virginia.*

MY DEAR MR. BRYAN:

I am in receipt of your letter of April 25, in which you ask for my opinion as to whether the civil and police justice of the city of Alexandria should under section 2550 of the Code certify monthly to the clerk of the corporation court not only a list of the fines and costs imposed and collected and a list of the fines and costs imposed but not collected, but also "the name of each person tried, for what offense and date of trial", even though no fine, cost or imprisonment is imposed on such person.

It is my view that cases in which the defendant is acquitted, and no fine, costs, imprisonment or other penalty is imposed on such defendant, should not be reported. The section provides in part that in the report "shall be shown the amount of every fine imposed by him, together with the costs, or the costs where no fine is imposed, the name of each person tried, for what offense and date of trial \* \* \* ." When the purpose of the section is considered, it seems to me reasonably plain that the provision requiring the reporting of the name of each person tried, for what offense and date of trial applies only to those cases where some fine, costs, or penalty has been imposed.

The statute should be construed to carry out its obvious purpose, and I can think of no useful purpose to be served by reporting the names of those acquitted. When the subsequent sections are considered, it is plain that the purpose of the reports is to facilitate collections of fines and costs, and this purpose certainly would not be served by requiring the reporting of cases where there are no fines or costs.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PRINTING, BINDING, ETC.—Contracts for—How and by Whom Made.  
STATE INSTITUTIONS—Contracts for Printing, etc.**

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

COLONEL LEROY HODGES,  
*State Comptroller,  
Richmond, Virginia.*

DEAR COLONEL HODGES:

I have your letter of September 14, enclosing certain correspondence which your office has had with reference to the binding of certain books and magazines upon direct orders issued by certain state institutions. You request my opinion as to whether such institutions are legally authorized to order this work directly, rather than through the Division of Purchase and Printing.

Virginia Code (Michie 1936) sections 383 and 385 plainly and unequivocally require that all printing, lithographing, engraving, ruling and binding required by any state institution or agency shall be done under contracts let through competitive bidding by the Director of the Division of Purchase and Printing. I can find

nothing in the law to qualify these requirements, and it is my opinion, therefore, that such work cannot properly be ordered directly by the institutions.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**PRINTING—Contracts for—Bids by “University Press.”**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 8, 1940.*

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

DEAR MR. KETRON:

This is in reply to your letter of May 1, addressed to Mr. Kelly of this office. You request the opinion of this office as to whether you should invite or permit the “University Press” to bid on contracts for book binding made through your office on behalf of other State agencies and institutions.

The “University Press,” as I understand the facts, is simply a part of the University of Virginia, operating printing and binding equipment purchased and used by the University primarily in connection with its own publications.

I find nothing in the law which authorizes the University to engage in the printing or binding business, even to the extent of furnishing such work to other State agencies and institutions for compensation.

It is my opinion, therefore, that the University should not be invited to bid on binding contracts made through your office on behalf of State agencies and institutions.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**PRINTING—What Constitutes—“Black and White” Process.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 22, 1939.*

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

DEAR MR. KETRON:

I have your letter of August 16, requesting my opinion as to how your office should dispose of requisitions from the various State departments, agencies, etc., for the preparation of certain forms by a process known as “black and white.”

You wish to know whether such requisitions should be treated as orders for printing and, accordingly, paid for out of the public printing fund.

From your description of the process involved, it is my opinion that this work should not be considered “printing” within the meaning of the centralized printing laws, taking into consideration the legislative intent and purpose behind these statutes.

It is my opinion, therefore, that requisitions for this sort of work should be returned to the respective departments and agencies, so that such work may be or-

dered directly by the latter and paid for out of their respective appropriations for general operating expenses.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PRISONERS—Allowance for Good Behavior—When Made.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 21, 1940.

HONORABLE H. B. CHERMSIDE, JR.,  
*Trial Justice,*  
*Charlotte Court House, Virginia.*

DEAR MR. CHERMSIDE:

This is in reply to your letter of June 17, in which you ask if a person sentenced to jail for a term of less than a month is entitled to a proportionate part of the ten days allowed by section 2860 of the Code of Virginia for each month the prisoner observes good behavior.

In my opinion, the allowance for good behavior provided for by this section may only be secured in those cases when the prisoner serves more than one month and that a proportionate part of this allowance cannot be secured for portions of a month served by the prisoner.

The statute provides that the jailer shall keep a record of each convict, and for every month that any convict appears by such record to have observed good behavior there shall, with the consent of the judge, be deducted from the term of confinement of such convict ten days. Since the record of the convict would not show a full month of good behavior when his term is for less than a month and since the statute makes no provision for time off in cases of sentences of less than a month, the prisoner would not be entitled to a proportionate part of the ten day credit when sentenced for a term of less than a month.

You also ask whether such time off allowance applies to the case where a defendant is sentenced to jail for non-payment of costs, or fine and costs, amounting to more than \$25, but less than \$50.

This office has heretofore expressed the opinion that confinement for non-payment of a fine and/or costs is not a jail sentence, but is merely coercion used by the State for the purpose of enforcing or compelling the payment of the fine and/or costs, and that no time off for good behavior may be allowed where the confinement is solely failure to pay the fine and costs. The term of confinement in such cases is fixed by section 4953 of the Code which provides a schedule of periods of confinement in jail dependent upon the amount of the fine and costs.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PRISONERS—Compensation for Transporting Of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 11, 1940.

HON. D. W. McNEIL,  
*Trial Justice of Rockbridge County,*  
*Lexington, Virginia.*

MY DEAR MR. McNEIL:

I am in receipt of your letter of June 8, in which you ask the following question:

"Is the officer entitled to any mileage for conveying the prisoner to jail where the distance for the prisoner to be carried is ten miles or less? In other words, should the first ten miles traveled by the prisoner be deducted before beginning to count for the prisoner?"

Section 3508 of the Code provides as to mileage for a prisoner:

" \* \* \* for each mile traveled of the prisoner in carrying him to jail, where the distance is over ten miles, eight cents \* \* \* ."

In my opinion, and this office has heretofore so ruled, where the distance the prisoner is carried is over ten miles, the officer is entitled to eight cents per mile for each mile traveled, including the first ten. If the prisoner is carried less than ten miles, the officer is not entitled to any mileage at all for the prisoner.

You next ask this:

"In computing mileage traveled by the officer should this mileage be computed from the jail to the place where the prisoner may be found by the officer and then the return mileage for the officer to the jail, or should the officer be allowed mileage from his place of residence to the jail before he starts out with the warrant of arrest for the prisoner?"

The language of the section (3504) is:

"For carrying a prisoner to jail under the order of a justice, for each mile traveled of himself in going and returning, eight cents \* \* \* ."

Your question is not in terms answered by the section. The language I have quoted should receive a common-sense construction. Ordinarily, I should say that the language means that mileage for the officer should be computed from the point at which he received the warrant from the justice, assuming that he leaves directly to arrest the prisoner when he receives the warrant. I do not see how any hard and fast rule can be laid down which will cover every case. Ordinarily, I should say the mileage should be computed from the point the officer in the normal course of performing his duties left to make the arrest. Of course, the return mileage will always be computed from the point at which the arrest is made to the jail, assuming that the prisoner is taken there.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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#### PRISONERS—Computation of Time—Good Behavior Allowances.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 23, 1940.*

CAPTAIN R. R. PENN,  
*Superintendent of State Farm,  
State Farm, Virginia.*

MY DEAR CAPTAIN PENN:

I am in receipt of your letter of February 19, in which you state that an individual was convicted in the Hustings Court of the City of Richmond on July 27, 1939, and given six months sentences "on three offenses of petty larceny, said terms to run consecutively, making a total of eighteen months."

I presume this man is at the State Farm.

Inasmuch as his aggregate sentence is eighteen months, I am of opinion that

his time should be computed under section 5017 of the Code, that is to say, he is entitled to good conduct allowance of fifteen days per month.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**PRISONERS—Re Execution of Sentence.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 6, 1939.*

MAJOR R. M. YOEUELL, *Superintendent,*  
*The Penitentiary,*  
*Richmond, Virginia.*

MY DEAR MAJOR YOEUELL:

I have examined the court orders in connection with the judgment of conviction of the Circuit Court of Pittsylvania County entered July 26, 1939, in the case of *Commonwealth v. Sam Swanson*, which judgment shows that the said Sam Swanson was convicted of murder and sentenced to death. The time fixed for the execution was September 26, 1939.

It appears that on the 20th day of September, 1939, the Governor granted a respite of execution of said sentence until December 15, 1939, and in his proclamation advising you of the respite he states that "on the last named day the sentence of the said court be duly executed". The last day being December 15, 1939, it is my opinion that it is your duty to execute the sentence of the court on that day.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**PRISONERS—Good Behavior Allowance—Where Sentenced for One Year and Costs.**

COMMONWEALTH OF VIRGINIA,

OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 16, 1940.*

MR. W. TERRELL SHEEHAN,  
*Trial Justice,*  
*Staunton, Virginia.*

MY DEAR MR. SHEEHAN:

This is in reply to your letter of January 31. It appears from the correspondence had by you with Miss Elizabeth Kates, Superintendent of the Virginia Industrial Farm for Women, that one Ada Corbin was committed September 26, 1939, to "serve 12 months on State Farm and pay court costs of \$11.40." You ask whether this sentence of 12 months and costs in a misdemeanor case is equivalent to a sentence of a year and a day in a felony case for the purpose of computing time off for good behavior.

Under section 5017 of the Code of Virginia (Michie 1936), convicts and jail prisoners under the control of the superintendent of the penitentiary whose sentences are more than one year are allowed 15 days per month time off for good behavior. A prisoner who was convicted of a misdemeanor or a felony, and whose sentence is not more than a year, is allowed a reduction of 10 days per month. Section 2860 provides for an allowance of 10 days per month to persons committed to jail.

Several statutes provide that persons convicted of crime may be confined for failure to pay the costs of the prosecution. These statutes all fix the limits of such confinement.

Under section 5017, the allowance for good behavior of 15, instead of 10, days per month depends upon whether or not the prisoner's sentence is more than one year. Whether or not the time for which the prisoner may be confined for non-payment of costs is to be added to the specified jail term in determining the allowance to be given for good behavior is, in my opinion, controlled by section 4949 of the Code. This section reads as follows:

"If a person sentenced to be confined in jail a certain time and afterwards until he pay a fine and costs of prosecution, fail to pay such fine and costs before the end of said term, he shall continue in confinement until the same be paid or his discharge be ordered by the court, or the judge thereof in vacation, or he be released by reason of the expiration of the limitation for such confinement prescribed by law."

Since it cannot be determined whether the prisoner should continue in confinement for non-payment of costs until the end of his term for the reason that, under section 4949, the prisoner is given until that time to pay the costs, his term must first be determined without considering the time for which he may be retained for non-payment of costs. It necessarily follows that whether the allowance for good behavior is to be 10 or 15 days per month is determined by the specified jail term without regard to the item of costs.

Such a result also follows from the fact that the purpose of assessing and collecting costs is not punitive but to reimburse the Commonwealth for expenses incident to the trial. See *Anglea v. Commonwealth*, 10 Gratt. 696. As you have so aptly stated in your letter to Miss Kates, it would certainly be an anomaly if the law said to a prisoner, "If you will pay the \$10 costs, you will be released in 9 months, but, if you do not pay the costs, you will be released in 6 months." I know of no statutory provision requiring such a result.

It is my opinion, therefore, that a sentence of 12 months and costs in a misdemeanor case is not equivalent to a sentence of a year and a day in a felony case.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### PRISONERS—Concurrent Sentences—Computation of Time.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 20, 1940.

HONORABLE WILLIAM ERLE EDWARDS,  
*Commonwealth's Attorney,*  
*Winchester, Virginia.*

MY DEAR MR. EDWARDS:

In your letter of February 13, 1940, you ask if, when an accused has been tried and convicted of two separate offenses and the order of the court in one case provides that the sentence imposed therein should run concurrently with that imposed in the other, the fact that the prisoner will be serving two sentences running concurrently will make any difference in the time to be allowed for good behavior under section 5017 of the Code of Virginia.

In my opinion, the time to be allowed for good behavior under this section is to be determined from the time the prisoner must actually serve, and that sentences which run concurrently should be construed as one sentence for the purpose of determining the time allowance for good behavior. Such allowance would, therefore,

be based upon the longer of the two terms of confinement to which the prisoner has been sentenced without regard to the other sentence which is being served at the same time.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PRISONERS—Use of, for County Work.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 20, 1939.*

MR. WILLIAM F. HUDGINS,  
*Clerk of the Circuit Court,  
Princess Anne County,  
Princess Anne, Virginia.*

DEAR MR. HUDGINS:

This is in reply to your letter of September 18, in which you request my opinion upon the question whether or not county prisoners in jail, available for the purposes under the provisions of section 2075 of the Code, may be utilized by the board of supervisors of the county in the county work of drainage of the roads of the county.

It is my opinion that these prisoners may be so utilized upon compliance by the board of supervisors with the provisions of said Code section above referred to, and that the said drainage work is within the purposes contemplated by said section.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC ASSISTANCE ACT:**

**RELIEF—By Whom Paid Where Family Migrates.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 2, 1940.*

HONORABLE VERNON L. DUNCAN,  
*Attorney for the Commonwealth,  
New Kent, Virginia.*

MY DEAR MR. DUNCAN:

I am in receipt of your letter of April 30, in which you describe a family which during the past few years has lived in several counties in Virginia, and in May, 1939, moved to a city where the family has been living ever since. You ask my opinion as to which county or city the children of the family are entitled to receive relief from under the public assistance act of 1938.

The family obviously meets the residence requirement of one year prescribed by section 27 of the public assistance act. Assuming that the other requirements of the act are met, in my opinion the relief should be afforded by the city in which the family has been living since May, 1939. It appears to me that under the public assistance act the residence requirement of one year applies only to the State and that it is not necessary for the dependent to have lived in any particular county or city of the State for as much as one year.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC ASSISTANCE ACT—Local Welfare Board—Appropriations to,  
by Board of Supervisors.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 1, 1939.

HON. PHILIP KOHEN,  
*Commonwealth's Attorney for Botetourt County,  
Buchanan, Virginia.*

MY DEAR MR. KOHEN:

I am in receipt of your letter of October 16, which for purposes of reply I quote in full:

"In accordance with the Virginia Public Assistance Act of 1938, our county has set up a welfare department, and, in accordance with law, contributes to this department along with the State and Federal governments.

"Practically every month at the regular meeting of our board of supervisors, our local superintendent of public welfare presents various bills to our board of supervisors for payment, which bills are payable to various hospitals for emergency cases of poor people who are sent to these hospitals; and said superintendent presents various other bills for payment by the board of supervisors, they usually being emergency cases of sickness.

"The said local superintendent of public welfare claims that in his department he does not have sufficient funds to take care of all these bills. Our board of supervisors has been paying these bills, and I am writing this letter to ask if, in your opinion, our board of supervisors has the authority to pay these bills.

"As you understand, our county has a welfare organization set up under the Public Assistance Act of 1938, and this organization is at work as in other counties of the State, and each year our county contributes a certain sum to this organization, but what I would like to know is, does our board of supervisors have the authority to pay emergency hospital bills and other bills in connection with aid to the poor, when our local welfare board says that they have not sufficient funds to meet the demands?"

I take it that the board of supervisors has appropriated sufficient funds for expenditure by the local board of public welfare for general relief to match the State funds made available to the county under the Virginia Public Assistance Act of 1938. The situation in Botetourt county, therefore, is that there are cases where relief is necessary, but the funds available to the local board of public welfare for this purpose have been exhausted.

Unquestionably, I think the board of supervisors may make an additional appropriation for general relief. For many reasons it would seem desirable that this additional appropriation be distributed through the local welfare authorities. In fact, even before the Public Assistance Act of 1938 was enacted, it was contemplated that the superintendent of public welfare in a county, under the supervision and control of the local board of public welfare, should administer the funds appropriated for the relief of the poor. See section 1902-o of the Code (Michie, 1936). The Virginia Public Assistance Act of 1938 expressly contemplates that the local boards of public welfare and the superintendent of public welfare should carry on the functions and duties imposed upon them by existing law. See sections 7 and 8 of the 1938 Act. I think it entirely plain, therefore, that the board of supervisors may make additional appropriation for relief of the poor, to be administered by the local board of public welfare and the local superintendent of public welfare. Certainly there is nothing in the 1938 Act which limits the amount of money that the board of supervisors may appropriate for relief. Your specific question, however, is whether or not the board of supervisors may direct the payment of obligations already incurred for relief by the superintendent of public welfare, the funds available to the local board of public welfare for this purpose having been exhausted.

Specifically answering your question, I am of opinion that under its broad, general powers the board of supervisors in its discretion may authorize the payment of these obligations. In effect, such an action would constitute an additional appropriation for relief, even though the obligations have already been incurred. Whether or not the board in authorizing these payments directs them to be paid direct to persons who have rendered the service, or directs that the payments be made through the superintendent of public welfare is within the discretion of the board.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PUBLIC ASSISTANCE ACT—Payments to Guardian Under.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 9, 1939.

MR. JAMES W. PHILLIPS,  
*Director of Public Assistance,  
Department of Public Welfare,  
Richmond, Virginia.*

MY DEAR MR. PHILLIPS:

I am in receipt of your letter of November 3, in which you present the case of six children who you state are eligible for aid under the provisions of Title 4 of the Public Assistance Act of 1938. These children you state are actually living with their mother and are eligible for aid from every "technical standpoint". You further state that a guardian has been appointed for the children, and you desire to know if, under section 31 of the Act, checks representing the payment of aid may be made to the guardian and whether the application for aid, under section 28 of the Act, shall be made by the guardian.

Sections 28 and 31 of the Act provide, respectively, that the applications for aid shall be made by, and the payments of aid shall be made to "the person having custody of the dependent child". I do not have before me the order appointing the guardian in the case you put, but, if such guardian "has the custody" of the person of the dependent children, I am of opinion that the application should be made by and the payments made to the guardian. I see no inconsistency in the guardian allowing the children to actually live with the mother and yet such guardian still retain the custody of the children as a matter of law. Of course, it goes without saying that the payments to the guardian are for the benefit of the children, and I understand from your letter that the guardian is actually spending the funds available under the award for this purpose.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PUBLIC BUILDINGS—Mechanic Liens Applied To.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 17, 1940.

MR. EDGAR E. WOODWARD, *Treasurer,  
Mary Washington College,  
Fredericksburg, Virginia.*

DEAR MR. WOODWARD:

In your letter of February 12, you state that a sub-contractor has notified you that he has an unpaid claim of \$34 for material sold and delivered to the general

contractor in the construction of the Administration Building at Mary Washington College. You ask if you should withhold \$34 from your final payment to the general contractor in order to satisfy this sub-contractor.

While section 6429a of the Code of Virginia (Michie 1936), which is a part of the mechanics' lien laws of this State, provides a method by which a sub-contractor furnishing labor or materials to a general contractor may impose a personal liability upon the owner for the amount of his, the sub-contractor's, claim against the general contractor, it has been held by the Supreme Court of Appeals of Virginia that this section has no application to contracts with the Commonwealth or its political subdivision for the construction of public buildings.

In the case of *Legg v. County School Board*, 157 Va. 295, it was said:

" \* \* \* The school board owed no legal duty to Legg [the sub-contractor] to promise to protect him. The mechanics' lien laws of Virginia (Code 1930, section 6426, *et seq.*) do not apply to public buildings, and Legg could not have placed a mechanics' lien on this building for the amount due him by O'Dell [the contractor], or have fixed a personal liability upon the school board by giving it notice of the debt due him by O'Dell. \* \* \* ."

See also *Bowers v. Martinsville*, 156 Va. 497.

In my opinion, therefore, there is no legal duty imposed upon you to withhold any part of your final payment due the general contractor in order to satisfy the claims of sub-contractors.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### PUBLIC CONTRACTS—Town's Interest and Councilman.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 9, 1940.

HON. FRANK P. BURTON,  
*Attorney for the Commonwealth,  
Stuart, Virginia.*

MY DEAR MR. BURTON:

I am in receipt of your letter of February 6, from which I quote as follows:

"The Town of Stuart is faced with the necessity of increasing or enlarging its water supply. Mr. J. J. West, a member of the Council, has submitted, in effect, the following proposition to the Town:

"Mr. West is an orchardist and one of the reservoirs owned by the Town adjoins the property of Mr. West. Mr. West has recently located a substantial source of water on his property, and has constructed a pipe line therefrom to his orchard, preparatory to extending his spray system. Mr. West advised the Town that, if the Town would erect a cement tank, which would be connected with the line referred to above, he would permit the Town to run a water line from the tank over across his property for a distance of approximately twelve hundred feet to the reservoir. The water will be given to the Town absolutely free, there will be no charge for the right of way for the water line, and the Town will pay for the construction of the tank and pay for the laying of the water line from the tank to the reservoir. Mr. West will agree to maintain the line from the tank to the source of the water, which is a distance of twenty-five hundred or three thousand feet. Mr. West will install a pipe in the lower portion of the tank and the pipe of the Town will be installed in the upper portion of the tank. During the spraying season, which ordinarily runs from March

until June, the Town will be entitled to the overflow. The remaining months of the year the Town will, of course, receive the full flow.

"The Town considers this a very splendid proposition because it will increase the water supply by approximately three million gallons of water a year."

You ask if, in my opinion, such an agreement between Mr. West and the Town is prohibited by section 2708 of the Code.

I have carefully considered the section in question and am of opinion that it does not apply to such an agreement as the one proposed. Apparently there is no possible profit involved for Mr. West, and the only beneficiary is the Town itself.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC FUNDS—Depositaries—Resolutions by Board of Directors—Securities Required.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 19, 1940.*

HON. JOHN LOCKE GREEN,  
*County Treasurer,*  
*Arlington, Virginia.*

MY DEAR MR. GREEN:

I have considered your letter of February 12, enclosing copy of resolution proposed to be adopted by the Arlington Trust Company under the provisions of section 350 of the Code, relating to county deposits in such company.

The provision in the statute authorizing the resolution reads as follows:

" \* \* \* and provided, further, that any such depository, in lieu of complying with the preceding part of this subsection (d), may, by its board of directors, adopt a resolution before such public funds are deposited therein, to the effect that, in the event of the insolvency or failure of such depository, such public funds hereafter deposited therein shall, in the distribution of the assets of such depository, be paid in full before any other depositors shall be paid deposits hereafter made in such depository, and the adoption of such resolution shall be deemed to constitute a binding obligation on the part of such depository; but at no time shall such public funds be on deposit in any such depository availing itself of the provisions of this proviso to an amount in excess of sixty per centum of the capital and surplus of such depository unless and until such excess be secured and provided by the provisions of this subsection (d) which precedes this proviso."

You will observe from the quoted language that the authorized method of securing deposits is in lieu of the other method set out in the section, and that it is provided that under this method the deposits shall not be in an amount in excess of sixty per centum of the capital and surplus of the depository, unless the excess is secured as set out in the preceding part of the subsection. In other words, the resolution of the board secures the deposits up to sixty per centum of the capital and surplus, and the securities, if that is the method adopted, secure the excess over and above sixty per centum of the capital and surplus. However, from a reading of the resolution, it appears that the securities are to be used to secure the deposits up to sixty per centum of the capital and surplus, and the resolution of the board secures the excess. This seems to me the exact reverse of the method provided by the quoted language in the section, and I suggest, therefore, that the requirements of the statute be strictly followed.

I would further suggest that the second paragraph of the resolution be changed so as not to make it appear that deposits are to be made in excess of the amount allowed by law. As I understand it, the statute does authorize the additional deposits which you contemplate making, provided its terms are complied with.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC FUNDS—Depositaries—Resolution of Board as Security.**

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

AARON RUSS, ESQ., *Vice President,  
Farmers Bank of Clinch Valley,  
Tazewell, Virginia.*

DEAR MR. RUSS:

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

"In reference to your letter of June 15, 1939 to W. L. Painter, Treasurer of Tazewell County, in regard to this Bank preferring County Deposits by resolution of Board of Directors.

"Proper resolution was made by our Board on December 5, 1938. You refer to deposits hereafter made.

"The balance of W. L. Painter, Treasurer of Tazewell County on August 16, 1939 was \$24,606.70. The question arising is—can we not use the Board resolution in conjunction with Bonds to protect the County Deposits?

"It is the purpose of this Bank to withdraw only the surplus Bonds above the amount needed to fully protect the County Deposits.

"It does appear to me that, should we keep over \$25,000 in bonds in escrow at all times—which would be more than the balance on August 16, 1939, we would be entitled to use the Board guaranty along with the Bonds to protect the peak of deposits from December to February."

I beg to advise that, in my opinion, the Treasurer of Tazewell County would be legally protected in his deposits by the \$25,000 in bonds retained in escrow and the Board's resolution as to deposits in excess of that amount. While the language of section 350 of the Tax Code is not entirely clear in this matter, I believe that these two methods may be used jointly without in any manner violating the spirit and purpose of the statute, and that same is in harmony with this cardinal purpose of protecting the deposits of the Treasurer without requiring any unreasonable amount in bonds to be held continually in escrow.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC FUNDS—Depositaries—What Institutions May Be Designated.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 5, 1940.*

HONORABLE G. M. WEEMS,  
*Treasurer of Hanover County,  
2nd Floor D. B. Cox Building,  
Ashland, Virginia.*

MY DEAR MR. WEEMS:

I am in receipt of your letter of January 30, in which you ask if an institution

such as the First Federal Savings & Loan Association of Richmond may be designated as a depository for county funds.

These institutions are, as you probably know, organized under Federal law and do not come within the classification of banks or trust companies. Without going into detail, I may say that, "after careful consideration", I am of opinion such institutions are not contemplated by section 350 of the Tax Code providing for the designation of county depository. Indeed, I doubt whether these institutions can comply with some of the requirements of this section, especially subsection (d) thereof. I note that this is the conclusion that has been reached by the Auditor of Public Accounts.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PUBLIC FUNDS—Deposits Secured by F. H. A. Loans.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 8, 1940.*

HON. FLOYD HOLLOWAY,  
*Clerk of York County,  
Yorktown, Virginia.*

MY DEAR MR. HOLLOWAY:

I am in receipt of your letter of January 5, in which you ask if notes secured by deeds of trust, which notes are insured by the Federal Housing Authority, may be accepted as security for county deposits in banks.

Section 350 of the Tax Code of Virginia provides, among other things, that a county depository shall first for the protection of money deposited with it pursuant to the said section pledge "securities of the character described in section fifty-four hundred and thirty-one of the Code of Virginia, as amended, except those described in subsection seventh thereof."

Subsection 19 of section 5431 of the Code of Virginia provides that fiduciaries may invest in "first mortgage real estate loans insured by the Federal Housing Administrator." I presume that the first mortgage loans which you refer to are those insured by the Federal Housing Administrator, and am, therefore, of the opinion that they may be accepted as security for county deposits. I need not, of course, remind you that all of the other requirements of section 350 must be complied with.

The notes of the Federal Housing Authority itself, I am informed, are guaranteed by the United States Government, and they also may be accepted as security for county deposits.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **PUBLIC PROPERTY—Proof of Ownership by State, County, etc.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 21, 1940.*

DR. ROWLAND EGGER,  
*Director of the Budget,  
Capitol Building,  
Richmond, Virginia.*

MY DEAR DR. EGGER:

I am in receipt of your letter of February 16, from which I quote as follows:

"The question has arisen in connection with the inventory of non-expendable assets, which the Division of the Budget is making, as to the status of desks, typewriters, and other equipment used by the clerks, treasurers, sheriffs, Commonwealth attorneys, sergeants and other local officers whose salaries and expenses are paid in part by the State.

"In a number of instances specific allowances have been made for the purchase of such equipment from State funds, but in the majority of instances it is impossible to ascertain whether the equipment was bought from State, local or joint funds.

"At the present, our instructions to the inventory staff provides that such assets shall not be inventoried as Commonwealth property unless it clearly appears from the record of the offices that such was purchased with money provided by the State.

"I should very much appreciate an expression of your views as to the ownership of property which we cannot definitely prove was bought with State money."

In my opinion, you have correctly instructed your inventory staff. The question as to ownership of such property in any particular case can only be determined by the ascertainment of the exact facts in such case. Where the facts are not known, I do not see how any general rule can be laid down for establishing the ownership of this property. If it is necessary to reach a conclusion in each case, it is my view that the only practicable way to handle the situation would be by a reasonable adjustment or division of the property with the locality involved.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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#### PUBLIC WELFARE, COMMISSIONER OF—Increase of Salary.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 13, 1939.*

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

DEAR GOVERNOR PRICE:

I have your letter of August 28, in which you request my opinion upon whether there is any legal objection to the increase of the salary of the Commissioner of Public Welfare, which increase is to be paid out of the funds granted to the State of Virginia by the United States for the administration of the Social Security Program, provided said increase is approved by the Governor. You enclose with your letter a copy of the resolution of the State Board of Public Welfare pointing out the increased duties imposed upon the Commissioner by reason of the work incident to the Social Security Program, and recommending an increase of \$1,500 per annum in his salary.

Since these funds are granted to the State of Virginia for the purpose of defraying the cost of administering the Social Security Program, and since many of the duties of the Commissioner of Public Welfare are related to this work, I am of opinion that there is no legal objection to the increase of the Commissioner's salary, as requested by the resolution of the State Board, if approved by the Governor, and the payment of same made out of the moneys granted to the State for administrative costs in connection with the Social Security Program.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**PUBLIC WELFARE, DEPARTMENT OF—Rules and Regulations  
Adopted By.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 29, 1940.

DR. WILLIAM H. STAUFFER,  
*Commissioner of Public Welfare,  
Travelers Building,  
Richmond, Virginia.*

MY DEAR DR. STAUFFER:

I am in receipt of your letter of January 29, in which you refer to Senate Joint Resolution No. 3 adopted January 26, directing that each department "authorized by statute to make, adopt, or promulgate rules and regulations having the force and effect of law" furnish to the Clerk of the Senate duplicate copies of all such rules and regulations adopted by any department, with the effective date of each.

You request that I advise you whether or not the rules and regulations promulgated by the State Board of Public Welfare fall within the purview of this resolution. You further state:

"The rules and regulations thus far passed by the State Board of Public Welfare and now effective are, in my judgment, administrative regulations purely covered by specific authority of the statutes. The State Board has not passed any rules or regulations affecting the 'man on the street' so to speak, nor has it sought to fix any penalties with respect to such rules and regulations as it has promulgated. Moreover, the rules and regulations of the State Board do not imply any court action or other process of law through failure of compliance. The rules and regulations concern themselves primarily with operating procedures in the administration of the Public Assistance program, and are by way of instructions and requirements purely between the State and local administrative authorities."

I presume that your request is primarily directed to your authority under the Virginia Public Assistance Act of 1938 (Acts 1938, p. 638). I have examined this Act and do not find that the State Board of Public Welfare is by it given authority to promulgate rules and regulations having the force and effect of law, and, from what you state, no such rules and regulations have been adopted by the said Board, such rules and regulations as have been adopted concerning themselves primarily with operating procedures and administration of the Public Assistance program.

Since the State Board does not have the power to adopt the rules and regulations specified in the Joint Resolution and, you state, has adopted no such rules and regulations, I am of opinion that it would be proper for you to advise the Clerk of the Senate to that effect.

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**REAL PROPERTY—Fixtures—Railroad Bridge.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 16, 1939.

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

MY DEAR MR. BROADDUS:

I have your letter of December 5, 1939, addressed to Mr. Kelly of this office, with reference to the ownership of a certain bridge over Smith River. From your

letter and from various discussions held in this office it appears that your question arises in the following manner:

Your Board of Supervisors wishes to have a secondary highway built in Henry County over the roadbed of a former railway. The right of way is owned by the State Conservation Commission, and the Commission is agreeable to its being dedicated as a public highway. It remains only for the Board of Supervisors to adopt the resolutions required by the Department of Highways, guaranteeing a clear title to the right of way.

In this connection a question has arisen as to the ownership of the old railway bridge over Smith River at the point where the right of way crosses that stream. This bridge is capable of being converted into a highway bridge, and you request my opinion as to whether, in view of a certain deed and other circumstances referred to below, this bridge should be deemed a part of the right of way now owned by the Conservation Commission, so that your Board of Supervisors may properly include the bridge in its resolution guaranteeing title to the right of way.

It appears that prior to August, 1925, the Fayerdale Ore and Lumber Corporation owned a 4,840-acre tract of mining and timber land (now Fairystone State Park) in Patrick County, together with the right of way in question, which right of way connected this tract with the Norfolk and Western Railway at a point in Henry County. (As I understand it, the Ore Company owned the roadbed in fee simple—not merely an easement of way.) On the right of way the Ore Company built its own railroad, including the bridge in question.

As successor in title to the Ore Company, the Conservation Commission now has undisputed ownership of the roadbed, and the only question as to its ownership of the bridge arises out of a certain deed, dated August 25, 1925, between the Ore Company and one T. W. Fugate.

By this deed the Ore Company conveyed to Fugate its entire railway, "including rails, ties, bridges, switches, and a right of way therefor," as well as the rolling stock and other movable equipment, but upon the express condition that if the grantee should abandon the use of such right of way as a railway for so much as one year, or remove therefrom "the railroad, rails, or track," the right of way should revert in fee simple to the Ore Company. Such abandonment has, in fact, taken place, and the question is now raised as to whether the bridge reverted together with the roadbed. The deed says nothing as to the removal of bridges, nor, on the other hand, does it expressly state that the bridges should revert as part of the right of way.

When the bridge was first built, it clearly became a real fixture and part of the roadbed to which it was annexed; it will hardly be disputed that the bridge was applicable (indeed, it was essential) to the purpose to which the roadbed had been appropriated, or that it was intended by the Ore Company as a permanent accession to the freehold. Hence it falls squarely within the definition of a real fixture established in the leading Virginia case of *Green v. Phillips*, 26 Gratt. (67 Va.) 762.

It is true that railroad rails and ties may be treated as removable trade fixtures in cases where a railroad company has merely acquired a right of way over the lands of another and subsequently abandoned it, there never having been any intention that the rails and ties should remain after termination of the easement. *Talley v. Drumheller*, 143 Va. 439, 130 S. E. 385. This rule has been applied to the stone piers of a half-completed bridge. *Wagner v. Cleveland etc. R. R. Co.*, 22 Ohio St. 563. These cases, however, are plainly distinguishable from the facts here presented, where the owner of the freehold constructed on its own land a bridge which was essential to the only use to which that particular land could be put, with the obvious intention that it should remain a permanent improvement of the realty.

The sole question, therefore, is whether the Ore Company, by its deed of August 25, 1925, severed the bridge from the realty of which it was a part. It seems to me almost inconceivable that it should have intended to do so: the apparent purpose of the condition in this deed was to assure access to the Norfolk and Western line in case the grantee should cease to furnish railway service. With

this contingency in mind, the Ore Company could hardly have intended to part with the bridges which were essential to any use whatever of the roadbed, nor could the parties well have intended that, in case of abandonment of the railway, the grantee should be left in ownership of bridges standing on land in which he had no interest, where they could be of no substantial value to him but essential to the only use to which the land could be put.

On the other hand, your attention is called to the following language in the deed:

" \* \* \* It is the intention of this deed to assign, convey, and transfer unto T. W. Fugate the railroad of the party of the first part, \* \* \* together with all the railroad equipment, including engines, rolling stock, rails, ties, bridges, switches, etc., and also the right-of-way therefor \* \* \* ."

There is room for the contention that this language has the effect of classifying bridges as part of the "railroad equipment," rather than as part of the "right-of-way," and that only the "right-of-way" is granted conditionally.

Upon a consideration of the entire deed, I do not think this latter contention should prevail. At the same time, I think it sufficient to constitute a cloud on the Conservation Commission's title which should be removed before your Board of Supervisors can properly adopt a resolution guaranteeing a clear title to the bridge in question.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### RECORDS—Right of Public to Inspect.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 29, 1940.*

HONORABLE PRESTON MOSES,  
*House of Delegates,  
Richmond, Virginia.*

MY DEAR MR. MOSES:

In your letter of January 25 you ask for my opinion regarding the right of the public to inspect the records of the school boards and the boards of supervisors.

The records of these bodies, including the minutes of their meetings, are public documents and, so far as they are of direct interest to an individual, or of public concern, I am of the opinion that any person, individually interested, has a right to inspect the records directly concerning him, and, that, where it is a matter of serious public concern, a taxpayer and citizen, although not himself personally interested, has a right to access to such of the records as may reasonably include the subject of public interest about which he desires information.

The right to access of public records is one spoken of as an absolute right, but the courts have held that there must be a sufficiency of purpose for which the applicant for the records desires the inspection. Not only must there be sufficient purpose but the custodian of the records may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and the inspection must be had in such manner and at such times as not to interfere with the business of his office.

In this connection see 23 R. C. L. pages 160-164, *Gleaves v. Terry*, 93 Va. 491, and *Keller v. Stone*, 96 Va. 667.

In so far as the records of the boards of supervisors are concerned, I call your attention to sections 2770-a and 2771 of the Code of Virginia (Michie 1936), which deal with the duties of the clerk of the board in regard to such records. Section 2771 provides, in part, as follows:

" \* \* \* and he [the clerk] shall also deliver, to any person who may demand it, a certified copy of any record in his office, or of any account therein, on receiving from such person the fees allowed to the clerk of the circuit court for similar services."

I find no statute dealing with the records of school boards and so can give you only the general information set out above in regard thereto.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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#### RECORDS—Lunacy Proceedings—Where Filed.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 6, 1939.*

HONORABLE FRANK GILBERT,  
*Justice of the Peace,  
Salem, Virginia.*

MY DEAR MR. GILBERT:

I have your letter of December 2, requesting my opinion as to the disposition of certain records in lunacy proceedings.

Virginia Code (Michie 1936) section 1019 provides that certain of the records in such proceedings shall be filed in the clerk's office of the county or city. You wish to know whether, in cases where the patient is a resident of one county, but is committed in another, these records should be filed in the clerk's office of the county of residence or in the county where the commitment is had.

While this statute is not unambiguous in this connection, from the context it is my opinion that these reports should be filed in the clerk's office of the county or city in which the commitment is held regardless of the residence of the patient. I am advised by Dr. H. C. Henry, Director of State Hospitals, that this has been the practice for many years, and hence it presumably conforms to the legislative intent, since the legislature has not provided otherwise.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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#### RESETTLEMENT ADMINISTRATION—Jurisdiction of State Over Inhabitants.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 15, 1940.*

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

MY DEAR DR. HALL:

This will acknowledge your letter of February 1, enclosing one, dated January 29, from Mr. C. Tyler Miller and requesting my opinion upon the question asked in Mr. Miller's letter.

Mr. Miller wishes to know "whether or not the Trial Justice Court in Rappahannock County has jurisdiction over children living in the Shenandoah Home-

stead of the Farm Security Administration, located near Flint Hill and Washington, Virginia, respectively, in enforcement of the compulsory education law."

I take it that the homesteads referred to are those established in Rappahannock county by the Resettlement Administration (now the Farm Security Administration) of the Federal government as rural rehabilitation projects on land purchased by the United States government for that purpose.

By an Act of Congress, approved June 29, 1936, it was provided that the acquisition of such lands by the government, theretofore or thereafter, should not be held "to deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property." (40 USCA, section 431.)

In view of this Act, it is clear that our statutes relating to compulsory education are fully enforceable against inhabitants of the areas in question.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

### **SALARIES—Increases—Approval of Governor—Limitations.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 24, 1940.*

SENATOR WM. M. TUCK,  
*Senate Chamber,  
Richmond, Virginia.*

DEAR SENATOR TUCK:

I have before me your letter of February 23, which is as follows:

"The report of the Comptroller recently published in the press shows that the salary of the Secretary of the Commonwealth was increased by executive order of the Governor from the amount of \$4,000, fixed by the Appropriation Act, to the sum of \$5,000, an increase of \$1,000. I call your attention to section 83 of the Constitution which provides as follows:

"The salary of each officer of the executive department shall be fixed by law, and shall not be increased or diminished during his term of office."

"I respectfully request your opinion upon the question of the authority of the Governor to increase this salary.

"The Comptroller's report also shows that the salaries of various department heads not affected by the above constitutional provision have been increased by executive order. Will you please give me your opinion as to the Governor's authority to make these increases."

The first paragraph of your letter raises the question whether the salary of the Secretary of the Commonwealth may be increased during his term of office. Section 83 of the Constitution to which you refer is a part of Article V relating to the Executive Department, which under the Constitution is composed of the following officers: the Governor, the Lieutenant Governor, the Secretary of the Commonwealth, the State Treasurer, and the Auditor of Public Accounts. Section 83, quoted above, expressly provides that the salaries of all these officers "shall be fixed by law". Only the General Assembly may enact a "law". It follows that it is my opinion that the General Assembly alone may fix the salary of the Secretary of the Commonwealth, and that even the General Assembly does not possess the power to increase or diminish same "during his term of office".

In the second paragraph of your letter you request my opinion as to the au-

thority of the Governor to increase the salaries of the heads of various departments "by executive order". This phrase "by executive order" is somewhat misleading. Neither the Constitution nor any general law confers on the Governor the authority to increase the salary of any officer or employee of the State except those attached to the Governor's office. The fixing of salaries is a legislative function to the extent the General Assembly elects to exercise it, but prior to 1926, generally speaking, it was left solely to the various boards, commissions and department heads to fix the salaries of the officers and employees under their direction and control. In that year Chapter 88, p. 86, of the 1926 Acts, provided:

"That the salary of no State officer or employee which is payable by the State and which is not specifically fixed by law, and the salary of no officer or employee of any State institution, board, commission or agency which is not specifically fixed by law, shall be hereafter increased, or authorized to be increased, without prior authorization of said board or commission and the consent of the governor first obtained in writing in each case. \* \* \*"

In 1932 their authority was further restricted by requiring the approval of the Governor of the amount of the salary fixed for new officials and employees entering the service. (Section 2, Appropriation Act, Acts 1932, p. 311; also Acts 1934, p. 711). The 1938 Appropriation Act, in section 4 (Acts 1938, p. 948) contains this provision, applicable only to salaries exceeding \$1,000:

"The compensation of each officer and employee who enters the service of the Commonwealth of Virginia during the period which begins July 1, 1938, and ends June 30, 1940, shall be fixed for the said biennium at such rate as shall be approved by the Governor in writing and no increase shall be made in the compensation of any officer or employee of the State government during the said biennium except with the Governor's written approval first obtained.  
\* \* \*"

It is quite clear that these various statutory provisions are purely restrictions on the authority of State Boards, Commissions and Department Heads, and that the only authority conferred on the Governor is a negative power, in the nature of a veto over the authority previously exercised by them. If any increase is made in salaries the State Board, Commission or Department Head makes it and the Governor approves it. If he declines to approve it, there can be no increase.

The question, therefore, whether the salary of a department head may lawfully be increased by executive approval depends upon whether the officer exercises the final authority over the appropriation from which he is compensated, or whether the appropriation is made to a State Board or Commission which controls expenditures. In the latter case it is my opinion that the Board or Commission may, by resolution, provide for an increase of the salary of the administrative head of the department and, if the Governor approves same, it will be legally effective.

On the other hand, I am of opinion that a department head, who has final discretion as to the disbursement of appropriations made to his office, has no authority to increase his own salary fixed by the General Assembly, even though the Governor might approve the increase. To use an illustration, without referring to any department other than my own, I do not consider that the Attorney General has any authority to increase his own salary either with or without executive approval. Such an act would constitute a gross breach of the trust and duty to disburse the appropriation which was imposed on him by the General Assembly.

It follows from the foregoing that I am of opinion that there is no statutory or constitutional provision conferring on the Governor the authority to increase the salaries of any officer or employee of the State except those compensated out of the appropriation to the Governor's office; that a State Board or Commission having control of the expenditure of a departmental appropriation may, but only with the Governor's approval, increase the salary of its administrative head, and that a department head who controls the expenditure of the appropriation from which

he is compensated has no authority to increase his own salary, fixed by the General Assembly, either with or without executive approval.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—Current Expenses—Levy for Indebtedness—Authority of Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 12, 1940.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of March 8, enclosing one from Mr. A. S. Noblin, Superintendent of Scott County Schools. I quote as follows from Mr. Noblin's letter:

"I should like for you to ask the Attorney General for an opinion on the question I have raised here and covering the following points: Do not the maximum and minimum levies set for the different counties under section 698-a, Acts of Assembly 1938, refer to the current operating expenses of schools? Does not the same act provide for a levy for indebtedness in addition to the current operating levy? If a levy for bonds voted in December 1938 is a part of the current school levy may not all prior bond issues for school purposes be retired through the current school levies from year to year? Does not section 657, Code 1936, invest in the Superintendent and the School Board the authority to determine whether or not the school levy for a given year shall include interest and principal on bonded indebtedness if such is to be construed as a part of current expenditures? Does not a bond issue voted by the citizens of a county imply a special county levy to retire both principal and interest?"

Section 698-a of the Code fixes the maximum and minimum amount of the school levy and provides in addition that for capital expenditures and the payment of indebtedness the Board of Supervisors *may* levy a special county tax. However, I cannot agree with Mr. Noblin's view that section 698-a is to be construed as restricting the use of the funds derived from the regular school levy to current operating expenses of the school. If the Board of Supervisors determines that within the limits of the maximum school levy there will be sufficient funds for the operation of the schools as well as for the payment of indebtedness, it may in its discretion adopt a school budget on this basis. Of course, the Board has the option of making an additional levy for debt service, but it is not compelled to do so and, if there are sufficient funds from the regular school levy, the Board may use these funds for the purpose of paying indebtedness. I may also say that the form of the budget adopted by the State Board of Education expressly recognizes that debt service is a regular part of the regular county school budget.

Nor can I agree with Mr. Noblin's view that the Superintendent of Schools and the County School Board have "the authority to determine whether or not the school levy for a given year shall include interest and principal on bonded indebtedness if such is to be construed as a part of current expenditures." The amount of the county school budget and what is to be included therein is a matter for the determination of the Board of Supervisors acting upon the recommendation of the County School Board. See *Scott County School Board vs. Board of Supervisors*, 169 Va. 213.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—Sale of Property.****SCHOOL BOARDS—Authority of, to Sell Property—To Use Proceeds of Sale.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 28, 1940.*

HON. WILLIAM H. LOGAN,  
*Attorney for the Commonwealth,  
Woodstock, Virginia.*

MY DEAR MR. LOGAN:

I am in receipt of your letter of February 26, in which you ask what disposition should be made of the funds derived from the sale of school properties made under the authority of section 678 of the Code of Virginia.

By section 676 of the Code all school property and the maintenance thereof is vested in the county school board. I refer you to this section for details of the power and authority of the said board. In view of the provisions of this section, it is my opinion that the proceeds of the sale of school property are likewise the property of the school board and may be used by it for school purposes. Of course, if the board does sell any property and has in its hands the funds therefrom, the board of supervisors may and unquestionably would take these funds into consideration in fixing a county school budget and in determining any other appropriations it might make for school purposes.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS—Sale of Property—Commissions For.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 9, 1940.*

MR. G. F. POTEET,  
*Division Superintendent of Schools,  
Floyd, Virginia.*

MY DEAR MR. POTEET:

I am in receipt of your letter of January 6, from which I quote as follows:

"We have recently sold a number of abandoned schoolhouses in Floyd county, Virginia. Each member of the school board had charge of the sale of the abandoned schoolhouses in his district. The question has arisen as to whether the school trustee is entitled to a commission on the sale of the abandoned school buildings in his district."

I know of no statute which provides for commission of a school trustee in the case that you present. In fact, I call your attention to section 708 of the Code of Virginia, which provides, among other things:

"Nor shall the board or the division superintendent employ any of its members in any capacity."

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOLS:****Teachers—Employment of—Degree of Relationship to School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 13, 1940.

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

MY DEAR MR. CARTER:

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

"Our superintendent of schools has asked for a construction of section 660 as amended by Acts of Assembly 1940.

"He tells me that the school board of Fauquier county has contemplated employing a teacher for the session of 1940-41 who has heretofore been employed by another school board and is within the prohibited degree of relationship. He also tells me that another teacher who was employed up until two years ago, when she was dropped on account of the fact that she married, now desires to be re-employed by the school board. She is also within the prohibited degree of relationship to a member of the school board."

Section 660 of the Code, as amended at the last session of the General Assembly (Acts 1940, page 644) so far as is pertinent here reads as follows:

" \* \* \* provided, further, that it shall not be lawful for the school board of any county, city, or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if said teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law or daughter-in-law, sister-in-law or brother-in-law of the superintendent, or of any member of the school board, provided, however, that this provision shall not apply to any such relative employed by any school board at any time prior to the effective date of this act. \* \* \* "

I call your particular attention to the language "this provision shall not apply to any such relative employed by any school board at any time prior to the effective date of this act." This language even literally construed is very broad and I am of opinion that in the case of the teacher who has never before been employed by the school board of Fauquier county she may now be employed by that board though she is within the prohibited degree of relationship to the superintendent of schools or a member of the school board. It seems to me that the words "any school board" in the proviso are not restricted to the board that is making the contract but applies to any other school board in the State. Statutes of this kind are to be strictly construed against rendering a person ineligible to employment.

In the case of the person who was formerly employed by the Fauquier county school board, I am of opinion, and have heretofore frequently so ruled in similar cases, that the board may now employ her, although she is within the prohibited degree of relationship to a member of the school board.

Very sincerely yours,

ABRAM P. STAPLES.  
*Attorney General.*

**SCHOOLS:****Teachers—Relation to Member of School Board.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 24, 1940.

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

MY DEAR MR. BICKERS:

I am in receipt of your letter of April 22, and beg to advise that this office has heretofore expressed the opinion that, under such circumstances, as are stated by you, section 660 of the Code of Virginia, as amended, does not forbid the employment of a teacher in the public schools who is a daughter of one of the members of the school board when such teacher was employed in the schools prior to the effective date of the amended section.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARD—Appointments to—When Made.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 7, 1940.

HON. L. H. SHRADER,  
*Trial Justice for Amherst County,  
Amherst, Virginia.*

MY DEAR MR. SHRADER:

I refer to our conversation of today, in which you asked my opinion as to the proper construction of the language in section 653 of the Code, reading as follows:

"The members of the county school board shall be appointed within sixty days prior to July 1, 1928, and within sixty days prior to July 1 every four years thereafter."

In my opinion, this language means that the appointment shall be made within the sixty days next preceding July 1.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARD—Authority of to Borrow Money.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 9, 1940.

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

MY DEAR MR. PARSONS:

I have your letter of April 8, in which you request my opinion upon the authority of the school board of Wythe County to borrow for a period of two years

a sufficient amount of money to construct a school building, with a view that same will be paid off by a loan obtained from the literary fund at the end of that time.

In my opinion, the school board does not possess this authority, as the statute authorizing temporary loans provides that same shall not extend for a period longer than one year and shall not exceed a certain percentage of the anticipated revenues.

The only suggestion I can make for financing the project is that a bond issue be made pursuant to section 673 of the Code, following the procedure provided for by sections 2738, 2739 and 2740.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### SCHOOL BOARDS—Authority to Issue Bonds.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 15, 1940.*

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of April 10, in which you quote from House Bill No. 366, which you state was passed by the last General Assembly. You state that the Act reads as follows:

"Be it enacted by the General Assembly of Virginia, That the school board of any county which is indebted for any money borrowed from the literary fund may anticipate the payment of the principal amount of any such loan or loans, or any part thereof, by the payment of such principal with interest thereon to the date of such anticipated payment. Provided, that if any such payments are made from borrowed money, the procedure for borrowing such money shall be as provided in Chapter 365 of the Acts of 1930, as amended."

You then ask:

"Does not the proviso in this particular act re-enact the procedure for borrowing money as provided in Chapter 365, Acts of Assembly, 1930 as amended; 'As amended' refers to Chapter 294, Acts of Assembly 1932?"

The title of Chapter 365 of the Acts of 1930 reads as follows:

"An ACT to authorize the issuance of bonds by county school boards of counties in the State of Virginia for the purpose of funding or refunding any of the current indebtedness of such counties incurred for school purposes and for the purpose of constructing school buildings or additions thereof."

Section 8 of the Act provided that no bonds should be issued thereunder after the 31st day of December, 1931. The Act was amended in 1932, the effect of the amendment being to extend the time within which bonds might be issued under the Act to the 31st day of December, 1932. However, so far as I have been able to find, the Act has never been repealed, but simply became non-effective after December 31, 1932.

In my opinion, therefore, the Act of 1940 to which you refer might fairly be construed as authorizing the refunding of literary fund loans and as extending for this purpose the time within which bonds might be issued under Chapter 365 of the Acts of 1930. It is well known, I imagine, that very few, if any counties have sufficient cash on hand to refund their literary fund loans, and so, if the Act to which you refer is not to be construed in the manner I have suggested, it is prac-

tically without real effect. It is true that the language is not as specific as it might be, but upon consideration of the whole situation I am of the opinion that the construction I have suggested is the proper one.

I might add the suggestion that, if any county now contemplates issuing bonds for the purpose of refunding literary fund loans as authorized in the Acts of 1940, I should think it would be wise for such county to seek the opinion of competent bonding attorneys, who might represent prospective purchasers of the bonds.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**SCHOOL BOARD—Loans—Additional Loans—Where First is for Less Than Authorized—Taking Up Prior Loan.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 27, 1940.*

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

DEAR MR. THOMPSON,

I am in receipt of your letter, which is as follows:

"Please give me your opinion upon the following question:

"Where a school board, pursuant to the provisions of section 675 of the Code of Virginia, has made a temporary loan of considerable less than the amount which it is authorized to borrow under the provisions of said section and has not paid the same back, is it permissible for said school board during the period of one year from the date of the making of said loan to make an additional loan of an amount greater than the first loan, and, out of the proceeds of said additional loan, pay off and discharge the first loan so that after the second loan is made the first loan will so be discharged."

In my opinion, the purpose and intent of the statute is to restrict the carrying over of temporary loans for a period longer than one year, and this purpose is not violated by making two or three small temporary loans, each succeeding loan taking up the prior one and having a margin in addition thereto.

If this were not true, it would have a strong tendency to cause the school boards to borrow as much as possible at the beginning of the year, in order to avoid a situation in which it might not be able thereafter during the year to borrow to its capacity in order to conduct the schools.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARDS—Loans By.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 29, 1940.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of March 27, in which you ask if a temporary loan made by a county school board under section 675 of the Code of Virginia "is legal".

This statute has been on the books for a number of years and I know of no reason why a loan made under the section and complying in all respects with the provisions thereof is not entirely valid.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARDS—Loans by—Number Which May Be Made.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 8, 1940.

HON. F. P. BURTON,  
*Attorney for the Commonwealth,  
Stuart, Virginia.*

MY DEAR MR. BURTON:

I am in receipt of your letter of January 4, in which you state that the School Board of Patrick County negotiated a temporary loan in June of 1939, under the provisions of section 675 of the Code of Virginia. This loan was paid back in full before December 1, 1939, and a few days later in December, 1939, the School Board found it necessary to make another temporary loan, which latter loan was approved by the Board of Supervisors on December 22, 1939, and the other requirements of section 675 seem to have been complied with.

You desire to know whether or not this second loan may be made. I know of no reason why, the first loan having been fully repaid, a second loan may not be negotiated. Section 675 imposes no limit on the number of times that a loan may be negotiated, provided the other requirements of the section are met.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARDS—Receiving Supplies Through County Purchasing Agent.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 1, 1940.

HONORABLE A. O. LYNCH,  
*Commonwealth's Attorney for Norfolk County,  
Norfolk, Virginia.*

MY DEAR MR. LYNCH:

I am in receipt of your letter of March 29 reading as follows:

"Recently the Board of Supervisors of Norfolk County appointed a county purchasing agent under the provisions of section 2725-b of the Code of Vir-

ginia, and notified all departments and agencies of the county that thereafter all supplies, materials, etc. should be obtained through the county purchasing agent. Will you please advise whether or not in your opinion sections 2725-b to 2725-d, inclusive, pertaining to the county purchasing agent, are applicable to the County School Board of Norfolk County."

The sections to which you refer authorize the board of supervisors to employ a county purchasing agent, who, under the supervision of the board of supervisors, shall purchase or contract for "all supplies, materials, equipment and contractual services required by any department or agency of the county government." This language is quite broad.

On the other hand, section 132 of the Constitution provides that the State Board of Education "shall select textbooks and educational appliances for use in the schools of the State." Sections 617 to 624 of the Code provide in detail that the State Board of Education shall enter into written contracts with publishers of textbooks, and further provides for the distribution of these books to the various counties.

I think it is reasonably plain, therefore, that the Legislature did not intend by the enactment of the county purchasing agent law to do away with the present system of purchasing textbooks. This is probably the largest single item of purchasing.

Section 656 of the Code provides that the county school board shall "provide for the erecting, furnishing and equipping of necessary school buildings and appurtenances and the maintenance thereof \* \* \* 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; \* \* \* to receive and audit all claims arising from commitments made pursuant to the provisions of this section and, by resolution or recorded vote, to approve and issue warrants on the county treasurer in settlement of those of such claims as are found to be valid." The above quoted provisions are certainly in large degree in conflict with the provisions of the county purchasing agent act.

I am further advised that the State Board of Education has prescribed specifications for much of the appliances and equipment used in the schools and to some extent assists the county school boards in purchasing equipment and appliances.

Of course, I recognize the rule that two statutes dealing with the same subject should be construed together if possible, but, in my opinion, the county purchasing agent statute and the statutes relating to the duties of the State Board of Education in connection with the purchase of textbooks and to the duties of the county school board in connection with the purchasing of other supplies and equipment conflict in so many respects that they cannot be satisfactorily reconciled.

It is my opinion, therefore, that the county purchasing agent law does not apply to supplies and equipment which are now being purchased by the State Board of Education and the county school board. I must confess that as to some items of supplies and contractual services the question may not be altogether free from doubt, but certainly as to the major items it seems to me reasonably clear that the purchasing agent law does not apply. Doubtless in such purchases as are not strictly controlled by statute the county school board, where economies cannot be effected, will be glad to avail itself of the services of the county purchasing agent but this is a matter which I am sure can be worked out by cooperation.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOARDS—Workmen's Compensation Act Applied To.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 8, 1940.

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

MY DEAR MR. HITE:

I am in receipt of your letter of April 6, inquiring as to the application of the Workmen's Compensation Act to the school board of a county.

Under this Act, this office has heretofore ruled that a school board is a self-insurer. See sections 8, 11 and 75-j of the Act. The payment under section 75-j of the Act simply represents a maintenance fund for the State Industrial Commission.

I am sure you will appreciate the fact that this office should not attempt to pass on the liability of the school board in any particular case. This liability depends upon the facts existing. Report of the injury or accident should be made to the State Industrial Commission and the determining of the liability will also be made by that Commission.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL BOOKS—Purchase of—Contract of State Board of Education.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 7, 1940.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

DEAR DOCTOR HALL:

This is in response to your letter of June 7, which is as follows:

"Please write me if Superintendent K. P. Bircckhead, Abingdon, Virginia, has a legal right to purchase textbooks in the quantities listed at the prices quoted in the attached carbon copy of his letter to Wilcox & Follett Company under date of May 31, 1940.

"The attached copies of contracts between the State Board of Education and Ginn and Company and the John C. Winston Co. show the titles checked with a red pencil quoted at higher prices than Wilcox & Follett have offered to sell these books to Superintendent Bircckhead.

"It is probable that Wilcox & Follett have purchased a lot of books displaced by an adoption in another state and are therefore in a position to undersell the contract prices of the publishers of these books in Virginia. I wish to know if the Virginia school boards have a legal right to buy these books at lower prices from the Wilcox & Follett Company."

I have examined the contract between the State Board of Education and Ginn and Company, and the John C. Winston Company, and do not find anything therein which obligates the State or the local school boards to purchase all of their books from these companies. This being true, I am of opinion that the school board of

Washington County may purchase books from other persons at lower prices if same are available.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SCHOOL FUNDS—Payment of, to City Treasurer.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 24, 1940.

DR. SIDNEY B. HALL,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

MY DEAR DR. HALL:

I am in receipt of your letter of June 5, enclosing one from Dr. Joseph H. Saunders, Superintendent of Schools of Newport News.

It seems that under the present practice checks covering State school moneys going to the cities are made payable to and sent direct to the city treasurer. Dr. Saunders desires to know if the checks may not be made payable to the treasurer, as at present, but sent to the clerk of the city school board, who in turn will deliver the check to the treasurer. Dr. Saunders desires the checks to be sent to the clerk in order that the clerk may make an entry on his books of the amount of State funds received.

Section 783 of the Code provides that "the State school funds \* \* \* shall be deposited with the treasurers of such cities, and kept by said treasurers in separate accounts \* \* \*."

Inasmuch as the statute does not prescribe the method to be followed in sending these funds to the city treasurer, I cannot categorically say that the method suggested by Dr. Saunders is prohibited. Certainly the most direct method of transmitting funds to city treasurers is the one now followed by the State Comptroller. If the Comptroller should adopt the indirect method suggested by Dr. Saunders, then, in the case of a loss through a mishandling of the funds, there might be serious question as to whether or not the Comptroller had exercised reasonable care in transmitting the funds to the treasurer.

On the whole, the question involved is more one of policy than of law, but I think it proper to call your attention to the potential danger in adopting the indirect method, however remote this danger may be.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SEAL OF THE COMMONWEALTH—Copying.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 8, 1940.

HONORABLE RAYMOND L. JACKSON,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

MY DEAR MR. JACKSON:

I have your letter of March 4, enclosing one dated February 28 from Mr. E. F. Polley, requesting my opinion as to whether you should grant Mr. Polley's re-

quest for "permission" to copy the seal of the Commonwealth on certain articles which he hopes to sell to the Commonwealth.

Under date of February 9, 1935, I advised your predecessor in office that, in my opinion, sections 4392b-4392h of the Code applied to the seal of Virginia and copies thereof, as well as to the complete State flag. Accordingly, these statutes would prohibit the use of a copy of the seal in the manner proposed by Mr. Polley.

I find nothing in the law which would empower the Secretary of the Commonwealth to grant to any person authority to use or copy the seal of the Commonwealth in a manner thus prohibited.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**SHERIFFS—Arrests—Mileage Allowances.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 11, 1940.*

MR. B. H. WAYLAND,  
*Sheriff of Culpeper County,*  
*Culpeper, Virginia.*

MY DEAR MR. WAYLAND:

I am in receipt of your letter of March 7, and will endeavor to answer your questions in the order in which they are asked.

"First: Is the sheriff entitled to mileage in making an arrest on a paper issued by a justice and on which the person arrested is brought to jail; if so, what is the allowance per mile?"

The answer to your question is contained in section 3508 of the Code, as follows:

"For carrying a prisoner to jail under the order of a justice, for each mile traveled of himself in going and returning, eight cents; for each mile traveled of the prisoner in carrying him to jail, where the distance is over ten miles, eight cents."

This office has heretofore ruled that a sheriff is entitled to the above mileage where he makes an arrest on a warrant issued by a justice.

"Second: Under the same conditions as set out in question 'one', is the sheriff entitled to any mileage in connection with transportation of the prisoner as distinguished from the transportation of the officer himself; if so, what is that allowance per mile?"

You will observe from the quoted language above that the sheriff is entitled to mileage of the prisoner at eight cents per mile where the distance is over ten miles.

"Third: Is the officer entitled to any mileage when he goes from his county to another county to return a prisoner being held in a foreign county to a jail in his county for the purpose of trial; if so, what is that allowance?"

This office has also heretofore ruled, in answer to your last question, that pursuant to section 4960 of the Code, where a sheriff goes out of his county, he shall receive such compensation as the court may certify to be reasonable. The section

further provides that the mileage that the court may allow the officer shall not exceed the rate allowed for services performed within the county.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### SHERIFFS—Compensation Of.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 29, 1940.

HONORABLE T. FREEMAN EPES,  
*Attorney for the Commonwealth,  
Blackstone, Virginia.*

MY DEAR MR. EPES:

I am in receipt of your letter of May 28, in which you state that the board of supervisors of Nottoway county has fixed the allowance of the sheriff of that county at the maximum prescribed by section 2726-r of the Code.

You desire to know if, in my opinion, the board may now allow the sheriff \$200 additional for attending trial justice court.

As I indicated in another letter to you today, the allowance which the board of supervisors makes to the sheriff, in my opinion, is intended to cover all services of a general nature which the sheriff performs for the county. If the sheriff attends the trial justice court as an officer, in my view, this is the kind of service that his allowance is supposed to cover. It follows, therefore, that, in my opinion, the board may not grant this officer an additional allowance for rendering this service.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### SHERIFFS—Fees—Where Over Three Persons Served.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., December 11, 1939.

MR. CHAS. C. CURTIS,  
*Sheriff of Elizabeth City County,  
Hampton, Virginia.*

MY DEAR MR. CURTIS:

I am in receipt of your letter of December 8, in which you refer to numbered paragraphs 2 and 3 of section 3487 of the Code as amended in 1938 (Acts 1938, p. 780). You then say:

"The question having arisen with reference to sheriffs' fees under the above mentioned Acts, particularly with the third paragraph which is interpreted by us to apply only to services made in cities having a population of more than thirty thousand (30,000), the sheriff's contention is that paragraph two of the above Acts govern sheriffs' fees at seventy-five cents (75c) for the first three summons and fifty cents (50c) for each additional defendant or witness."

It seems to me that the provisions of the second and third paragraphs of this section are reasonably plain. In my opinion, under the second paragraph, sheriffs of counties are entitled to a fee of 75 cents for service of the instruments mentioned in the paragraph, except where the service of the instrument is directed to more

than three defendants or witnesses, in which case a fee of 75 cents may be charged for the first three and 50 cents for each additional defendant or witness in excess of three.

The third paragraph, in my opinion, means that a sheriff of a county is entitled to a fee of 75 cents for summoning a witness or garnishee on an attachment, but where the service is directed to more than one witness or garnishee, the fee of 75 cents may be charged for such one witness or garnishee, and a fee of 50 cents shall be charged for each additional witness or garnishee in excess of one.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

### SHERIFFS—Fugitive from Justice Warrants—Fees and Expenses.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 28, 1940.

HONORABLE G. M. GILKESON, *Sheriff*,  
Staunton, Virginia.

DEAR MR. GILKESON:

I am in receipt of your letter of March 21, in which you ask two questions covering the arrest of persons in your county for Federal authorities, for authorities of another State, and for city or county authorities in this State. I have been unavoidably delayed in my reply on account of my attendance on the Supreme Court of the United States in an important case.

These questions I am quoting for the purpose of answering *seriatim*, as the last paragraph of your letter suggests that your inquiries are largely concerned with the payment of fees and mileage for the arrest of fugitives from justice for the authorities which are mentioned in such inquiries.

"1. When an officer of this county makes an arrest for the authorities in another state or for the Federal authorities, should a 'fugitive from justice warrant' be obtained and where should it be returned or filed?"

Leaving out for the present the question as to the arrest of fugitives from justice at the instance of Federal authorities, I will answer your inquiry as to the arrest of such fugitives for the authorities of another State.

Section 5062 of the Code provides for the issuance of a warrant for a fugitive from justice for another State, upon complaint on oath, or other satisfactory evidence, that the person whose arrest is sought has committed an offense in that State. The warrant authorized provides that the person accused shall be carried before the same or some other justice within the State, and that the officer, to whom the warrant is directed, may execute the same in any county or corporation in the State, and bring the party, when arrested, before any justice of that county or any other county or corporation. Persons arrested, unless for the purpose of bail, should, in my opinion, be carried before trial justices instead of justices of the peace.

It is not necessary to have a warrant, already issued at the time an arrest is made, where the charge against the fugitive, or alleged fugitive, is for a felony. See *Williams v. Commonwealth*, 142 Va. 667. In that case the court held that, while an arrest without a warrant was proper where one was charged with a felony in another State, "of course a proper warrant should be procured and the charge formulated as soon as possible."

No person should be arrested for a misdemeanor or for a breach of the peace, either for the authorities of another State or for offenses committed within the State, without a warrant, unless the offense was committed in the presence of the officer.

"2. When an arrest is made by an officer of this county for the city of Staunton or any other city or county in the state, should a 'fugitive from justice warrant' be obtained and where should it be returned or filed?"

Section 4827 of the Code and subsequent sections relate, in detail, the method of procedure where a warrant is issued in a county or corporation other than that in which the charge should be tried. In my opinion, the law as to arrests for a felony, for a misdemeanor, and for a breach of the peace apply to the proceedings under section 4827.

*Jones v. Morris*, 97 Va. 43, carries an illustration of a case in which a warrant was issued in the city of Newport News, charging an offense committed in the city of Richmond. The accused was arrested in Newport News; was carried before a justice in Newport News; was committed, by the justice, to a policeman of the city of Richmond; was, by the latter, carried to Richmond, and was tried before a police justice in that city, acquitted and discharged.

As to fees and mileage, my office is informed by the office of the Comptroller that practically all States require officers from the State of Virginia, going after persons arrested and held in other States, to pay all costs incurred in the arrest and detention of such persons, and that all such expenditures by officers are allowed as other criminal costs. If that practice is followed by Virginia authorities, arresting officers would require of all officers from other States the payment of all fees connected with the arrest of persons for such States.

I am further of the opinion that the law as to fees for arrests and board of persons charged with a Federal offense are the same as for those arrested for authorities of other States. My office has been informed by an Assistant District Attorney that, where arrests are made for Federal authorities and prisoners jailed, the fees for such arrests and the board of such prisoners are paid directly to the officers entitled by Federal Marshals, taking their receipts for such payments.

As to the payment of fees in connection with arrests for crimes committed in another county or corporation, I am of the opinion that the fees and mileage of the arresting officer should be certified by the trial justice and allowed by the trial justice and judge of the circuit or corporation court of the county in which the offense is alleged to have been committed in the same manner as if the accused had been arrested in the county in which the offense is alleged to have been committed.

Cordially yours,

ABRAM P. STAPLES.  
*Attorney General.*

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**SLOT MACHINES—Legality of Possession Of.**  
**SEARCH WARRANT—Validity—Description of Premises.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 6, 1940.*

MR. WILLIAM D. PRINCE,  
*Trial Justice of Sussex County,*  
*Stony Creek, Virginia.*

DEAR MR. PRINCE:

In your letter of March 4, you stated that one Hueay was tried and convicted by you upon a warrant charging that he did "unlawfully keep, possess, lease, rent or permit the operation of a certain slot machine, or slot machines, device, or devices, as defined in Section 4694a of the Code of Virginia, in a building owned, leased or occupied by him or under his management or control."

You enclosed in your letter a copy of the search warrant used in the case and a copy of the affidavit upon which such warrant was issued. You ask if the search warrant was a valid one and if you are authorized to seize and confiscate the slot

machines in the possession of the defendant. From your letter it is not clear whether the illegal slot machines have already been seized and are now in the possession of the court or whether you intend to have the machines seized by virtue of the search warrant.

I have examined the warrant and am of the opinion that it is of doubtful validity since the place to be searched is not specifically identified or described. For this reason, if the property has not yet been seized, I am of the opinion that another warrant specifically identifying the place to be searched and the property to be seized should be used. It would be advisable not to use a printed form of the kind submitted to me as such was intended for use in a certain type of criminal case not similar to the case at hand.

However, if the slot machines in question have already been seized and are now before the court and are of the type declared by section 4694a of the Code to be illegal *per se*, the mere possession of which is unlawful, I am of the opinion that they should not be returned to the accused but should be ordered destroyed by the court. Under this section, such property is declared to be a public nuisance and may be seized under a search warrant issued in accordance with law and destroyed.

It is a general rule of law that contraband or property, the possession of which is illegal, cannot be returned to the person from whom it was illegally taken, since that would make him a criminal when he became repossessed of it. 16 C. J. page 1251. See also the case of *Hall v. Commonwealth*, 138 Va. 727, at page 743. In this case, which involved the admissibility of evidence of contraband liquor which had been seized under an illegal search warrant, the Supreme Court said that the court should keep the articles in its custody for such disposition as may seem proper, and not cause the defendant to further violate the law by delivering them into her unlawful possession.

Of course, all machines operated on the nickel-in-the-slot principle are not illegal *per se*. If the machines in question are innocent in themselves and their mere possession is not unlawful, they would not be within the rule set out above and should be returned to their owner. If, however, they are of the type, the mere possession of which is unlawful, I am of the opinion that they should be ordered destroyed, even though there may be some doubt as to the validity of the search warrant under which they were seized.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**SOIL CONSERVATION COMMITTEE—Liability for Torts.**  
**Id.—Bonding of Employees.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., October 4, 1939.

HONORABLE JOHN R. HUTCHESON, *Vice-Chairman,*  
*State Soil Conservation Committee,*  
*Blacksburg, Virginia.*

DEAR MR. HUTCHESON:

I have your letter of September 30, in which you request my opinion on several questions arising under the Soil Conservation Districts Law, Virginia Code (Michie 1936) sections 1289(13)-1289(29).

You first ask my advice as to the liability of the State Committee for injuries or damages caused by employees of the Committee, or by District Supervisors, in driving automobiles in the course of their employment.

Since the State Committee is a public, governmental agency, it cannot be held answerable for the negligent acts of its officers and employees. Of course,

the individual driver would be personally liable for his own negligence, as would be any officer or member of the Committee who should be guilty of actual negligence in the selection and employment of an unfit person as driver. There could not, however, be any vicarious liability on the part of the Committee, or of its members individually, for the negligent acts of an employee, simply by virtue of the relationship of master and servant.

You next inquire whether the State Committee should carry workmen's compensation insurance, and whom it should cover. In this connection, I have consulted the Honorable William H. Nickels, Jr., Chairman of the Industrial Commission, and suggest that you take up with him the question whether your Committee should qualify as a self-insurer or carry insurance, since this is a matter of policy rather than a question of law.

Finally, you request my opinion as to whether members of the State Committee and its employees should be bonded.

Your attention is called to Code section 1289(16), paragraph (c), which require the State Committee to provide for the bonding of "all employees and officers who shall be entrusted with funds or property."

If you will advise this office as to the number of employees to be bonded under this requirement, I shall be glad to furnish you with the appropriate blank forms.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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#### SOIL CONSERVATION LAW—Election of District Supervisors—How Held

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 4, 1939.*

MR. J. R. HORSLEY, *Chairman,*  
*Soil Conservation Districts Committee,*  
*Appomattox, Virginia.*

DEAR MR. HORSLEY:

I have your letter of September 26, requesting my opinion on several questions relating to the election of district supervisors under the Soil Conservation Districts Law, Virginia Code (Michie 1936) sections 1289(13)-1289(29).

In my opinion, the provisions of section 1289(13) entirely supersede the general election law requirements as to notices of candidacy and petitions in support thereof. Accordingly, a candidate for Soil Conservation District Supervisor is entitled to have his name printed upon the ballot, if he qualifies by filing the petition prescribed in Code section 1289(18), within the time therein required.

If an election for district supervisor is held at the time of a general county election, the names of candidates may be printed on the same ballots used for other county officers, or on separate ballots, as the circumstances may require. If separate ballots are used, of course, it will be preferable to use separate ballot boxes.

As to the manner in which such elections shall be called, it is my opinion that the provisions of this same Code section are exclusive, and that when its provisions have been carried out no further notice is necessary.

You specifically ask whether an election for district supervisor should be deemed a "special election." Since this term may be used differently in different connections, it is impossible to give a categorical answer which would not be misleading.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**SPECIAL POLICE—Compensation of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 19, 1939.*

JUDGE EDWARD MEEKS,  
*Amherst,  
Virginia.*

MY DEAR JUDGE MEEKS:

I have your letter of October 17, with reference to the fees allowable to a special police officer appointed under Virginia Code section 4797.

The view this office has always taken of this question has been that the sheriff of a county is an officer elected by the people, whose compensation is derived principally from the fees incident to the performances of his duties. You can readily see the situation which might arise over the State generally if the regular duties of the sheriff, for which he usually receives compensation by way of fees, are performed by special officers, and the sheriff thus deprived of the fees which would normally come to him. If this practice was followed to any very great extent, it might in effect so far deplete the revenue of the office of sheriff that it would be difficult to secure a competent man to take the office.

Section 4797 of the Code, which provides for the appointment of special policemen, seems to contemplate that such public compensation as they receive shall be paid pursuant to an appropriation of the board of supervisors of a county. I am advised that it is sometimes the practice to appoint special policemen in connection with the operation of a large industry and, in such cases, their compensation is paid by the operating company. Any practice, however, for the payment of fees to these officers out of the State Treasury has never come to my notice or attention, and so far as I am advised there never has been any such practice.

With reference to the particular case to which you refer, I suggest for your consideration the provisions of section 4960 of the Code. If these services were rendered in connection with a criminal case or cases, since no specific compensation is provided for this officer in connection with same, it seems to me that the Court might allow compensation under the last named section, and the Court might certify to the reasonableness thereof.

I do not know of any method by which the officer to which you refer may be compensated other than by the board of supervisors out of the county revenue, or else out of the State Treasury under section 4960.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General*

**SPEED LIMIT—Ambulances.  
Id.—Constables and Sheriffs.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 19, 1940.*

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

MY DEAR MR. WHITEHEAD:

I have your letter of February 16, in which you make the following request:

"Kindly advise whether or not there is any statute allowing ambulances to exceed the state speed limit which is 55 miles per hour. Also whether or not sheriffs and constables have the right to exceed the 55 mile speed limit."

As to your first question, your attention is called to Virginia Code (Michie 1936) section 2154(111).

This same section, together with Code section 2154(55), covers your second question also.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**STATE BOARD OF AGRICULTURE—Funds for Constructing Laboratory.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 14, 1940.

HONORABLE L. M. WALKER, JR.,  
*Commissioner of Agriculture and Immigration,*  
*Richmond, Virginia.*

MY DEAR MR. WALKER:

I am in receipt of your letter of May 8, in which you refer to chapter 331 of the Acts of 1940 (Acts 1940, p. 535).

This Act makes an appropriation to the State Board of Agriculture of \$5,000 for the purchase of land in the county of Rockingham and the construction thereon of a laboratory for the diagnosis of diseases of livestock and poultry. Section 3 of the Act provides that:

"The appropriation herein made shall become available for expenditure only when satisfactory proof is furnished the Governor that the sum of five thousand dollars has been provided and made available by the political subdivisions adjacent to the proposed location for use in the construction and equipment of such laboratory."

You desire to know, in the event they can secure WPA funds, if the political subdivisions may treat such funds as their part of the \$5,000 to be provided and made available by such political subdivisions.

The quoted portion of the Act stipulates that \$5,000 shall be "provided and made available by the political subdivisions". It seems to me reasonably plain that this means that this sum shall be provided and made available by the political subdivisions themselves out of their own funds. I do not think that, if the WPA provides and makes available any funds, such funds can be said to be provided and made available by the political subdivisions.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General*

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**STATE BOARD OF EDUCATION—Authority of—To Spend Federal Monies.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 22, 1940.

HONORABLE ROBERT C. VADEN,  
*Gretna, Virginia.*

MY DEAR SENATOR VADEN:

I hope you will pardon my delay in replying to your letter of May 10, since the receipt of which this office has been exceptionally busy.

You call attention to the fact that the appropriation bill for 1940, as passed, contained a provision authorizing the State Board of Education and/or the State Library Board to accept and expend any funds which may be made available by the Federal government for certain purposes. Pointing out that the Governor has indicated his veto of this portion of the Act, you request my opinion as to the effect of such action.

The portion of the Act here vetoed is itself an appropriation of certain funds, if and when they may become available, and may be eliminated from the Act without affecting any of the appropriations to which the Governor did not object.

Enclosed herewith is a copy of the opinion recently rendered by me, to which you refer in your letter, reviewing the authorities and expressing my opinion as to the scope of the Governor's power to veto distinct portions of an appropriation bill. In view of the reasons stated and the authorities cited therein, it is my opinion that the portion of the Act to which you refer constitutes an item of appropriation subject to separate veto under section 76 of the Constitution.

Your attention is called to the fact that any Federal funds made available for any of the district purposes may still be expended, with the Governor's approval, by either of the agencies in question under the terms of section 39 of the Appropriation Act.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**STATE BOARD OF EXAMINERS OF ARCHITECTS, ENGINEERS,  
AND SURVEYORS—Examination of Minor By.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 11, 1940.*

MR. E. W. SAUNDERS, *Chairman,*  
*State Board of Examiners of Architects,*  
*Professional Engineers and Land Surveyors,*  
*1006 E. High Street,*  
*Charlottesville, Virginia.*

DEAR MR. SAUNDERS:

This is in reply to your request for my opinion upon the question whether or not under the provisions of the Acts of 1938, page 494, which is carried into Michie's Code as section 3145-g, a person not twenty-one years of age, but otherwise qualified, may make application to be permitted to take an engineering examination.

This section provides that a person under twenty-one years of age may not apply for the certificate but does not restrict the age of the person who may take the examination. Statutes of this kind are not to be construed as handicapping and impeding the efforts of persons to qualify themselves for their professions but should be liberally construed to enable them to engage in their chosen work as soon as the law permits.

It is my opinion, therefore, that it is within the authority of the Board and, in fact, its duty to permit such an applicant to take the examination and also to advise him promptly as to the result thereof so he may be guided in his future actions with reference thereto. If such person successfully passes the examination, he may make application for the certificate as soon as he becomes twenty-one years of age and the certificate should then be granted.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE BOARD OF NURSE EXAMINERS—Compensation of Members Of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 11, 1940.

MISS ELIZABETH BUXTON, *President,*  
*Virginia State Board of Nurse Examiners,*  
*511 Chesapeake Avenue,*  
*Newport News, Virginia.*

MY DEAR MISS BUXTON:

This is in reply to your letter of June 5, in which you request my opinion upon the question of the authority of the State Board of Examiners of Graduate Nurses to pay to the Secretary of the Board, who is also a member of same, pursuant to an understanding entered into when said Secretary accepted the position, the sum of \$5 for each day spent in attending the meetings of the Board.

This question arises from the provisions of the Acts of 1922, page 22, being section 1704 of Michie's 1936 Virginia Code. This section provides that the Secretary may receive a salary which may be fixed by the Board and which shall not exceed \$2,000 per annum. Your present Secretary, Miss McLeod, you advise also holds the position of Inspector of Schools of Nursing in Virginia and the total compensation which she, as well as her predecessor, in these positions has received has been the sum of \$2,700 per annum plus the attendance fee of \$5 for each day of attendance upon meetings of the Board.

In my opinion, it is within the authority of the Board, under the provisions of the statute, to compensate Miss McLeod in the manner in which you state has been customary for years in the amount which was agreed upon at the time that she accepted the position. I see no legal objection to her receiving the \$5 attendance fee per diem, under these circumstances.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE COLLEGES—Admission of Student as Resident of Virginia.  
Domicile and Residence.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 18, 1940.

MR. EDGAR E. WOODWARD, *Treasurer,*  
*Mary Washington College,*  
*Fredericksburg, Virginia.*

DEAR MR. WOODWARD:

I have your letter of June 17, in which you request my opinion as to whether a certain student should be admitted to your Institution as a resident of Virginia under circumstances which you describe as follows:

"The parents of the student in question live in Washington and have paid poll taxes in Fauquier County for the past three years. The student has resided with her parents in Washington, D. C., attended High School in the City of Washington, and upon graduation has enrolled as a student in this college."

The facts stated are not sufficient to show affirmatively that this student either is or is not a resident of Virginia. In view of the nature of the question and the nature of the legal concept of domicile and residence, this office can hardly do

more than describe the general principles to which you should apply all the facts and circumstances available to you in determining the question whether this student is a resident of Virginia.

If the parents of the student in question were originally residents of Virginia, their Virginia residence has continued unless they have gone elsewhere with intent to make the new place their home. If this is the case no one fact, such as the payment of poll taxes in Virginia, is sufficient to prevent the legal conclusion that the Virginia domicile has been lost through acquisition of a new residence elsewhere. If on the other hand the parents of this student were not originally domiciled in Virginia, they may be considered Virginia residents only if they have come into the State with the intention of making their home in Virginia.

In the absence of very exceptional circumstances, the domicile of the student will be as a matter of law the same as that of her parents.

I am sure you will agree that the application of these broad standards to the facts and circumstances of a particular case, especially in so far as the elusive fact of intent is concerned, is a matter which can not be positively determined by this office except in very clear cases.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE COLLEGES—Admission of Student at Reduced Tuition.  
Domicile and Residence.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 15, 1940.

DR. SAMUEL P. DUKE, *President,*  
*Madison College,*  
*Harrisonburg, Virginia.*

MY DEAR DR. DUKE:

I am in receipt of your letter of June 13, with regard to a young man who feels that he has met the requirements of chapter 331 of the Acts of 1936, relative to reduced tuition charges in State supported institutions of higher learning.

I must say that I do not think that the facts set out in your letter relative to the young man's residence in this State meet the requirements of the Act. It does not seem to me that merely attending school in Virginia in any sense makes a person a "bona fide citizen or resident of Virginia". If this were true, then a person could attend school at your institution, for example, a year and then claim residence here so as to entitle her to reduced tuition charges in the future.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE COLLEGES—Advertising By.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 17, 1940.

DR. ROWLAND EGGER,  
*Director of the Budget,*  
*Richmond, Virginia.*

MY DEAR DR. EGGER:

I have your letter of January 11, in which you state the following problem:

"One of our teachers colleges has applied for authorization to print a circular letter to go to the girl graduates of Virginia high schools in the class of

1940, and return postcards which such students may use if they wish to secure the catalogue and literature of the college.

"The Medical College of Virginia also proposed to attach a reply postal card to a recent issue of its monthly bulletin, the apparent purpose of which was to encourage interest in its school of dentistry."

You call attention to the following language of section 37 of the Appropriation Act for 1938:

"It is hereby provided that no public funds or money shall be expended by any State institution of higher learning to which an appropriation is made by this act, for the purpose of paying for advertisements or advertising intended or designed to promote student attendance at any such institution." (Acts 1938, pp. 954-955.)

My opinion is requested as to the effect of this statutory provision upon the measures proposed by these State institutions.

The statute quoted was undoubtedly intended to prohibit public expenditures for advertising of the kind which is bought and sold as such by the publishers of periodicals and other advertising mediums, and expenditures for such purpose are clearly not permissible.

On the other hand, the statute certainly was not intended and cannot be construed to prevent a State institution from making available to the public a fair description of its curriculum and educational facilities, as by the publication and distribution of a catalogue.

The proposals of the institutions to which you refer would seem to involve nothing more than a reasonable plan for distributing literature which the respective institutions unquestionably have the right to publish, by putting it in the hands of persons indicating an interest therein. Without undertaking a strict definition of the terms "advertising" and "advertisements" as used in the statute, suffice it to say that in my opinion section 37 of the Appropriation Act does not prohibit the practices which you describe.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE HOSPITALS—Admission to, for Free Treatment—Domicile and Residence—Intent Necessary.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 6, 1940.*

DR. H. C. HENRY,  
*Director of State Hospitals,  
309 North 12th Street,  
Richmond, Virginia.*

MY DEAR DR. HENRY:

I have your letter of February 3, enclosing one, dated February 2, from Dr. R. Finley Gayle, Jr., in which my opinion is requested as to whether a certain patient should be admitted to one of the State Hospitals for free treatment as a resident of Virginia, in spite of the fact that the patient and her husband have resided in this State for less than one year. Dr. Gayle's letter describes further circumstances relating to the residence of this couple.

Our laws relating to the admission of patients to State Hospitals make no distinction between persons who have become legal residents of the State the moment before they seek admission and other residents of the State. It follows that this

patient's right to be admitted free of cost depends solely on the difficult question of her legal residence at the time of commitment, regardless of how recently her residence may have been established.

Under the law, a person acquires legal residence in a new place whenever he goes to that place with intent to make it his home, or, as it is sometimes put, with no present intention of moving away.

It is often extremely difficult to apply this test to a particular case, the most troublesome problem generally being to determine whether the person in question actually entertained, in good faith, the requisite intent. This factual question is one on which this office can reach no satisfactory opinion in any case, since it is impossible for us to obtain all the evidence in complete detail.

Accordingly, I can only advise you that in this and similar cases the lunacy commission must determine, to the best of its ability, whether all the evidence does or does not indicate that the party who is alleged to have become a resident of Virginia has moved here with the bona fide intention of making Virginia his or her home, and commit the patient as a resident or non-resident accordingly.

It should be borne in mind, of course, that a person who is insane at the time of a change in physical residence cannot acquire a new legal domicile, since only a sane person can entertain the intent which the law requires.

Regretting that I cannot give you a categorical answer to your precise question, I am

Cordially yours,

*Attorney General.*  
ABRAM P. STAPLES,

**STATE HOSPITALS—Authority to Act as Guardian—Appointment of Committee.**

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

MR. L. H. HUBBLE, *Steward,*  
*Southwestern State Hospital,*  
*Marion, Virginia.*

MY DEAR MR. HUBBLE:

I am in receipt of your letter of December 12, asking if there is any statute authorizing a State hospital to act as guardian for an incompetent person who is confined in the institution.

I know of no statute authorizing a State hospital to act as such fiduciary, but I refer you to section 1050 of the Code and the following sections relative to the appointment of a committee for such insane person. These sections prescribe in detail how such committee shall be appointed and set out his powers and duties.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE HOSPITALS—Claim Against Estate of Deceased Patient.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 3, 1940.

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

DEAR DOCTOR DEJARNETTE:

This is in reply to your letter of December 28, 1938, in which you state that Mrs. Maggie Patrick, who had been a patient in the Western State Hospital for

many years, has recently died. You request the opinion of this office as to whether the hospital may present a claim against her estate for the cost of her maintenance while she was a patient therein.

This question is controlled by the first sentence of section 1058 of the Virginia Code (Michie 1936); which reads as follows:

"The estate of any person committed to any hospital for the insane or colony for the epileptics or the feeble-minded shall not be charged with any expense incident thereto or for his maintenance therein."

Assuming that Mrs. Patrick was a regularly committed insane person and not admitted as an inebriate, voluntary patient, or as a non-resident, it is the opinion of this office that, in the absence of some express contract with her committee regarding the furnishing of extra comforts, the hospital has no right to share in the distribution of her estate.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**STATE HOSPITAL—Discharge of Patient—Rights Restored.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 5, 1940.

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

MY DEAR DR. DEJARNETTE:

I am in receipt of your letter of March 2, in which you inquire as to your authority under section 1046 of the Code of Virginia to discharge a patient at your institution and give him a certificate thereof.

It seems to me that this section is clear authority for you to discharge such patient when he is restored to sanity and to give the certificate in cases where the person is not charged with or convicted of crime.

You next ask if such discharge restores to such patient "all of her legal rights to control her affairs, institute law suits, and perform all of the activities of a sane person."

The answer to this question depends upon what has happened during the confinement of the individual in your institution. For example, a committee might have been appointed to handle her property. If so, it will be necessary to have this committee discharged by appropriate proceedings. Other proceedings might have been instituted in court in connection with the affairs of the individual during her confinement in your institution. It would be necessary, therefore, for further action to be taken by the same court in this connection. In the absence, however, of any restrictions imposed upon the individual by appropriate court procedure, I should say that such person would have all of the rights of a sane person.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

## STATE HOSPITAL—Interception of Patient's Correspondence.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 15, 1940.

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

DEAR DR. DEJARNETTE:

In reply to your letter of March 2, I am of the opinion that you may legally intercept and withhold from any patient under your care any correspondence which you believe would be detrimental to his mental health.

As suggested in your recent conversation with Mr. Kelly of this office, it would seem entirely proper to refer the writer of any such letter which concerns the property or legal rights of the patient to the patient's committee.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

## STATE HOSPITALS—Medical Record of Patient—Inspection Of.

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

DR. W. T. SANGER, *President,*  
*Medical College of Virginia,*  
*Richmond, Virginia.*

DEAR DOCTOR SANGER:

This is in reply to your letter of December 16, in which you ask several questions regarding the legal status of a patient's clinic and hospital record and the legal right and duty of the hospital to permit persons other than the hospital authorities or the physicians treating the patient to examine such record.

It is my opinion that the hospital record of a patient belongs to the hospital and not to the patient, and that, in most instances, there is no duty upon the hospital to permit anyone, other than the hospital authorities, to examine such record. However, since the record is one which concerns the patient, he should be permitted to see or use it whenever he has a valid reason for so doing unless it contains information, knowledge of which, in the opinion of the hospital authorities, would be detrimental to the health of the patient.

The present practice of the Medical College of Virginia in refusing to allow any report to go out regarding any case or to allow anyone to see a patient's record without the consent of the patient is one which, in my opinion, the College should continue to follow. While, as stated above, it is my opinion that the record belongs to the hospital, the relationship between the patient and the hospital is a highly confidential one, from which, in my opinion, is inferred a promise on the part of the hospital to keep the patient's record confidential and to permit third parties to see it only in case the patient consents. Of course, an order of a court requiring the record to be produced for use as evidence in a lawsuit should be obeyed.

Whether or not the consent of the attending physician should also be secured before the hospital permits the record to go out is a question depending upon the understanding, either express or implied from custom and practice, between the physician and the hospital. Since I am not sufficiently advised of the attending

physician's connection with and interest in the hospital record of the patient, I am unable to give a more definite opinion on this question.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**STATE HOSPITALS—Transfer of Inmates to State Farm—Procedure.**

RICHMOND, VA., October 25, 1939.

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

DEAR DOCTOR DEJARNETTE:

This is in reply to your request for my opinion upon the proper procedure to follow for the purpose of having transferred to the State Farm inebriates confined in the State Hospital, who have, by experience, proven to be almost beyond hope of further assistance in your institution.

I call your attention to section 5058(11) of the Code, as amended by Acts of 1930, page 825, which provides as follows:

"The governor may, upon the recommendation of the commissioner of public welfare, transfer any jail inmate within the Commonwealth to the State farm for defective misdemeanants, or other farm or farms, in a case of emergency or necessity."

It seems to me that, if a person of the type you describe should be arrested for drunkenness after escaping from your Institution or while on furlough and sentenced to jail, then such person may be transferred in the manner prescribed in the above section by action of the Commissioner of Public Welfare and the Governor of Virginia. Of course, you would have to explain fully to the Governor and the Commissioner of Public Welfare the circumstances which, in your opinion, make such action necessary.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**STATE HOSPITAL BOARD—Authority of Printing—Contracts For.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 5, 1940.

HONORABLE F. W. GWALTNEY,  
*Executive Secretary,*  
*State Hospital Board,*  
*Richmond, Virginia.*

DEAR MR. GWALTNEY:

This is in reply to your letter of May 24, requesting my opinion as to the authority of the State Hospital Board to install a small printing shop at one of the State hospitals for the insane or at one of the colonies for the feeble-minded.

It appears that such a shop is desired for use in training and giving employment to patients who are in need of occupational therapy in some form; that the necessary equipment and the services of a trained printer to supervise the work are to be paid for out of funds appropriated or transferred to the institution in question for general maintenance and operation purposes, including the care and treatment of patients; that the products of the shop could be used by the Board and

the several hospitals or colonies to supplant printing which otherwise must be contracted for at an annual cost considerably in excess of the cost of installing and operating the proposed shop.

Virginia Code (Michie 1936) §§1077 and 1095 provide that the special boards of directors of the colonies and hospitals, respectively, shall provide vocational or industrial training so far as their resources permit for the patients of these institutions. The powers and functions of these special boards have now been transferred to the State Hospital Board by Virginia Code (Michie 1936) §1006, as amended by Acts Extra Session 1936-1937, Chapter 3.

In my opinion, if the Board finds that installation of the proposed printing shop is a desirable and economical method of providing occupational therapy in one of its institutions, the statutes referred to above afford the necessary legal authority.

You further suggest that printing required for the special use of some hospital or colony, other than the one at which the print shop is located, might be ordered and paid for through the Division of Purchase and Printing as if the work were being done by commercial printers, in order to comply with the centralized printing laws. In my opinion, this would be neither necessary nor proper, since the centralized printing law deals only with printing which is required to be done under contract with a private concern, and in such cases requires competitive bidding.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**STATE INSTITUTIONS—Contracts With—Personal Interest of Member  
of Board of Visitors.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 2, 1940.*

MR. ALEX. F. RYLAND,  
*Chairman Finance Committee,  
Board of Visitors of Virginia Military Institute,  
First and Merchants National Bank,  
Richmond, Virginia.*

MY DEAR MR. RYLAND:

This is in reply to your letter of February 1, in which you request my opinion upon the question whether or not the payment by the Virginia Military Institute to the First and Merchants National Bank of compensation for its services in connection with the investment of the Institute's endowment funds would be a violation of section 4706 of the Code.

You state that while you are a Vice President of the bank, you are not a stockholder, and that the services rendered by the bank would be restricted to the Trust Department, with which you are not connected. Your only connection with the investment of the funds would be in the capacity of Chairman of the Finance Committee of the Board of Visitors.

The Code section referred to prohibits any member of the board of visitors of a State Institution from being interested in a contract with such Institution, so the answer to your question depends upon whether your position as Vice President of the bank would have the effect of creating a personal interest in you in relation to the investment of these funds.

I am of opinion that, under the circumstances above stated, you would not be interested in the contract between the Institute and the bank, and that, therefore,

the payment of compensation by the Institute to the bank to which you refer would not be in violation of section 4706 of the Code.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**STATE INSTITUTIONS—Endowment Fund—Types of Investments.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 31, 1940.

HONORABLE ALEX F. RYLAND,  
*Chairman of Finance Committee,  
Board of Visitors of the Virginia Military Institute,  
First and Merchants National Bank,  
Richmond, Virginia.*

MY DEAR MR. RYLAND:

This is in reply to your letter of January 30, in which you request my opinion upon the authority of the Board of Visitors of the Virginia Military Institute to adopt a resolution, a copy of which you enclosed with your letter.

Under the terms of this resolution the First and Merchants National Bank is designated as a depository of the endowment funds of the Institute, and is authorized to continue to receive and act on instructions of the Chairman of the Finance Committee of the Board of Visitors with respect to investment or re-investment of the endowment funds in real estate notes.

The resolution further contemplates that these funds may be invested in other types of securities, and you state it is contemplated that some of the funds may be invested in certain high-grade common stocks, preferred stocks and bonds other than those secured by real estate first mortgages. The resolution provides that, in the event of investment in these last mentioned types of securities, the bank shall receive and act only on the written instructions of two or more members of the Finance Committee of the Board of Visitors.

I find no provision in the statute which restricts the type of securities in which these endowment funds may be invested. In handling these endowment funds, it is my opinion that the Board acts in the capacity of a fiduciary, and that the funds should have the status of trust funds. In this connection, I call your attention to section 5431 of the Code, which prescribes certain types of securities in which fiduciaries may invest without being liable for loss.

The Supreme Court of Appeals of Virginia, in the case of *Koteen v. Bickers*, 163 Va., at page 690, has held that trustees are not required necessarily to invest in the securities referred to in section 5431 of the Code, and that all the statute means to say is that trustees will be relieved from liability if they do make such investments. The Court holds further that whether or not other investments are such as a reasonably prudent man would make is a question of fact.

Section 837 of the Code, which is a part of Chapter 38 relating to the Virginia Military Institute, empowers the Board to make regulations for the management of the affairs of the Institute. In my opinion, this resolution would be considered as a regulation relating to the investment of the endowment funds, and that it is within the power of the Board to adopt same.

It follows, therefore, that I am of the opinion that there is no legal objection to the resolution, or any action which may be taken pursuant thereto as outlined in your letter.

I do not take it, however, that your request for my opinion has any relation to the compensation which may be paid to the bank for its services in the matter, as this subject is not covered in the resolution.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Abatement Where Error Made by Commissioner of Revenue  
—Improper Assessment.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 11, 1940.

MR. M. E. HESS,  
*Commissioner of the Revenue,  
Lebanon, Virginia.*

MY DEAR MR. HESS:

I am in receipt of your letter of March 8, from which I quote as follows:

"Kindly write me a letter explaining whether or not under section 413 of the Code I have a right to issue abatements for improper assessments on real estate, which are shown to be improper by reason of being double assessed, etc. This being my first year in office, and this section reading 'provided the error sought to be corrected in any case was made by the Commissioner of Revenue to whom the application is made', I do not quite understand whether or not I should issue abatements in such cases."

The language to which you refer, namely, "provided the error sought to be corrected in any case was made by the Commissioner of the Revenue to whom the application was made", means where the error in the assessment was due to the fault of the Commissioner of the Revenue, as distinguished from a mistake of the taxpayer. You also understand, of course, that your authority to make corrections under section 413 of the Tax Code is limited to those cases in which the tax has not been paid, and where the application for correction is made within one year from the 31st day of December of the year in which the assessment sought to be corrected is made.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Airline—Fuel Used in Intra-State Operation.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 13, 1940.

MR. E. L. RYAN, JR., *Executive Assistant,  
Division of Motor Vehicles,  
Richmond, Virginia.*

DEAR SIR:

I have your memorandum of March 11 in which you inquire as to whether the tax imposed on certain motor fuel used by the Pennsylvania Central Airlines, Inc., was properly assessed, this fuel having been purchased within this State.

You state that this airplane line is operating under a license issued by the Civil Aeronautics Authority, a federal agency, between Detroit, Michigan, and Norfolk, Virginia. This authorization first permitted the company to operate its planes between Detroit and the Hoover Airport in Arlington, Virginia, but later extended the license to this concern to operate its planes to Norfolk. According to your memorandum, the planes stop at Hoover Airport in Arlington, change pilots and then the same plane is flown to Norfolk. On the return trip to Detroit, the plane stops again at the Hoover Airport in Arlington and changes pilots. You do not state whether the company extends passenger service between Norfolk and

Arlington. For the sake of this discussion, it is assumed that such service is offered. The proceeds of the tax collected from such carriers have in fact been used to partially maintain the above mentioned airports.

I understand that this corporation has made application for a refund of the tax paid on the gasoline used and that your Division has taken the position that the tax is properly imposed on gasoline which was actually used in flying the airplanes of this company between Arlington and Norfolk. In this connection, I refer you to Section 2 of Chapter 368, Acts of 1938:

"That there be, and hereby is, imposed, and hereby required to be paid, through medium of deduction from refunds as now required by law, or directly if and when there shall be any change in the law which constitutes the provisions herein for retention of said portion of refundable gasoline taxes no longer applicable, a tax of three cents on each gallon of gasoline purchased in this State for use and used by intra-state operators in the propulsion of airplanes or any kind of aircraft."

Although in flying its planes from Detroit to Norfolk, this company is engaged in inter-state commerce, a portion of this route constitutes intra-state commerce, and, therefore, the tax is properly imposed. In this connection, I refer you to the case of *Inter-state Busses Corp. vs. Holyoks Street R. Co.*, 273 U. S., Page 45, 71 Law Ed., Page 530. In that case, the State of Massachusetts required common carriers by motor to obtain a license to transport freight and passengers over the highways of Massachusetts. Contention was made by the appellant that inasmuch as its operations were between Hartford, Connecticut, and Greenfield, Massachusetts, it was exempt from the operation of the act requiring the license although it admitted that it was engaged in the transporting of passengers for hire between points within the State of Massachusetts. The Court said:

"Appellant may not evade the Act by the mere linking of its intra-state transportation to its inter-state or by the unnecessary transportation of both classes by means of the same instrumentalities and employees."

I also quote from the headnote of that case:

"Requiring an inter-state carrier of passengers by bus to secure a license to transact intra-state business does not unconstitutionally deprive it of its property without due process of law."

Inasmuch as the 1938 Act, from which I quote above, provides that the tax imposed by the same shall be used for the administration of the aviation laws, for the construction, maintenance and improvements of airports and landing fields, such a tax is not a burden to inter-state commerce. In this connection, see the case of *Varney Air Lines, Inc., v. Babcock*, 1 Fed. Sup., Page 687, in which the Court said:

"There would seem to be no question of the right of the state or owner of a facility used by one, although engaged in inter-state commerce, to make a charge upon the person who uses it where the amount of the charge be reasonable and fair as to the amount of the use made of the facility. It does not constitute a burden on inter-state commerce. The amount of the charge and method of collection are primarily for determination by the state. *Hendrick v. Maryland*, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385; *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U. S. 252, 39 S. Ct. 265, 63 L. Ed. 590. As somewhat parallel to the tax here, the state may levy a tax with respect to the exaction of a gasoline tax as compensation for use of highways by busses and trucks engaged in inter-state traffic. *Inter-state Transient Co., Inc., v. Lindsey*, 283 U. S. 183, 51 S. Ct. 380, 75 L. Ed. 953. The tax here is allocated to the purpose of furnishing and maintaining airports and air navigation

facilities which the plaintiff uses. Therefore under the facts disclosed by the record and the principle as stated the tax imposed by the act and required to be paid by the plaintiff does not burden inter-state commerce."

For the foregoing reasons, I am of the opinion that the refund of the tax on the motor fuel used by this concern in its intra-state operation—that is to say, from Hoover Airport, Arlington, to Norfolk, should be denied.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

#### **TAXATION—Authority to Receive Voluntarily Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *June 8, 1940.*

HONORABLE O. B. WATSON,  
*Treasurer of Orange County,  
Orange, Virginia.*

MY DEAR MR. WATSON:

Replying to your letter of June 5, I beg to advise that, in my opinion, there is nothing in chapter 427 of the Acts of 1940 (Acts 1940, page 882) which would prohibit you from receiving taxes voluntarily paid, even though a suit may not be brought for their collection. In other words, the single purpose of the chapter is to prohibit any legal proceeding to enforce the payment of taxes after the time specified.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### **TAXATION—Capitation Tax—Deduction by Comptroller for Collection Cost to State—Constitutionality.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 13, 1939.*

HON. G. M. WEEMS,  
*Treasurer of Hanover County,  
Ashland, Virginia.*

MY DEAR MR. WEEMS:

I am in receipt of your letter of September 11, in reply to mine of September 6, in which you ask for my opinion on the constitutionality of section 41 of the Appropriation Act of 1938 (Acts 1938, page 955), which section reads as follows:

"Before distributing to the counties and cities of the State the amounts received into the treasury from collection of State capitation taxes, the comptroller shall deduct from the amounts returnable to the counties and cities a sum equal to five per centum of the amount of State capitation taxes collected and credit the amount to the general fund of the Commonwealth to reimburse that fund for the expenses paid therefrom incident to the assessment and collection of said capitation taxes."

As the reason for your request, you call my attention to section 173 of the Constitution of Virginia, the first sentence of which reads as follows:

"The General Assembly shall levy a State capitation tax of, and not exceeding one dollar and fifty cents per annum on every resident of the State not less than twenty-one years of age, except those pensioned by this State for military services, one dollar of which shall be applied exclusively in aid of the public free schools, and the residue shall be returned and paid by the State into the treasury of the county or city in which it was collected, to be appropriated by the proper authorities to such county or city purposes as they shall respectively determine."

I find that a provision similar to section 41 of the 1938 Appropriation Act has been carried in the Appropriation Act for a number of years, and that the deduction authorized by the section has been regularly made. As I indicated in my letter of September 6, the State bears a definite portion of the expense of assessing and collecting the State capitation taxes in that it pays its part of the salaries of the county treasurer and the county commissioner of revenue. In addition, it should be stated that, since one dollar of the State capitation tax is applied in aid of public free schools and the residue paid over to the counties and cities, it is clear that the localities in effect receive the benefit of the entire State capitation tax less the estimated costs of assessing and collecting said tax. In my opinion, it is within the discretion of the General Assembly to deduct from the amount of the State capitation taxes collected a reasonable sum to reimburse the State for its expense in assessing and collecting said taxes, and that the provision that has been made by the General Assembly for deducting this expense is not in violation of section 173 of the Constitution. It seems to me reasonably plain that the Constitution did not contemplate that the State should pay a share of the expense of assessing and collecting the tax and then be required to pay the entire amount collected to the localities. The practical result would be that it would cost the State money to collect the tax for the locality. I, therefore, think it reasonable to construe the language of the Constitution to mean that the net "residue" of the State capitation tax should be paid to the localities.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TAXATION—Capitation Tax—Deduction by Comptroller for Collection Cost.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., September 6, 1939.

HON. G. M. WEEMS,  
*Treasurer of Hanover County,  
Ashland, Virginia.*

MY DEAR MR. WEEMS:

I am in receipt of your letter of September 5, in which you inquire as to the authority for the deduction made from a county's portion of the State capitation tax.

I refer you to section 41 of the Appropriation Act of 1938 (Acts of 1938, page 955), which reads as follows:

"Before distributing to the counties and cities of the State the amounts received into the treasury from collections of State capitation taxes, the comptroller shall deduct from the amounts returnable to the counties and cities a sum equal to five per centum of the amount of State capitation taxes collected and credit the amount to the general fund of the Commonwealth to reimburse that fund for the expenses paid therefrom incident to the assessment and collection of said capitation taxes."

You will recall, of course, that the State pays its portion of the salaries of the county treasurer and the county commissioner of the revenue.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TAXATION—Commission for the Blind—Vending Machines Of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 1, 1939.*

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

DEAR MR. WATTS:

This is in reply to your letter requesting my opinion upon the question whether or not the city of Newport News may lawfully impose a license tax upon slot machines vending candy, nuts, and gum, which are leased and operated by the Virginia Commission for the Blind.

The Virginia Commission for the Blind is a State agency, and, as such, in my opinion is exempt from any license taxes on the part of any municipality of the State. The legal effect of a license tax imposed upon the Commission would be the same as a tax upon the State itself, and in my opinion would be invalid.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TAXATIONS: Delinquent—Prosecution of Suits by Collector.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *May 14, 1940.*

HONORABLE E. W. CHELF,  
*Commonwealth's Attorney,*  
*Salem, Virginia.*

MY DEAR MR. CHELF:

I am in receipt of your letter of May 13, and beg to advise that I agree with you that a delinquent tax collector, who is not an attorney at law, does not have authority to institute and prosecute suits for the collection of taxes.

Under section 403 of the Code, if the Board of Supervisors desires to employ you to bring these suits, this is clearly within the power of the Board.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Delinquent Lists.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 17, 1940.

HON. C. H. MORRISSETT,  
*State Tax Commissioner,  
Richmond, Virginia.*

MY DEAR MR. MORRISSETT:

I am in receipt of your letter of May 10, in which you refer to an inquiry made of you by a county treasurer relative to the construction of section 388 of the Tax Code, and especially that portion of it which provides that the delinquent lists "shall speak as of June thirtieth of each year—that is to say, such lists shall conform to the facts as they existed on such date." The question put to you is:

"In view of the fact that June 30, 1940, falls on Sunday, please advise whether or not collections of 1939 taxes made on Monday, July 1, 1940, may be considered as having been made before date of delinquency."

You have stated that, in your opinion, the effect of the provision in the section is in reality to fix an accounting period. No penalty accrues against the taxpayer for failure to pay his taxes by June 30, and, as a practical matter, I am advised that, if he pays his taxes by July 1, his name is stricken from the delinquent list.

In view of the above consideration, I agree with you that it is the intent of the section that the delinquent lists shall speak as of June 30, whether or not that day happens to fall on Sunday.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Delinquent Tax Lists—Correction of by Board of Supervisors.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 6, 1940.

HONORABLE V. S. PITTMAN,  
*County Treasurer,  
Courtland, Virginia.*

MY DEAR MR. PITTMAN:

I am in receipt of your letter of May 3, in which you ask if the board of supervisors may refuse to accept a part or all of the delinquent list submitted by the treasurer under sections 387 and 388 of the Tax Code.

I know of no authority given to the board of supervisors by any statute which authorizes such board to refuse to accept any part or all of these delinquent lists. The lists are simply submitted by the treasurer as required by the sections of the Tax Code I have mentioned, and no provision seems to have been made by statute for the board of supervisors to pass on the correctness of the lists.

Of course, if the board is of opinion that some items are improperly on the lists, it could discuss them with the treasurer, and I presume that officer would exert every effort to carry out the wishes of the board.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Erroneous Assessment—Duty of Commissioner of Revenue  
Where Building Destroyed.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 9, 1940.

HON. WM. M. SMITH,  
*Attorney for the Commonwealth,  
Cumberland, Virginia.*

MY DEAR MR. SMITH:

I am in receipt of your letter of April 8, from which I quote as follows:

"There is a tract of land that was assessed properly for 1930 with a building thereon, and was returned delinquent for that year. The latter part of year 1930, this building was consumed by fire and not rebuilt. The Commissioner of the Revenue has assessed this building for each and every year since that time, and the property has been returned delinquent and is still delinquent for years 1932, 1933, 1934, 1935, 1936, 1937 and 1938, and the tax is unpaid for year 1939.

"I wish to know whether or not the owner of the property should be permitted to redeem this property by paying all unpaid taxes on the land exclusive of the assessment against the buildings from year 1931 to the present time, plus the taxes on land and buildings that were properly assessed prior to that time, and yet unpaid."

I know of no authority that the clerk has to accept the unpaid taxes on the land exclusive of the assessment against the building in complete discharge of the taxes which have been assessed and which are now delinquent. It is entirely true that section 263 of the Tax Code provides for the commissioner of the revenue to reduce the assessment where buildings on the land are destroyed. Apparently the commissioner of the revenue has not acted under this section in the case you have before you. The commissioner having failed to act, I know of no remedy that the taxpayer has except that provided by section 414 of the Tax Code.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Exemption from—"Internal Improvements" Defined—Pri-  
vate School.**

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

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

DEAR MR. THOMPSON:

I have your letter of August 4, and regret that absence from the city has caused this delay in my reply.

You request my opinion as to whether the five-year exemption from local taxation provided for in chapter 119 of the Acts of 1930, which was enacted pursuant to, and follows the language of, section 189 of the Virginia Constitution, may be extended to a private school as an inducement for the location of such school in the county or town granting such exemption.

The statute referred to (arbitrarily designated by the compilers of Michie's Code of Virginia as section 435-b of the Tax Code) authorizes the granting of such exemptions to "manufacturing establishments and works of internal improvement."

The sole question presented, therefore, is whether private schools can be considered "works of internal improvement" within the meaning of this statute.

While the authorities do not afford a precise definition of the terms "internal improvement", or "works of internal improvement", it seems reasonably clear from expressions of our Court of Appeals and decisions in other jurisdictions, that these terms cannot be construed to include a private school.

In the case of *Shenandoah Lime Co. v. Governor*, 115 Va. 865, 80 S. E. 753, in construing a constitutional provision which prohibited State participation in "any work of internal improvement, except public roads", the court commented as follows on the meaning of this term as used in the Constitution and statutes of Virginia:

" \* \* \* Whatever interpretation that term may have elsewhere, it has no such meaning in Virginia, where for nearly if not quite one hundred years it has acquired a definite and well recognized meaning. Each of our Codes, beginning with that of 1819, to and including the Code of 1887, have had chapters entitled 'Works of Internal Improvement.' In using this term in article 185, the late Constitutional convention must be presumed, according to established rules of construction, to have used the term only in the definite sense and meaning that had attached to it throughout the history of the State. Its meaning as thus defined and understood throughout the legislation of the State, and the decisions of her courts, has included and had reference to the channels of trade and commerce, such as turnpikes, canals, railroads, telegraph lines, including in more recent years telephone lines, and other works of a like *quasi* public character. In the past these works, designated as 'works of internal improvement,' were sometimes constructed and operated by the State, but generally by corporations composed of private individuals, which, because of the public character of their work, always enjoyed the power of eminent domain, owed duties to the public and were subject to State regulation. \* \* \* " (115 Va. at 871-872.)

While I find no case in which the court has dealt specifically with the statutory and constitutional provisions here involved, I can conceive of no reason why the term "works of internal improvement" should be construed to have a substantially different meaning in this connection than the connotation attributed to the phrase as used in the constitutional provision construed in the *Shenandoah Lime Company Case*, *supra*.

Furthermore, in a case more nearly in point on its facts, the Supreme Court of Arkansas has squarely held that a constitutional provision authorizing county courts to appropriate funds "for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties", did not authorize an appropriation of county funds to secure the location within the county of even a public Agricultural School. *State v. Craighead County*, 114 Ark. 278, 169 S. W. 964.

It is my opinion, therefore, that the Virginia constitutional and statutory provisions for the five-year tax exemption to which you refer can hardly be construed to authorize extending such an exemption to a private school.

Cordially yours,

ABRAM P. STAPLES,  
Attorney General.

**TAXATION—Federal Employees Subject To.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 14, 1940.

MR. H. W. JOHNSON,  
*Commissioner of the Revenue,*  
*Prince George,*

MY DEAR MR. JOHNSON:

I am in receipt of your letter of May 11, with further reference to the liability to the State income tax of certain Federal employees living on Federal reformatory property located in Prince George county.

From the information furnished by you, it seems that this property on which these Federal employees live and work was acquired by the Federal Government under the authority of chapter 382 of the Acts of 1918 (Acts 1918, p. 568). This Act gave to the United States exclusive jurisdiction over the lands acquired thereunder.

I am, therefore, of opinion that Federal employees living and working thereon who have not established their domiciles in Virginia are not subject to the State income tax.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TAXATION—Immunity of Diplomatic and Consular Officials—Motor Fuel Tax.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 29, 1940.

HONORABLE M. S. BATTLE, *Director,*  
*Division of Motor Vehicles,*  
*Richmond, Virginia.*

DEAR COLONEL BATTLE:

You have requested the opinion of this office as to whether foreign diplomatic officers and foreign consular officers should be accorded exemption from the Virginia motor fuel tax. Your file on this matter includes a communication from the Honorable Cordell Hull, Secretary of State, addressed to the Governor of Virginia, in which communication a request is made that the Standard Oil Company of New Jersey be informed that the Virginia motor fuel tax on certain purchases of motor fuel made by Mr. Folke Wennerberg, Counselor of the Swedish Legation, who is now acting as Charge de Affairs ad interim of Sweden at Washington, D. C., need not be collected from Mr. Wennerberg. The Secretary of State, in this communication, also states that the Department of State plans to issue certificates of exemption together with identification cards to foreign diplomatic officials and consular officers of certain foreign countries and asks whether or not recognition can be given by the Commonwealth of Virginia to this proposed plan.

Under the principles of international law foreign ministers are accorded certain privileges and immunities from taxation, but they are not exempt from all taxes. The extent and basis of immunity of foreign ministers has been stated as:

"The person and personality of an ambassador, and the property belonging to him as a representative of his sovereign, are not subject to taxation; other-

wise no exemption from taxes or duties is accorded him as a matter of right; \* \* \* ." (2 C. J., section 24, page 1303.)

And:

"A foreign minister is privileged from being called upon to contribute personally to the general taxes of a country; that is, to such taxes as are levied by the government, and which are available for the general purposes of the State, in which the ambassador is not interested. But a foreign minister is not exempted from the payment of local dues which are raised for purposes of local administration, and which are expended on local objects, from which he himself, in common with his neighbors, derives immediate benefit. \* \* \* ." (Dr. Twiss, Law of Nations I, section 203.)

It would seem, therefore, that the question of whether foreign ministers are entitled to exemption from the Virginia motor fuel tax would depend upon the nature of the tax. The tax is required to be paid by dealers in motor fuel upon all motor fuel sold and delivered or used within the State of Virginia. The revenue derived from the tax is required to be used for the construction and maintenance of roads and highways in the State. Provision is made for the refund of the tax paid by persons who buy motor fuel but who use the same in some manner other than in the operation of motor vehicles upon the roads and highways of the State. It would seem that the Virginia motor fuel tax is not a property tax, that is, a direct tax upon motor fuel as such, but is in reality a privilege tax paid for the use of the highways of the State, measured by the amount of motor fuel purchased and used in the operation of motor vehicles upon such highways.

It is my opinion, therefore, that the Virginia motor fuel tax, being a privilege tax and not a tax upon the person or property of the individual using the fuel, does not fall within the law of nations concerning the privileges and immunities of ambassadors and ministers.

Consular agents are in an entirely different class of foreign representatives from ministers and other envoys in regard to their privileges and immunities, as well as in the functions they perform. Consular rights and immunities arise solely as the result of treaties and statutes, in the absence of which consular representatives are amenable to the laws of the State in which they reside.

The only treaty provision between the United States of America and the Kingdom of Sweden, which has been called to my attention as dealing with this question, is the following which is contained in a treaty proclaimed on March 20, 1911:

"Consuls-general, consuls, vice-consuls-general, vice-consuls, deputy consuls-general, deputy consuls, and consular agents, citizens of the State by which they are appointed, \* \* \* shall likewise be exempt from all direct taxes—national, State, or municipal—imposed upon persons, either in the nature of capitation tax or in respect to their property, unless such taxes become due on account of the possession of real estate, or for interest on capital invested in the country where said officers exercise their functions, or for income from pensions of public or private nature enjoyed from said country. \* \* \*."

In view of what has been said above concerning the nature of the Virginia motor fuel tax, it is clear that Mr. Wennerberg is not exempt from such tax by virtue of the above quoted treaty provision.

Of course, whenever there do exist treaty provisions of the United States which would have the effect of exempting the diplomatic and/or consular officers of a foreign country from the Virginia motor fuel tax, such treaty provision is controlling and must be respected by this State. However, we can find no provision in the Virginia law authorizing such a procedure as is embodied in the proposal of the Secretary of State with reference to the issuance of certificates of exemption and identification cards, even in cases where treaties provide exemptions.

The law does contain provisions [section 2154(215)-2154(216a)] for refunds of motor fuel taxes in certain cases where the legislature has decreed that no tax should be imposed. It would seem to be the intent of the legislature that in those instances where the dealer sells motor fuel, including the amount of the tax in the price paid by the purchaser, to persons upon whom the tax should not be imposed, such person should file a claim for refund with the Director of the Division of Motor Vehicles, who should allow the same.

It is my opinion, therefore, that, in those cases where consular officials are rightfully entitled to exemption from tax, he should apply for and be allowed a refund. The right of a consular officer to a refund would depend upon the particular treaty in force with the country which he represents, and is, therefore, a matter upon which I can express no general opinion.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### TAXATION—Junk Dealers.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 31, 1940.

HON. MARCUS A. COGBILL,  
*Attorney for the Commonwealth,  
Chesterfield C. H., Virginia.*

MY DEAR MR. COGBILL:

I am in receipt of your letter of May 27, from which I quote as follows:

"Junk canvassers solicit junk throughout Chesterfield County for the purpose of sale to junk dealers. These canvassers *do not buy or pay for* the junk. Are such canvassers required to have permits to so canvass?"

I am of opinion that, pursuant to section 182 of the Tax Code, these canvassers must have been appointed by the junk dealer for whom they canvass, in accordance with the second paragraph of the section. If they have been so appointed and the junk dealer has paid the license tax prescribed by the section, they may then canvass anywhere in the State.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### TAXATION—Limitation of Time of Collection—Constitutional Law—Proceedings to Collect Taxes.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 2, 1940.

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

MY DEAR GOVERNOR PRICE:

I am in receipt of your letter of April 2, forwarding a copy of House Bill No. 305, which, as you say, "limits the time within which any suit, action or other proceeding may be commenced for the collection of taxes or levies assessed on tangible

personal property." The Bill is further confined to county, city and town taxes upon tangible property.

You ask whether, in my opinion, there are any constitutional objections to the Bill, and I assume that you desire an immediate reply.

Within the limited time for study at my disposal, the only section of our Constitution which could be reasonably argued to bear on this question is section 174, providing in part that "after this Constitution shall be in force, no statute of limitations shall run against any claim of the State for taxes upon any property \* \* \*." However, our Court of Appeals has held that the prohibition contained in this section of the Constitution against a statute of limitations for claims for taxes "is clearly confined to State taxes". *Commonwealth v. United Cigarette Machine Company*, 120 Va. 835, 843. Indeed, from such investigation as I have been able to make, it seems that, in the absence of constitutional prohibition, the validity of statutes imposing limitations within which taxes may be collected is generally accepted.

In my opinion, therefore, there is no valid constitutional objection to House Bill No. 305.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### TAXATION—Lodging House License—When Required.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 5, 1940.

HONORABLE DAVID NELSON SUTTON,  
*Commonwealth's Attorney,  
West Point, Virginia.*

MY DEAR MR. SUTTON:

I am in receipt of your letter of February 3, from which I quote as follows:

"Will you please advise me whether or not a person who does not furnish rooms but who has four or five people as regular boarders in the home should take a license as operator of a lodging house, or any other license, for the purpose of furnishing only table board?"

This office has heretofore expressed the opinion, concurred in by the State Department of Taxation, that a regular boarding house which does not furnish meals or lodging to transients is not subject to the State license imposed upon lodging houses by section 186 of the Tax Code of Virginia. If, however, the proprietor of the house that you have in mind does furnish meals to transients, then the lodging house license is applicable.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### TAXATION—Non-Compliance With Statute—Validity of Levy.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 15, 1940.

HON. L. B. MASON, *Clerk,  
King George, Virginia.*

MY DEAR MR. MASON:

The State Tax Commissioner has referred to this office your letter of April

9 addressed to him, with the request that I write you direct. In that letter you state :

"I am just in receipt of your letter of the 5th instant, advising me the change in section 288 of the Tax Code of Virginia, which went into effect on March 5, 1940, and in reply will say that the board of supervisors of this county, not knowing about this change, fixed upon their regular meeting in May, which is May 2, 1940, for the approval of the county budget and fix the amount of the county levy.

"As the budget has been published for approval at the May meeting of the board, will you kindly advise me the best way to proceed in this matter?"

Section 288 of the Code, as amended, provides that the county and district levies shall be fixed by the board of supervisors not later than their meeting in April.

This office has heretofore had occasion to consider the effect of this amendment of section 288 of the Tax Code, and has expressed the opinion that under the circumstances a levy fixed this year by the board of supervisors at their meeting in May would not be held to be invalid. The question does not seem to have directly been passed upon by our Court of Appeals, but the section in question was discussed in *Smith v. Board of Supervisors of Washington County*, 155 Va. 343, 351, 352. However, kindred questions are discussed at some length in 26 R. C. L., at page 355. I quote below from this authority :

"The statutes in almost all of the states provide in considerable detail how the work of assessing the taxes shall be performed; but compliance with all these provisions in exact conformity to the law is not necessarily a condition precedent to a valid tax. All those provisions which are intended for the security of the citizen, for insuring an equality of taxation and to enable everyone to know with reasonable certainty for what real and personal estate he is taxed and for what all those who are liable with him are taxed are conditions precedent and if they are not observed he is not legally taxed; but many regulations are made by statute, designed for the information of assessors and other officers and intended to promote method, system and uniformity in the modes of procedure, the compliance or non-compliance with which in no respect affects the rights of tax-paying citizens. Such provisions may be considered directory merely, and non-compliance with them does not affect the validity of the tax. In the former class falls a failure of the assessors to deposit in the proper place a list of the persons taxed and a statement of the taxes on their property or a failure of the assessors to state in their certificate that they have assessed the property at its true cash value or a failure of the assessors to take the oath of office. It is held by the weight of authority that an assessment expressed in figures without any indication to show that the figures represent the number of dollars of the assessment is void for uncertainty. A provision that tracts of land shall be listed in one table and town lots in another is directory merely, and a failure of the assessors to comply therewith does not invalidate the assessment and the same is true of a provision requiring a separate listing of the property of white and colored persons, or of a provision requiring the records to be kept in books, when in fact they are kept on separate sheets of paper. A tax will not be held invalid because it does not appear that the returns of the election at which the question of levying the tax had been submitted to the people has been canvassed by the officers designated by law for the purpose, if it is shown that in fact the vote was in the affirmative. \* \* \* "

It is reasonably plain, in my opinion, that the requirement concerning the time within which the levy shall be made is not a condition precedent to the validity of the levy, but is directory for the purpose of promoting "method, system and uniformity".

My conclusion is that a levy fixed this year by your board of supervisors at its meeting in May, assuming the other requirements of the pertinent statutes are complied with, will be valid.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Property Subject to Lien.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., June 7, 1940.

MR. V. I. G. HAMPTON,  
*Deputy Commissioner of the Revenue,  
Galax, Virginia.*

MY DEAR MR. HAMPTON:

I am in receipt of your letter of May 31, from which I quote as follows:

"If a man buys a car, furniture, or anything of personal property, and it is financed by a finance company, should they list this property for taxation if they had same on January 1, 1940?"

I am of opinion that the property, if in the possession of the taxpayer on January 1, 1940, should be by him reported for taxation. The fact that a finance company may have a lien on the property does not relieve the owner from taxes thereon.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Publication of Increased Levy.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 22, 1940.

HONORABLE C. CARTER LEE,  
*Attorney at Law,  
Rocky Mount, Virginia.*

MY DEAR MR. LEE:

I am in receipt of your letter of March 20 with reference to the number of times that a proposed increase in a local tax levy must be published pursuant to section 2577m(4) of the Code.

I have read this section and it seems to me plain that only one publication is necessary, so long as the other requirements of this section are met. There is nothing in this section to indicate that there must be more than one publication. I note that this is also your opinion.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Recordation of Conveyance.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 10, 1940.

HON. A. H. CRISMOND, *Clerk,*  
*Circuit Court of Spotsylvania County,*  
*Spotsylvania, Virginia.*

MY DEAR MR. CRISMOND:

I refer to your visit to this office with reference to the recordation tax to be imposed on a deed between the City of Fredericksburg and the Kenmore Hosiery Company, Inc. I have examined this deed and on its face it is simply a deed from the City conveying real estate to the Company. While it may be that a deed of release could have been executed, yet the deed is not a deed of release, but a simple conveyance. I can find nothing in section 121 of the Tax Code of Virginia which exempts the recordation of this deed from the tax imposed by the section.

I observe that it has been stated to you that the property was originally conveyed to the City of Fredericksburg to secure a debt due the City by Amaret Building Corporation, and that the deed you enclosed is merely a release of the debt. However that may be, the deed on its face is a conveyance of real estate and the statute affords no exemption of the tax.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Recordation of Conveyance Taxable.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., March 27, 1940.

HON. J. W. BAKER, *Clerk,*  
*Circuit Court of Frederick County,*  
*Winchester, Virginia.*

MY DEAR MR. BAKER:

I am in receipt of your letter of March 23, enclosing a copy of an instrument between Carl F. Massey and William P. Massey, parties of the first part, and Ruth Farley Massey, party of the second part.

It seems to me that this instrument is in reality a conveyance by the parties of the first part of their candy business for a consideration of \$28,637.65. Although the instrument is called a contract, its real effect, it seems to me, is that of an outright conveyance of personal property for the consideration named.

Under this construction of the instrument, I am constrained to be of the opinion that, if it is desired to record it, its recordation is taxable under the first paragraph of section 121 of the Tax Code, the measure of the tax being the consideration, inasmuch as that is greater than the value of the property conveyed.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Recordation Tax—Where Grantor to Federal Instrumentality.**

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

HONORABLE GEORGE T. TYSON,  
*Clerk of the Circuit Court,  
Eastville, Virginia.*

MY DEAR MR. TYSON:

Your letter of September 28th, addressed to the Honorable LeRoy Hodges, has been referred to this office. You asked "whether or not State Tax should be charged upon deeds made by the Federal Farm Mortgage Corporation, and also the Federal Deposit Insurance Corporation, conveying real estate".

In such a case, the person offering the deed for recordation is naturally the grantee therein and this is the person who will pay the tax. In my opinion, therefore (and I have heretofore so ruled), the fact that the grantor in the deed is a Federal instrumentality does not relieve the grantee from paying the recordation tax imposed by section 121 of the Tax Code of Virginia.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Refund to State of Federal Tax on Tires Assembled on Automobiles.**

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

HON. P. E. KETRON, *Director,  
Division of Purchase and Printing,  
State Office Building,  
Richmond, Virginia.*

MY DEAR MR. KETRON:

I refer to my several conversations with Mr. Grubbs relative to the possibility of Virginia receiving credit for the Federal excise tax on the manufacturers of tires and inner tubes where such tires and tubes are assembled on an automobile chassis purchased by the State of Virginia.

I have given careful consideration to this possibility and have had some correspondence with Mr. N. K. Haig, Director of Government Sales of the General Motors Sales Corporation. The existing Federal statutes on the question of credits and refunds reads in part as follows:

"Section 620. Tax-Free Sales. Under regulations \* \* \* no tax under this title shall be imposed with respect to the sale of any article—

\* \* \* \* \*

"(3) for the exclusive use of the United States, any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia."

"Section 621. Credits and Refunds. (a) A credit against tax under this title, or a refund, may be allowed or made—

\* \* \* \* \*

"(3) to a manufacturer, producer, or importer, in the amount of tax paid by him under this title with respect to the sale of any article to *any vendee*, if the manufacturer, producer, or importer has in his possession such evidence as the regulations may prescribe that on or after October 1, 1935.

"(A) such article was, by *any person*—

"(i) resold for the exclusive use of the United States, any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia;" (*Italics supplied*).

The ruling of the Treasury Department is that the sale of automobile chassis, equipped with tax paid tires, to a governmental agency is not such a resale of tires as is contemplated by the above quoted sections. The reasoning behind the ruling is that to obtain credit the tires must be resold as such and not as a part of an automobile chassis equipped with tires.

It may be of interest to you to know that I am informed that, where the Federal Government purchases automobile chassis equipped with tires, no credit is given for the excise tax on tires.

I have reached the conclusion that the language of the pertinent statutes supports the regulation of the Treasury Department and that we could not reasonably expect to accomplish anything by pursuing the matter further. It is my opinion, where a statute speaks of an article of merchandise being "resold", the better view is that the proper construction is that the word "resold" means resold as such and not as a part of a manufactured or assembled product. You will further observe that the credit in the case of a purchase by the State is given "under regulations" of the Treasury Department, and my view is that the language of the statute supports the regulation which appears to be now in effect. It may be, if appropriate arrangements could be made with the automobile manufacturer, this credit could be obtained by purchasing only the automobile chassis and making a separate purchase of the tires from the tire manufacturer. Whether or not this is practicable or will result in any net saving, I leave for your consideration.

Very sincerely yours,

W. W. MARTIN,  
*Asst. Attorney General.*

#### TAXATION—Retail Merchants License Tax.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 23, 1940.

HON. R. NELSON SMITH,  
*Attorney for the Commonwealth,  
Yorktown, Virginia.*

MY DEAR MR. SMITH:

I am in receipt of your letter of April 22, in which you inquire as to license tax liability of a retail merchant in York county. It appears that the merchant sells a small amount of articles which she manufactures and, in addition, sells other merchandise purchased by her for resale.

Section 188 of the Tax Code, dealing with the license tax liability of retail merchants, reads in part as follows:

"Every person, firm and corporation engaged in the business of a retail merchant shall pay a license tax for the privilege of doing business in this State to be measured by the amount of sales made by him or it during the next preceding year, and all goods, wares and merchandise manufactured by such merchant and sold in this State, as merchandise, shall be considered as sales within the meaning of this section; provided, that this section shall not

be construed as applying to manufacturers taxed on capital by this State, who sell at the place of manufacture, goods, wares and merchandise manufactured by them."

You state that the merchant in question is not taxed on capital.

I am of opinion, therefore, that she should report her entire sales as the basis of her retail merchant's license tax.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TAXATION—Retroactive Income Tax.  
Constitutional Law—Due Process—Retroactive Tax As.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 10, 1940.

SENATOR AUBREY G. WEAVER, *Chairman,*  
*Senate Finance Committee,*  
*Richmond, Virginia.*

DEAR SENATOR WEAVER:

This is in response to a request from your Committee for the opinion of this office upon the question of the constitutionality of House Bill No. 96. This Bill proposes to amend and re-enact sections 24 and 31 of the Tax Code of Virginia, as heretofore amended in relation to income taxes.

Under the present provisions of said section 24, "gross income" does not include "salaries, wages and other compensation received from the United States by officers or employees thereof, and pensions received from the United States or this State". The effect of the amendment is to include as "gross income" such salaries, wages and other compensation, and also pensions received from the United States or this State, unless same are "on account of military or naval service in armed forces, whether such service was rendered by the recipient of the pension or by a relative by blood or marriage".

The Bill provides further that these amendments shall apply to and be in force for the taxable year 1939, and for every year thereafter until otherwise provided by law.

Employees of the District of Columbia, as well as members of legislative bodies, judges and officers of courts, and persons in the armed forces are likewise included in the provisions requiring their compensation to be included as "gross income".

The particular provisions of the Bill which would make the State income tax applicable to the items aforesaid for the taxable year 1939 have been challenged by persons before the Senate Finance Committee as violative of due process of law because of their retroactive effect. It is true that the effect of the Bill is to eliminate deduction from "gross income" for the year 1939 of the items referred to. However, in my opinion, it is clear that this retroactive affect does not render the statute unconstitutional.

It is unnecessary to burden the Committee with a citation of numerous cases, but I will call attention to the recent case of *Welch v. Henry*, 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87, and to annotations on the subject contained in 109 A. L. R. 523; 11 A. L. R. 518; 118 A. L. R. 1153.

In *Welch v. Henry*, *supra*, which involved the validity of retroactive income tax imposed by the State of Wisconsin, the Supreme Court of the United States, in sustaining the validity of the tax, quoted from a previous case (*Stockdale v. Atlantic Insurance Co.*, 20 Wall. 341), which involved the validity of a retroactive Federal income tax, in which former case Mr. Justice Miller said: "The right of Congress to have imposed this tax by a new statute, although the measure of it was

governed by the income of the past year cannot be doubted; \* \* \* no one doubted the validity of the tax or attempted to resist it".

Not only the opinions of the Supreme Court of the United States, but those of many state courts cited in the annotations above referred to, leave no doubt in my mind as to the validity of the provisions contained in House Bill No. 96.

Yours very truly,

ABRAM P. STAPLES,  
*Attorney General.*

### TAXATION—Situs of "Floating" Personalty—Automobiles.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *February 14, 1940.*

MR. N. E. SEMONES,  
*Commissioner of the Revenue,  
Hillsville, Virginia.*

MY DEAR MR. SEMONES:

I am in receipt of your letter of February 12, from which I quote as follows:

"Mr. Everett Benton Padgett owns his home in Carroll County and works for the Norfolk and Western Railway Company in Roanoke, Virginia. He boards and rooms four or five days per week in the corporation limits of the city of Roanoke, and on each week end, he returns to his home at this place, where he is assessed with his real estate and personal property and capitation taxes.

"He owns an automobile which has heretofore been assessed in Carroll County, and taxes paid on the same in Carroll County along with other taxes assessed against him. The authorities in Roanoke have been after him demanding that he pay personal property tax on his automobile in the city of Roanoke.

"Can Mr. Padgett be required to pay personal tax on his automobile in the city of Roanoke on the state of facts above given?"

Difficulties arise in many cases with reference to the situs for taxation of tangible personal property where this property is "floating" so to speak, such as automobiles and vessels. Each case has to be determined upon the basis of its own particular facts, and you do not give sufficient facts to enable me to categorically answer your question. For example, you do not state whether the owner of the automobile in question drives it to his home on week-ends and keeps it there at those times, nor do you state, although I assume that it is the case, whether the automobile is continuously kept in Roanoke during the week days.

As a general principle however, I can advise you that in the case of floating tangible personal property such as this, where no permanent situs has been established for the property at any other place than the domicile of the owner thereof, I am of the opinion that such property is taxable to the owner at his domicile. From the facts that you present, I am inclined to be of the opinion that no permanent situs for this automobile has been established in Roanoke and that, therefore, it is taxable at the owner's legal residence in Carroll County. However, I remind you that facts might exist in this case that would alter this conclusion.

Our Supreme Court of Appeals has discussed this question of the taxation of floating tangible personal property rather elaborately in the case of *Newport News vs. Commonwealth*, 165 Va. 635. The opinion in this case is available to you in the office of some lawyer of your acquaintance, and I suggest for your information that you read it. When you apply the principles laid down by our court in this case to

the facts in the case you have before you, I believe you will have no difficulty in reaching the correct solution.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TORTS—Liability of State Agencies For.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 27, 1940.

HONORABLE N. CLARENCE SMITH, *Chairman,*  
*Virginia Conservation Commission,*  
*Richmond, Virginia.*

DEAR MR. SMITH:

In your letter of May 11, you ask if any liability would rest upon the State, the Virginia Conservation Commission, or the Division of State Parks for injuries suffered by tourists and vacationists in the recreational areas operated by the Conservation Commission.

You state that the Commission furnishes directly to the tourists certain facilities, such as cabins, riding trails, etc., for a charge. Other facilities, such as restaurant facilities, and bathhouse facilities are furnished the tourists by concessionaires who pay, as rental to the State, a certain percentage of their receipts. In one park it is contemplated that a boat owned by the Commission shall be leased to the concessionaire.

You ask if the State, the Commission, or the Division of Parks would be liable for injuries to the tourists arising from the use of facilities for which the State itself receives direct payment or for injuries arising from the operations of the concessionaire.

The Virginia Conservation Commission and its subdivision, the Division of State Parks, are State agencies and in legal contemplation arms of the State. I have frequently expressed the opinion that neither the State nor any of its governmental agencies is liable for any negligent injury to any person or for any tort committed by such agencies or its employees. It is my opinion that no liability would attach to the State, the Conservation Commission, or the Division of State Parks as a result of injuries to any person arising from the use of facilities furnished directly by the State, or arising from the operations of the concessionaires in the various State recreational areas. Therefore, I see no necessity for securing insurance covering public liability.

Of course, if injuries result to any person as a result of the negligence of any individual officer, agent, or employee of the State, such officer, agent, or employee would be individually liable, but no liability would attach to the State or its agencies.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TORTS—Visitors to Penitentiary—Waiver of Liability.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 21, 1940.

MAJOR RICE M. YUELL, *Superintendent,*  
*The State Penitentiary,*  
*Richmond, Virginia.*

DEAR MAJOR YUELL:

You have asked if the officials, guards, and employees of the State penitentiary would be relieved from liability for personal injuries suffered by minor students

or other persons visiting the penitentiary as a result of the negligence of such officials, guards, or employees, if the visitors are required to sign an agreement waiving any right of action they may have as a result of such negligence.

In my opinion such a waiver signed by adults in consideration of their being admitted as visitors to the penitentiary would be valid and would have the effect of relieving the individual officials, guards, or employees of liability for injuries caused by their negligence. However, due to the fact that contracts made by minors may be avoided by them, a waiver of negligence signed by a minor would have no binding effect.

To protect the officials, etc., from suit by minors as well as adults, an enactment of the legislature providing that no visitor to the penitentiary should have any right of action against the officials, guards, or employees of the penitentiary for personal injuries received while a visitor therein as a result of the negligence of such officials, etc., would be necessary. Such a law would, in my opinion, be valid.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### TOURIST CAMPS—Duties of Dept. of Agriculture.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 15, 1940.

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

MY DEAR MR. LAPSLEY:

This will acknowledge receipt of your letter of May 10, in which you refer to the so-called Quesenberry Law, relating to the maintenance and operation of tourist camps passed at the last session of the General Assembly (Acts 1940, p. 272). You then state that section 3, subsection (b), of the Act provides "that the officers and employees of the Department of Agriculture, the health and sanitation officers and the officers and employees of the Department of Health or health unit shall have access to all tourist camps at all reasonable hours." You then ask me to advise you what duties, if any, are required of the Department of Agriculture under the terms of this law.

The only reference to the Department of Agriculture in the Act is, as you state, in subsection (b) of section 3. This reference is as follows:

"Each tourist camp in this State shall at all reasonable hours be open to inspection by the officers and employees of the Department of Agriculture."

I cannot find that the Act places any additional duties upon the Department of Agriculture in connection with the Act, and so I must assume that the permission given its officers and employees to inspect tourist camps is for the purpose of enabling the Department to enforce such other laws as the Department may be required to enforce which are applicable to such tourist camps.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TRADE MARKS—Descriptive Word.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., July 10, 1939.

HONORABLE RAYMOND L. JACKSON,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR MR. JACKSON:

I have considered your letter of June 27, enclosing certain correspondence between your office and the Midas' Research Bureau with reference to an application recently filed in your office for registration of a trade mark.

The application in question submitted for registration of the word "SOFT", to be used as a trade mark for an extensive line of cosmetics. Your file shows that you have once rejected this application on the ground that the term "SOFT" is descriptive of the goods in question, or of the quality of such goods, within the meaning of Virginia Code (Michie 1936) section 1458-a, which provides that "The Secretary of the Commonwealth shall not register as a trade-mark \* \* \* any mark \* \* \* which consists merely in words which are descriptive of the merchandise with which they are used or the character or quality of such merchandise."

Since the word "SOFT" is undoubtedly intended to attribute to the cosmetics in question a quality of making the skin soft, and therefore is, in one sense at least, "descriptive" of the "character or quality of such merchandise", it is my opinion that you are legally justified in adhering to your original decision that this mark is not subject to registration under our statute.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TRADE MARKS—Geographical Terms.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 29, 1940.

HONORABLE RAYMOND L. JACKSON,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR MR. JACKSON:

Re: Application of David Pender Grocery Company for registration of trade mark.

I have your letter of May 10, enclosing your file of correspondence with reference as to the above matter. The applicant wishes to register as its trade mark the word "Commonwealth," to be used in connection with the sale of eggs. You request my opinion as to whether this application should be granted in view of Code section 1458-a, which prohibits the registration of "merely geographical name or term."

It seems to me extremely doubtful whether the term "Commonwealth," as so used, would have any geographical significance to the public. This being true, it is my opinion that the applicant should be given the benefit of the doubt and that the application should be granted.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

## TRADE MARKS—What Constitutes—"Glass House Restaurant."

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 17, 1940

HONORABLE RAYMOND L. JACKSON,  
*Secretary of the Commonwealth,  
Richmond, Virginia.*

DEAR MR. JACKSON:

Re: The Interstate Company—Application for Registration of Trade-mark.

I have recently received from Messrs. David and Fainman of Chicago, Illinois, as counsel for the applicant, certain information which I had requested concerning the above matter, and am now in a position to give the advice requested in your letter of November 22, 1939.

It appears that The Interstate Company, an Illinois corporation, is engaged in the business of operating restaurants and lunch rooms throughout the United States. The restaurant buildings are all of the same general design, employing glass brick construction, and each operates under the name of "The Glass House Restaurant."

The company has filed with you two applications for the registration of a trade-mark under the provisions of Virginia Code (Michie 1936) Chapter 61. The device sought to be registered under each application is simply a photograph of a building of the design referred to, bearing the name "The Glass House Restaurant."

The first of these applications describes the merchandise in connection with which such trade-mark will be used as follows:

"Coffee, food products, miscellaneous foods and ingredients of foods, and advertisements, labels, prints, and printed matter of all kind advertising the same."

The second application states that this trade-mark is to be used upon:

"Buildings, store fronts, store front designs, and advertisements, prints, and printed matter of all kind advertising the same."

I have previously expressed the opinion that our trade-mark registration law authorizes the registration of only such marks, devices, etc., as were recognized as trade-marks at common law—*i. e.*, arbitrary symbols or devices used by the manufacturer or distributor of vendible commodities to identify his products and distinguish them from similar products manufactured or sold by others.

Accordingly, I have heretofore advised your predecessor in office that a mark or device used by a restaurant in connection with food served to its guests is not, in my opinion, subject to registration. In such a case it is apparent that the thing actually sought to be protected is not a trade-mark but the trade name of the restaurant, as to which our laws leave the proprietor to his common law and equitable remedies against unfair competition, unaided by statute.

It follows that the present applications should be rejected unless and until amended so as to show that the device sought to be registered has been actually adopted and used for the purpose of identifying some vendible commodity which is placed on the market by the applicant, and which might otherwise be mistaken for the product of another.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TREASURER—Employment of, to Collect Delinquent Taxes.****OFFICERS—Compatibility of—Treasurer As Attorney to Collect Delinquent Taxes.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *September 13, 1939.*

HON. G. M. WEEMS,  
*Treasurer of Hanover County,  
Ashland, Virginia.*

MY DEAR MR. WEEMS:

I am in receipt of your letter of recent date, in which you ask the following question:

"I would appreciate your advising me whether or not the designation of myself as the attorney to act in the collection of delinquent taxes under section 403 of the Tax Code would be in violation of section 2702 of the Code of Virginia. Anything done by me under section 403 would be without additional compensation, and I am, of course, a practicing attorney."

In my opinion, your employment as attorney to bring suits for the collection of taxes is not in conflict with section 2702 of the Code, as I do not think that an attorney employed to bring an action on behalf of the Board of Supervisors can be said to be an officer. I observe that you state that these suits are to be brought by you without additional compensation.

As to the resolution which the Board of Supervisors should pass directing you to bring these suits, I am of opinion that it should be more specific than the one you suggest in the second paragraph of your letter, especially in view of your position as Treasurer. I think it would be well for the resolution to specifically state, for example, for what years' delinquent taxes you are to proceed under section 403, or, if the Board does not desire to confine your activities to designated years, then it would seem to me advisable that the Board should list the taxpayers against whom the proceedings are to be instituted or designate the taxpayers in some plain and unambiguous manner.

The employment of a treasurer to bring suits for delinquent taxes under section 403 of the Code is unusual, and I know of no county in which it has been done but, where no additional compensation is paid the treasurer for this service, I can think of no legal objection to the practice.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TREASURERS—Liability of For Honoring Warrants.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 27, 1940.*

HON. HOWARD E. COLE,  
*Treasurer of Loudoun County,  
Leesburg, Virginia.*

MY DEAR MR. COLE:

I am in receipt of your letter of March 19, in which you inquire as to your liability in honoring a warrant of the board of supervisors for the payment of the salary of the sheriff in the assumed case (in your opinion) where the board of supervisors has increased the salary of the sheriff contrary to the provisions of

law. I take it that the warrant in all respects complies with the provisions of sections 2724 and 2724-a of the Code, relating to allowance of claims and issuance of county warrants. The legal effect of your question is to inquire as to your responsibility in passing upon the validity of the action of the board of supervisors in increasing the sheriff's salary.

Section 2726 of the Code authorizes the board of supervisors "to determine what annual allowances, payable out of the county treasury, shall be made severally to the sheriffs \* \* \* of their respective counties." It is plain, therefore, that the board of supervisors has the jurisdiction to fix the salary of the sheriff.

It is well settled that, for reasons of public policy, fiscal officers are held to a very strict liability for public funds entrusted to their care. However, I seriously question whether on principle this doctrine would be extended so far as to hold that a treasurer is personally liable for funds paid out under a warrant of the board of supervisors complying in all respects with the sections of the Code relative to the issuance of such a warrant and issued for a purpose concerning which the board of supervisors had jurisdiction to act.

The liability of a treasurer has been considered by your Court of Appeals in the case of *Leachman v. Board of Supervisors*, 124 Va. 616. I quote below from the opinion (pages 624-625):

"Quite a number of cases have also been cited to sustain the proposition that the treasurer is a mere disbursing officer, and has no right or power to question the action of the board of supervisors, or to go behind it, but is bound to pay warrants drawn upon him by the board. Undoubtedly the treasurer has no supervisory power over the board to determine the validity of accounts allowed by the board. He cannot refuse to pay claims for which warrants have been legally issued, simply because he thinks they are not just or lawful, nor for any other reason which has been passed upon by the board where it had the power to act. If the matter is within the jurisdiction of the board, and the board has acted upon the claim and issued a legal warrant therefor, it is plainly the duty of the treasurer to pay it. It will be unnecessary to examine these cases, as the legal proposition involved is not in controversy, but only its application. In the case in judgment, the claims had not been passed upon by the board and no legal warrants therefor had been issued, so that no such question is involved as that determined by the cases referred to."

Upon consideration, I am of opinion that, where a warrant meets the requirements I have mentioned, there is no personal liability upon the treasurer in honoring such a warrant, even though he may be of opinion that the board of supervisors probably acted contrary to law.

I take it that in the case you present you are of opinion that the board of supervisors has so plainly exceeded its authority in fixing the salary of the sheriff that the question is hardly debatable. In such a situation the question of your liability might be a close one.

I realize that the matter is an important one to you and I, therefore, suggest that it be passed upon by your court in an appropriate proceedings instituted for the purpose. I suggest for your consideration that you might ask the court for a declaratory judgment, or that you might refuse to honor the warrant and, in this event, the question could be determined in mandamus proceedings brought against you directing you to honor it.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TREASURER—Premium on Deputy's Bond—By Whom Paid.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *March 18, 1940.*

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

MY DEAR MR. ROSS:

I am in receipt of your letter of March 15, from which I quote as follows:

"The Treasurer of Madison County gave as surety on his Treasurer's bond the American Bonding Company which complied with the order of the Court. The premium was paid two-thirds by the county and one-third by the Commonwealth.

"The Treasurer has now required a bond of his deputy and submitted cost of premium to the Board of Supervisors in the proportions as stated above. The Board is objecting to the payment of premium on deputy's bond on the grounds that they feel they have fully complied with the statutes in the payment of the premium of the Treasurer's bond. The Board is of the opinion that the matter of the deputy's bond is between the Treasurer and the deputy."

It seems to me that the Board of Supervisors is correct in its position, as I can find no statute authorizing the payment of the premium on a deputy treasurer's bond by the county and State.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TRIAL JUSTICE—Admitting to Bail—Fee.**

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

HON. L. H. SHRADER,  
*Trial Justice,*  
*Amherst, Virginia.*

MY DEAR MR. SHRADER:

I am in receipt of your letter of November 6, from which I quote as follows:

"I am advised that it has been the custom of the Trial Justice of Amherst County when he admits to bail a person while he is on the bench to charge \$1 bail fee. This custom has been challenged by several lawyers in Lynchburg, citing section 4829(a) of the Code of Virginia. Please advise me whether or not a trial justice when sitting in court or just preceding his court should charge and collect a fee of \$1 for letting a person to bail."

Section 4987-m of the Code (Michie, 1936), providing what fees are taxable and chargeable by a trial justice, reads in part as follows:

"For admitting any person to bail, including the taking of the necessary bond, one dollar, which shall, notwithstanding other provisions to the contrary, be collected at the time of admitting the person to bail."

As you know, section 4987-m is a part of the State-wide Trial Justice Act enacted in 1936.

Section 4829-a of the Code, to which you refer, was last amended in 1930, and to the extent that it is inconsistent with section 4987-m I am of opinion that the latter section prevails. It seems plain, therefore, that by express authority of statute a trial justice may charge a fee of \$1 for admitting a person to bail.

Trial justices receive a salary and do not personally retain the fees taxed in their courts, such fees being distributed as provided in section 4987-m. The purpose of the provision in section 4829-a, relied on by the attorneys you mention, in my opinion was to prohibit an officer personally receiving and retaining a fee for performing a service which he is paid a salary to perform. However, since a trial justice in no case personally retains the fees taxed by him, this argument does not apply in the case of that officer charging the fee specified in section 4987-m for admitting a person to bail.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### TRIAL JUSTICES—Authority of, to Try Upon Notice of Motion.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 28, 1930.

HON. R. P. BRUCE,  
*Trial Justice,*  
*Wise, Virginia.*

MY DEAR MR. BRUCE:

I am in receipt of your letter of August 23, from which I quote as follows:

"I have a case pending before me as Trial Justice for Wise County by notice of motion, in which the defendant has filed motion to dismiss because the action is by notice of motion, and claims that section 6046a has been declared unconstitutional by the decision of the Supreme Court of Appeals in the case of *Shulman v. Sawyer*, 167 Va. page 386.

"I am writing to ask what has been the construction placed on section 6046a of the Code of Virginia in view of the decision of the Supreme Court of Appeals in *Shulman v. Sawyer*, above referred to, and whether or not that whole section is invalidated."

Specifically answering your question, I beg to advise that, so far as I know, there has been no construction placed on section 6046a of the Code of Virginia by any court of record since the decision in the case of *Shulman v. Sawyer*, 167 Va. 386.

I may say also that this office has almost uniformly taken the position that it should not express an official opinion in a case which is actually pending before a court for decision. However, I do not feel that I would be exceeding the bounds of propriety by calling your attention to the fact that *Shulman v. Sawyer*, *supra*, involved a proceeding before a Civil Justice of the City of Norfolk, which proceeding, it was contended, was authorized by section 6046a of the Code. I made the suggestion to you that the Trial Justice of a county is not dependent upon section 6046a of the Code for his authority to hear a case upon a notice of motion for judgment. The State-wide Trial Justice Act itself, which was re-enacted in its entirety in 1936 (Acts 1936, page 615) provides (paragraph 4 of section 4987f of the Code) that a civil action within the jurisdiction of a Trial Justice may be brought "by warrant or notice of motion \* \* \* ." Here, therefore, would seem to be authority for use of a notice of motion in civil cases before a Trial Justice, independent of section 6046a.

I also refer you to numbered paragraph 8 of section 4987i of the Code, relating to the procedure before a Trial Justice in civil cases, and then to section 6020 of the Code, and particularly the second paragraph thereof.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TRIAL JUSTICES—Clerks of—Issuance of Process.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 16, 1940.*

HONORABLE HUBERT D. BENNETT,  
*Trial Justice,*  
*Pittsylvania County,*  
*Chatham, Virginia.*

DEAR JUDGE BENNETT:

I have your letter of April 8, requesting my opinion as to whether the clerk of a trial justice court has power to issue a summons in garnishment.

Under the Trial Justice Act, Virginia Code (Michie 1936) sections 4987a-4987p, the various kinds of civil and criminal processes which may be issued by the trial justice himself are specifically enumerated, and summonses in garnishment are expressly included. Code section 4987-f, par. (6).

As to the issuance of process by the clerk, the statute merely provides in general terms that "such clerk \* \* \* may within the jurisdiction, territorial and otherwise, of such trial justice, issue warrants and processes original, mesne and final, both civil and criminal \* \* \* ." Code section 4987-g.

In my opinion, this latter section was intended to confer on the clerk power to issue any of the forms of civil and criminal processes specifically mentioned in the preceding section, including summonses in garnishment.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TRIAL JUSTICE—Finality of Judgment—Reduction of Sentence.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *August 22, 1939.*

HON. A. J. TAVENNER,  
*Trial Justice,*  
*Winchester, Virginia.*

MY DEAR MR. TAVENNER:

I am in receipt of your letter of August 19, in which you state that a person was convicted by you of a second offense for drunken driving, and that you imposed a sentence of four months in jail and \$100 fine and costs. I gather from your letter that the time for appeal has expired, and you desire to know whether you can now reduce the sentence to one month of confinement in jail.

You call my attention to that portion of section 4722 of the Code which provides that "no court shall suspend the sentence in any such case", referring to the second offense under that section, which deals with drunken driving.

Under the circumstances stated by you it appears to me that your judgment has become final. Indeed, under date of November 8, 1937, in an opinion to the

Trial Justice of Franklin County I expressed the view that the judgment of a trial justice becomes final in a criminal case when the said judgment is actually entered on the warrant under which the defendant is tried. You are, of course, familiar with section 4987-1 of the Code, which provides that trial justices shall enter in the docket all cases tried and prosecuted and all matters coming before him and the final disposition of the same. The judgment of the trial justice in a criminal case having become final, I know of no authority which that officer has to reduce the sentence which was imposed at the trial.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

### TRIAL JUSTICE—Jurisdiction—Misdemeanors and Felonies.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., November 17, 1939.

JUDGE C. S. TOWLES;  
*Trial Justice,*  
*Reedville, Virginia.*

MY DEAR JUDGE TOWLES:

I have your letter of November 15, and concur in your view that a trial justice has no jurisdiction to try a person charged with violating the statute you refer to. Section 4758 of the Code, which defines felonies and misdemeanors, provides as follows:

"Offenses are either felonies or misdemeanors. Such offenses as are *punishable* with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors."

You quote the following from the statute prescribing the penalty for the crime involved:

"Any person violating the provisions of this Act, upon conviction thereof, shall be confined in the penitentiary for not less than one year nor more than three years, or may be confined in jail not exceeding one year and fined not less than one hundred dollars, nor more than one thousand dollars, either or both, in the discretion of the court or jury trying the case."

It is clear that, from the language that you quote as above set out, the crime is *punishable* by confinement in the penitentiary, and, therefore, is a felony. It is well settled that a trial justice does not have jurisdiction to try a felony case.

It may be that the judge of the circuit court will be disposed to mete out the same punishment to the accused which you deem appropriate, but, it is my opinion that the trial justice does not have jurisdiction in the case except to refer the matter to the grand jury after a hearing.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TRIAL JUSTICE—Jurisdiction—Violation of Town Ordinance.**  
**Mayor—Trial—Jurisdiction of.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *November 6, 1939.*

HON. JOSEPH E. DUFF,  
*Trial Justice of Russell County,*  
*Lebanon, Virginia.*

MY DEAR MR. DUFF:

I am in receipt of your letter of October 26, in which you ask if the trial justice of a county and the mayor of a town have concurrent jurisdiction to try violations of town ordinances, where the town has adopted a resolution continuing in the mayor jurisdiction to try cases involving violations of town ordinances, this resolution being provided for in subsection 12 of section 4987-f of the Code.

Subsection 2 of section 4987-f of the Code provides that a trial justice shall have exclusive original jurisdiction of all offenses involving violations of town ordinances. Subsection 12 of the section above indicated provides for continuing in the mayor jurisdiction to try violations of town ordinances. I do not recall that the question you raise has ever been passed on before, but, construing subsection 2 and subsection 12 of section 4987-f together, and from a consideration of other pertinent statutes, it is my opinion that the better view is that the mayor has exclusive jurisdiction to try cases involving violations of town ordinances.

I must say, however, that I think the question is not at all free from doubt, but, in view of the fact that the validity of judgments might be drawn in question, it is my opinion that it would be better for the trial of such cases to be left to the mayor, for certainly there can be no question about his jurisdiction.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

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**TRIAL JUSTICES—Jurisdiction of Over Federal Property.**  
**Post Offices—Criminal Offenses Committed In—Jurisdiction.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 15, 1940.*

HONORABLE W. TERRELL SHEEHAN,  
*Trial Justice of Augusta County,*  
*Staunton, Virginia.*

MY DEAR JUDGE SHEEHAN:

This is in reply to your letter of April 8, in which you request my opinion upon the question of the jurisdiction, if any, of your trial justice court to try persons for criminal offenses committed on the Skyline Drive and post office premises.

With respect to the Skyline Drive, Virginia reserves ample jurisdiction over criminal offenses as shown by section 19-a of the Code, as contained in the Acts of 1936, at page 611. This section does not seem to have been carried into Michie's Code properly, but section 19-a, as shown in Michie's 1936 Code, was repealed by the Act to which I have referred you. You will note from section 19-a, as set forth in said 1936 Acts, that the Commonwealth of Virginia reserves exclusive governmental, judicial, executive and legislative powers, and jurisdiction in all civil and criminal matters, except to such extent as might be inconsistent with the provisions of said section 19-a.

With reference to post offices, where the lands were acquired prior to 1936, the United States has exclusive jurisdiction over all offenses committed on post

office properties, and, in my opinion, your court would have no jurisdiction to try a case for an offense committed thereon. If, however, the post office property was acquired after the 1936 Act became effective, then I think you would have jurisdiction.

Your second question relates to the authority of officers to make arrests on such properties.

The officer has full and complete authority to make arrests on the Skyline Drive, both for offenses committed thereon or elsewhere in the State. They also have power to make arrests on post office properties acquired prior to 1936, where the offense was committed in the State but not on the post office property. They have authority to arrest for offenses committed on the post office property where the property was acquired after the 1936 Act referred to became effective.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TRIAL JUSTICES—Report to Circuit Court Clerks.  
Fines—Payment in Installments.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 9, 1940.

HON. A. H. CRISMOND, *Clerk,*  
*Circuit Court of Spotsylvania County,*  
*Spotsylvania, Virginia.*

MY DEAR MR. CRISMOND:

I am in receipt of your letter of May 7, in which you ask how a trial justice should make his report to the clerk of the circuit court under section 2550 of the Code in cases where fines are allowed to be paid in installments.

This office has heretofore ruled that a trial justice may allow fines to be paid in installments.

Section 2550 provides that a trial justice shall report to the clerk of the circuit court all cases in which fines and costs have been imposed during the next preceding month, showing in which cases the fines and costs have been paid and in which cases they have not been paid. In cases where the fine and costs have not been paid, the clerk is by section 2552 required to issue a writ of *feri facias* therefor. Obviously a writ of *feri facias* should not be issued where the trial justice has allowed the fine and costs to be paid in installments, but the clerk has no discretion in the matter if the case is reported to him.

Section 2550, therefore, does not take care of the situation that you present. However, I am of opinion that, since it is recognized that these payments may be made in installments, the best thing for the trial justice to do is not to report a case to the clerk of the court where the instalment method of payment is being followed until the payments have been completed or the defendant has failed to meet the instalments. I realize that the statute does not support this practice, but it seems the best solution under the circumstances and is being followed in a number of counties. It meets with the approval of the Auditor of Public Accounts. If the trial justice does make the report where the instalment method of payment is being allowed, I am of opinion that the clerk will be justified in not issuing the *feri facias* until he ascertains from the trial justice that the defendant is not meeting his payments.

If I correctly understand the purport of your second question, it seems to me that all that the clerk needs is a warrant with the endorsement thereon.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**TRIAL JUSTICE SYSTEM—Adoption and Repeal of, by Town Council.  
Fees—Violation of Town Ordinance—Payment to County.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., January 16, 1940.

HON. FRANK NAT WATKINS,  
*Commonwealth's Attorney,*

HON. J. H. LEWIS,  
*Trial Justice,*  
*Farmville, Virginia.*

GENTLEMEN:

I am in receipt of your letter of January 13, in which you ask the opinion of this office on the following questions:

May a town which has heretofore voted not to operate under the trial justice system as provided in section 4987f, paragraph 12, now by resolution of the Town Council vote to operate under the trial justice system?"

There is no time limit placed upon the right of the council of a town to pass the resolution authorized under paragraph 12 of section 4987f of the Code, and I am, therefore, of opinion that a town that has heretofore not chosen to pass such a resolution may now do so.

"Should a Town Council pass an ordinance electing to operate under the trial justice system, later withdraw from the acting under the trial justice and place the matter again in the hands of the mayor?"

In my opinion, the authority given by paragraph 12 of section 4987f to pass the resolution therein provided for carries with it by implication the authority to repeal such a resolution if the council of the town should so determine.

"Whom should the trial justice pay the fees for the violation of town ordinances to where the town is operating under the trial justice system? Do they go to the town or to the county as provided in section 4987m, paragraph d?"

Under paragraph (d) of section 4987m, all fees paid to and collected by a trial justice, including one-half of the fees collected for the Commonwealth's attorney, but not including fees belonging to officers other than the trial justice, his clerk, and the Commonwealth's attorney, are to be turned in to the treasury of the county or city. In other words, the section does not provide, where the trial justice has jurisdiction to try cases involving violation of town ordinances, for any fees to be paid in to the treasury of the town. Inasmuch as the county, and not the town, contributes to the salary of the trial justice, I presume the Legislature considered that the county should be entitled to these fees.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**VETO—Authority of Governor to.  
Constitutional Law—Scope of Veto Power.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 9, 1940.

HONORABLE JAMES B. MARTIN,  
*Member House of Delegates,  
Gloucester, Virginia.*

DEAR MR. MARTIN:

I have your letter of May 3, which is as follows:

"Hon. A. E. S. Stephens, Hon. William M. Ferguson and I offered an amendment to the appropriation act inserting a provision in the appropriation for the Commission of Fisheries prohibiting the expenditure of any part thereof to maintain or operate the boat 'Sirene'. This amendment was adopted, but the provision was vetoed by the Governor. I will appreciate it if you will give me your opinion on the question of the Governor's power to veto this provision.

"The Governor also vetoed certain general provisions contained in the appropriations to the offices of the Attorney General, the Director of the Budget and the Planning Board also, a general provision at the end of section 2 of the act, and one at the end of section 3. I wish you would also give me a similar opinion with respect to each of these, and if the action was unauthorized, the effect thereof, if any, on these provisions and on the act as a whole."

All of the questions raised in your letter are controlled by a few established principles governing the exercise of the executive veto.

In Virginia the veto power is conferred by section 76 of the State Constitution. This section first authorizes the Governor to approve or disapprove every bill passed by the Legislature. If disapproved, the entire bill fails unless re-enacted by a two-thirds majority vote in both Houses.

As to appropriation bills it is further provided:

" \* \* \* The Governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. \* \* \* "

This provision, added to the Constitution in 1904, adapts the veto power to the practice of combining a great number of wholly unrelated appropriations in one omnibus "budget bill." Under it the Governor may disapprove one or more of such distinct items, just as if they had been enacted in separate bills, without vetoing other appropriations which have no real connection with the ones disapproved. The veto, however, the Constitution provides must "not affect the item or items to which he does not object." If it does affect such another item, the Governor may not exercise the power.

Corresponding provisions are contained in the Constitutions of most States, and the law is well settled as to their general effect.

First of all it is clear that the term "item" in such a constitutional provision, if unaccompanied by more general language, means a specific appropriation of money for some stated purpose. *Bengzon v. Secretary*, etc., 299 U. S. 410; *In re Opinion of the Justices*, 2 N. E. (2d) 789 (Mass.); *Callaghan v. Boyce*, 153 Pac. 773 (Ariz.); *Regents v. Trapp*, 113 Pac. 910 (Okla.).

Furthermore, regardless of how broad the constitutional language may be, it is universally held that no Governor may eliminate from an appropriation bill conditions or restrictions attached to one or more appropriations, thus converting conditional into unconditional appropriations and in effect supplying authority for

expenditures never authorized by the Legislature. *Bengzon v. Secretary, etc. supra*; In re *Opinion of the Justices, supra*; *State v. Holder*, 23 So. 643 (Miss.); *Black & White Taxicab Co. v. Standard Oil Co.*, 218 Pac. 139 (Ariz.); and see the opinions in *Fergus v. Russel*, 110 N. E. 130 (Ill.); *Mills v. Porter*, 222 Pac. 428 (Mont.).

Finally, it is well settled that constitutional authority to veto a separate item of an appropriation bill does not include power to change an item without striking it out altogether, as by cancelling part of the item only, or reducing the amount appropriated. As said by the Supreme Court of the United States in the *Bengzon Case, supra*, quoting from *State v. Holder, supra*:

" \* \* \* ' \* \* if a single bill, making one whole of its constituent parts, 'fitly joined together,' and all necessary in legislative contemplation, may be dis severed by the governor, and certain parts torn from their connection may be approved, and thereby become law, while the other parts, unable to secure a two-thirds vote in both houses, will not be law, we shall have a condition of things never contemplated, and appalling in its possible consequences.' " (299 U. S. at p. 415.)

This principle is established beyond question. In re *Opinion of the Justices, supra*; *Regents v. Trapp, supra*; *Hills v. Porter, supra*; *Wood v. State Administrative Board*, 238 N. W. 16 (Mich.); *Fulmore v. Lane*, 140 S. W. 405 (Tex.); *Fergus v. Russel*, 110 N. E. 310 (Ill.); *Strong v. People*, 220 Pac. 999 (Colo.); *Wheeler v. Gallet*, 249 Pac. 1067 (Idaho); *Peebly v. Childers*, 217 Pac. 1049 (Okl.).

It should be noted here that under the Virginia Constitution this limitation against changing an item without vetoing it altogether is emphasized by the express constitutional provision that "the veto shall not affect the item or items to which he" (the Governor) "does not object."

The application of these principles to your specific questions is clear.

The provision referred to in your letter, prohibiting the Commission of Fisheries from expending any part of its appropriations on the boat "Sirene", is manifestly not an "item" within the established meaning of that term as used in section 76 of the Constitution. As said by the Supreme Court of the United States in the *Bengzon Case, supra*, in construing a provision identical with that quoted above from our Constitution:

" \* \* \* An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money \* \* \* ." (299 U. S. at p. 414.)

On the contrary the vetoed provision with respect to the "Sirene" is merely a limitation on the authority given for expending items which the Governor has approved—a restrictive condition qualifying such items of appropriation. This is quite apparent from the language of the proviso itself. Furthermore, section 2 of the Act provides that all appropriations in the entire Act are made "upon the provisos, terms, conditions, and provisions above set forth herein and those herein-after set forth." Hence the Governor's veto, if effective, would permit expenditures never assented to by the Legislature, in violation of the elementary principle that every expenditure of public funds must be authorized by the Legislature—a principle expressly incorporated in section 186 of our Constitution. Again quoting from the Supreme Court's opinion:

" \* \* \* This" (elimination of a restrictive condition) "would not be negation of an item or items of appropriation by veto but, in effect, affirmative legislation by executive edict." (299 U. S. at p. 414.)

Finally, to eliminate this provision by veto would violate the established principle that the executive may never change a bill, or a distinct item of an appropriation bill, but must approve or disapprove it *in toto*; that he may, therefore,

eliminate from an appropriation bill only distinct and independent items, removal of which will "not affect the item or items to which he does not object."

The same general considerations are applicable to the other provisions vetoed and referred to in your letter.

One provision you refer to relates to various appropriations made throughout the Act out of which State agencies and institutions may employ and compensate attorneys, and requires that all such attorneys shall be appointed by the Attorney General. Under existing general law, these agencies may employ attorneys only on the recommendation of the Attorney General, in cases where he finds it impractical or uneconomical to perform the required legal services himself, and the fees paid must be approved by him. Virginia Code section 374a.

The provision ostensibly vetoed is not an "item" of appropriation but simply carries out the policy contained in the general law by requiring that all attorneys so employed shall be "in all respects" subject to the provisions of section 374-a of the Code." It is clear that the attempted veto of this provision is without legal effect.

Likewise the vetoed provision with respect to the appropriation made to the State Planning Board is manifestly not an item but is a condition restricting the expenditure of the funds appropriated. This provision is as follows:

"It is hereby provided that no part of this appropriation shall be used by the Virginia State Planning Board, or any other agency of the State Government for the investigation and study of county government in Virginia or elsewhere."

Again the effect of the veto, if valid, would be to render a conditional appropriation unconditional.

The next general provision vetoed is that at the end of section 2. This is a legislative limitation upon the power to reduce certain salaries of State officers and employees, which is conferred on the Governor by a preceding paragraph of the same section. The vetoed provision requires the elimination of any salary increases ordered or authorized by the Governor in case he thereafter orders a uniform reduction of all salaries, and requires the reduction to be applied to the salary as it existed before the raise.

This provision is not an "item" but has an inseparable connection with every appropriation which the Governor approved out of which salaries over \$4,000 may be paid. It is a restrictive condition applicable to these appropriations, the elimination of which would authorize expenditures never agreed to by the Legislature.

The last paragraph of section 3 of the Act consists of a provision exempting from that section the Legislative and Judiciary Departments. This paragraph was vetoed. The section as enacted requires that new salaries and salary increases, except in the Legislative and Judiciary Departments, must be approved by the Governor. The effect of the veto, if valid, would be to extend the Governor's control of such salaries into the Legislative and Judiciary Departments as well as the Executive Department, and thus enlarge the Governor's power beyond that conferred by the Legislature.

This provision is manifestly not an "item", and to eliminate it would obviously change or "affect" every item of appropriation to the Legislative and Judiciary Departments, which the Governor has approved.

Your remaining questions relate to provisions vetoed in connection with appropriations for the Division of the Budget.

Here the Legislature appropriated sums of \$22,327 and \$28,147, respectively, for two years of the biennium, "for supervision and administration of the budget and maintenance of records and accounts." It then added specific directions, some of which the Governor has vetoed, as to how certain portions of these amounts should be used. The first provision vetoed is a mandatory requirement that a salary of \$6,000 per annum "shall be paid" to "A Legislative Director" of the Budget, to be appointed by joint action of certain House and Senate Committees. The vetoed

language imposed on this officer the duty to cooperate with the Executive Director appointed by the Governor in the supervision of expenditures out of all appropriations to assist in the preparation of the budget and to perform other specified duties.

In my opinion this requirement as to the use of \$6,000 per year, to be paid out of the approved items of \$22,327 and \$28,147, may not be deemed an "item" of the bill, subject to separate veto, but is a mandatory proviso attached to the items appropriated. The Legislature has plainly indicated its intention that all expenditures made under the Act shall be supervised jointly by an officer of its own choosing and one appointed by the Governor. It follows that to veto this requirement, and thus change the basic structure of the Budget Division so as to permit expenditures without such supervision, would materially affect items which the Governor has approved.

Furthermore, elimination of this provision would greatly affect the approved items of \$22,327 and \$28,147, as is shown more fully below in connection with another provision vetoed under these appropriations for the two years.

Executive disapproval of just such provisions was held void in the cases of *Fulmore v. Lane*, *In re Opinion of the Justices* and *Regents v. Trapp*, all *supra*. As stated in *Fulmore v. Lane*:

" \* \* \* Nowhere in the Constitution is the authority given the Governor to approve in part and disapprove in part a bill. The only additional authority to disapproving a bill in whole is that given to object to an item or items, where a bill contains several items of appropriation. It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes non-effective. \* \* \* " (140 S. W. at p. 412.)

The above language was quoted with approval by the Supreme Court of the United States in the *Bengzon Case*, *supra* (299 U. S. 413-4). I find no authority for a contrary view, unless certain language used in the cases of *People v. Brady*, 115 N. E. 204 (Ill.), and *Fairfield v. Foster*, 214 Pac. 319 (Ariz.), should be deemed applicable here. The present question was not actually involved in those two cases, and it is sufficient to say that the great weight of authority squarely supports the view herein expressed.

Again in connection with these appropriations for the Budget Division, the Governor vetoed a provision restricting the amount that should be spent by that office for "additional salaries and wages." Like the provision requiring a Legislative Director, this is clearly not an "item", but is a qualifying proviso attached to the appropriations made to this Division, and an inseparable part thereof.

Manifestly, these provisions cannot be vetoed by the Governor without affecting "items to which he does not object." The Act as now printed, with the vetoed language omitted, appropriates the total sums of \$22,327 and \$28,147 for the broad general purposes of "supervision of preparation and administration of executive budget and maintenance of records and accounts", subject only to the payment of \$4,500 towards the \$6,000 salary to the Executive Director. With the Act thus altered the Division would be authorized, in its discretion, to spend the entire balances of \$18,327 and \$24,147 for "additional salaries and wages", and the entire appropriations could be used for purposes other than compensating the Legislative Director. Certainly this was never agreed to by the Legislature, and to produce this result by exercise of the veto would vitally affect the said items of \$22,327 and \$28,147, to which, as above pointed out, the Governor does not object.

In reply to your request, therefore, I will advise that, in my opinion, section 76 of the Virginia Constitution clearly does not authorize an executive veto of any of the provisions referred to in your letter.

As to the effect of the attempt to veto these provisions, I am of opinion that

all the provisions are effective and valid just as though the Governor had not disapproved the same. He has approved the Act itself and his approval of the Act renders the entire Act, as well as these disapproved provisions, valid and effective. *Bengson v. Secretary, etc.*, 299 U. S. 410; *Fulmore v. Lane*, In re *Opinion of the Justices, Black & White Taxicab Co. v. Standard Oil Co.*, *Callaghan v. Boyce*, *Fergus v. Russel*, and *Wood v. State Administrative Board*, all cited hereinabove.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**VIRGINIA—World's Fair Commission—Authority of, to Sell Property.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 28, 1940.

HONORABLE N. CLARENCE SMITH, *Secretary*,  
*Virginia-New York World's Fair Commission*,  
*Life Insurance Company of Virginia Building*,  
*Richmond, Virginia.*

DEAR MR. SMITH:

I have your letter of February 26, requesting my opinion as to your authority to sell certain property heretofore purchased by the Virginia-New York World's Fair Commission, pursuant to a resolution adopted at a recent meeting at which five members of the Commission were present.

You also ask whether, if such general authority exists, you may give an option on such property pursuant thereto.

The Virginia-New York World's Fair Commission was established by a provision of the 1938 Appropriation Act, found at page 842 of the Acts of 1938. I find nothing in this Act, or elsewhere in the law, which would authorize the Commission to sell property purchased by it with public funds. It is my opinion, therefore, that such property can be sold only through the Division of Purchase and Printing pursuant to the provisions of Virginia Code (Michie 1936) section 585(70) paragraph (b).

Such sale should in any event be authorized by an official act of the Commission. The Commission consists of ten members and hence, under the terms of the third paragraph of Code section 5, as construed in the case of *Booker v. Young*, 12 Gratt. (53 Va.) 303, there should be present at least six members.

Finally, it is my opinion that general authority to dispose of the property in question by public or private sale would carry with it authority to give an option for a reasonable period for the purpose of facilitating a sale.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**VITAL STATISTICS, BUREAU OF—Furnishing Information to other States—Fees.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., August 16, 1939.

DR. W. H. STAUFFER  
*Commissioner of Public Welfare*,  
*Richmond, Virginia.*

MY DEAR DR. STAUFFER:

I am in receipt of your letter of August 14, in which you state that you are anxious to develop courtesy arrangements with several states for interchange of

information on birth dates. These states, you say, are willing to furnish your local welfare offices certificates of birth which are needed to establish age under the public assistance laws if they can secure from Virginia the same service.

You direct my attention to section 1580 of the Code, providing for a fee of 50 cents when a certified copy of a birth record is furnished. You further state that you have fully discussed the matter with Dr. I. C. Riggins, Commissioner of Health, under whose office the Virginia Bureau of Vital Statistics operates, and that Dr. Riggins desires to co-operate with you to the extent that the law permits him to do so.

The question is whether these birth certificates may be furnished to the other states without the payment of the fee of 50 cents above mentioned.

My suggestion is that, in the cases of those states with which you are able to consummate reciprocity arrangements, the application for the new certificates be made to your department. Your department could then in turn request the certificate from the Bureau of Vital Statistics. I do not think that section 1580 contemplates that a state agency should be charged a fee for the furnishing of a certificate. You could then furnish to the requesting state the desired certificate.

I do not think that this method can be fairly said to represent an evasion of the requirements of section 1580, for Virginia will be getting value received for the service she is rendering. However, you might consider the desirability of requesting the Legislature to amend the section so as to in terms ratify the procedure I have outlined, although there is unquestionably room for argument that the language "shall be entitled to a fee" in section 1580 is not mandatory.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

#### WARRANTS—Execution of in Another County or Corporation.

OFFICE OF THE ATTORNEY GENERAL,  
COMMONWEALTH OF VIRGINIA,  
RICHMOND, VA., December 4, 1939.

HON. B. HUNTER BARROW,

*Trial Justice, Dinwiddie County,  
Dinwiddie, Virginia.*

DEAR MR. BARROW:

In your letter of November 30, you state that a resident of Roanoke was given a summons to appear before the Trial Justice of Dinwiddie County for a violation of the traffic law; that the party summoned failed to appear; and that a warrant was sent to the Sergeant of the City of Roanoke who returned the same unexecuted because the Civil and Police Justice of that city, stating the warrant to be defective, had refused to endorse it. You ask for my opinion upon the best way to have this warrant executed.

Under section 4825 of the Code, if a person charged with an offense escapes from the county in which the offense was committed, the officer to whom the warrant is directed may pursue and arrest him anywhere in the State; or a justice of a county or corporation other than that in which it was issued, on being satisfied of the genuineness thereof, may endorse thereon his name and official character, and such endorsement shall operate as a direction of the warrant to an officer of such justice's county or corporation.

It is my opinion, therefore, that the warrant to which you refer may be executed either by the officer of Dinwiddie County to whom the warrant was directed, or by an officer of the City of Roanoke in case the Civil and Police Justice of that City endorses it. In my opinion, if the paper is so defective that, in fact, it does not constitute a warrant, said justice would be justified in refusing to endorse it, and, therefore, before endorsing it, it is proper for him to determine the validity of the paper.

Whether or not the warrant in the case to which you refer was in fact defective is, of course, a question I cannot determine without the warrant before me.

Very truly yours,

ABRAM P. STAPLES,  
*Attorney General.*

# **WEIGHTS AND MEASURES—"Package" Defined.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *April 26, 1940.*

HON. L. M. WALKER, JR.,  
*Commissioner of Agriculture and Immigration,  
State Office Building,  
Richmond, Virginia.*

MY DEAR MR. WALKER:

I am in receipt of your letter of April 26, in which you quote as follows from a letter which you have received from Swift & Company:

"Confirming our conference with you and Mr. Hubbard today, we are interested in knowing whether bacon put up in 'dividers' or 'layers', that is, sliced bacon laid out strip by strip, overlapping slightly in clapboard fashion, on a piece of paper somewhat longer and wider than the bacon and folded over so the edges frame it like a picture, leaving the bacon practically entirely exposed to view and touch, should be marked with the net weight of the contents on the paper, or whether it should be weighed when sold in the presence of the customer. Determination of this question seems to depend upon whether bacon put up in this manner constitutes a package within the meaning of Code Section 1485 (17½) defining 'in package form' to be a commodity \* \* \* in coverings or wrappings of any kind \* \* \* making one complete package of the commodity.

"For the reasons expressed to you, and in which we understand you concur, it is felt that beyond reasonable room for controversy bacon in such a 'divider' or 'layer' does not constitute a package, let alone a 'complete package'. The Federal Law (U. S. C. A., Title 21, Section 10) expressly defines package form to mean 'enclosed', which in turn has been construed by the Attorney General of the U. S. to mean 'sealed' or 'tied'. It might be added that in no other State in the Union are such 'dividers' required to be marked with net weight, indicating to our minds that they are not considered anywhere to be packages."

You desire my opinion as to whether this method of putting up bacon could be said to be "in package form" within the meaning of section 1485 (17½) of the Code (Michie, 1936).

The words "in package form" as used in section 1485 (17½) "shall be construed to include a commodity in a package, carton, case, can, box, barrel, bottle, phial, or other receptacle, or any coverings or wrappings of any kind put up by the manufacturer \* \* \*."

It appears to me beyond reasonable doubt that the above quoted definition of the term "in package form" clearly contemplates that the commodity shall be completely enclosed in some kind of covering or wrapping and that a commodity which in substantial effect is simply lying on a piece of paper, leaving the commodity almost entirely exposed to view and touch, does not come within the scope of the term "in package form".

Therefore, the piece of paper that you describe would not be required to have marked thereon the weight measure or numerical count.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**WELFARE BOARD—Authority of—to Force Recipient of Aid to Reimburse.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 9, 1939.*

HONORABLE EDWARD H. RICHARDSON,  
*Commonwealth's Attorney,  
Salem, Virginia.*

DEAR MR. RICHARDSON:

I am in receipt of your letter of October 5th from which I quote as follows:

"The Welfare Board of Roanoke County has asked me to write you for an opinion as to their legal right to force a recipient of Old Age Assistance to reimburse the Welfare Board for Old Age Assistance given him when the recipient sells real estate which he owned at the time aid was granted. At the time the Old Age Assistance is granted, the recipient of same is told that a lien is created against any of his estate and he signs an application in which he states that he realizes this to be a fact.

"In the case before the Board at present, the recipient at the time relief was granted him, owned a piece of real estate worth approximately \$700.00. After receiving approximately \$150.00 in Old Age Assistance he sold this property receiving cash for same, and has given the Welfare Board of Roanoke County a check in full for the amount of Old Age Assistance given him in the past."

I am of opinion that the Welfare Board of Roanoke County clearly has the right to accept this restitution voluntarily made. It seems to me that, independent of any statutory provisions, if the recipient of Old Age Assistance, upon the acquisition of funds, desires to make a reimbursement of the grants that had been awarded him, the governmental authorities would have the right to accept this reimbursement.

As you know, the amount received from this recipient should be prorated in accordance with the provisions of section 1904 (19) of the Code (Michie's Supplement 1938).

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General*

**WITNESSES—Number Paid by State Treasury.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *October 2, 1939.*

HONORABLE PRICE GOODSON,  
*Commonwealth's Attorney,  
Galax, Virginia.*

DEAR MR. GOODSON:

I am in receipt of your letter of September 29, in which you ask how many witnesses may be paid out of the state treasury in any one criminal case before a trial justice court.

This office has heretofore expressed the opinion that section 3512a of the Code (Michie 1936), which provides that the maximum number that may be paid out of

the treasury before a justice of the peace or a police justice in a trial of a criminal case is five, is controlling.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**WITNESSES—Out of State—Payment of.  
Id.—Compensation—General.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *December 29, 1939.*

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

MY DEAR MR. CARTER:

I have your letter of December 28, in which you request my opinion as to the effect of chapter 397 of the Acts of Assembly of 1938 upon the authority of the State to pay in advance for the attendance of a witness from out of the State.

You will note that section 4957 of the Code provides that a person residing out of the State who attends a court therein as a witness shall be allowed the proper compensation for attendance and travel to and from the place of his abode, the amount of same to be fixed by the court. I think this section contemplated that the payment should be made after the witness had attended.

I am further of opinion that the effect of the 1938 Act referred to, construed in connection with section 4957, would be to authorize the court to certify to the Comptroller a statement of the amount necessary to pay the out-of-State witness, and enter an order fixing the amount of same and directing the Comptroller to issue his warrant therefor in such manner as to the court may seem appropriate.

Section 4960 of the Code provides that when in a criminal case any person renders any service, for which no specific compensation is provided, the court may allow therefor what it deems reasonable, and such allowance may be paid out of the treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service. Of course, the compensation of the witness is prescribed by the 1938 Act, but the same principle should be applicable as to the method of securing payment.

It is my opinion that, construing all three of these sections together, the Comptroller would be authorized to pay the expense in accordance with the order and certificate of the judge of the court in which the case is pending.

Sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*

**ZONING—Regulation of Unsightly or Unaesthetic Businesses.**

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., *January 11, 1940.*

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

DEAR MR. WHITE:

Your letter of December 28, with reference to the regulation and control of "automobile graveyards" in your county, has given me considerable pause.

You state that your county wishes to prevent the establishment of such junkyards on property near public highways because of their unsightliness, and request my opinion as to whether this may be accomplished by an ordinance adopted pursuant to Virginia Code (Michie 1936) section 3030c, rather than through the establishment of a planning board with power to create land-use zones as authorized by Code sections 2773(80)-2773(90).

In my opinion the principal difficulty arises out of constitutional limitations upon state and municipal power to restrict or regulate the use of property by any means whatever for purely aesthetic purposes. According to the great weight of authority, the conduct of a particular business or the use of land in a particular manner cannot constitutionally be prohibited or regulated *solely* because such use constitutes an eyesore. 3 McQuillin, *Municipal Corporations* (2nd ed. 1928) sections 943, 1049.

On the other hand, it is well settled that aesthetic considerations may be taken into account, in combination with other factors, in determining whether a given business or land use is subject to government regulation. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269. And in many cases upholding such regulation it is difficult to find any actual public interest other than the policy of eliminating eyesores. *E. g., State v. Kierman*, 116 Conn. 458, 165 Atl. 601. Nevertheless, the courts in such cases are at pains to find some other factor, in addition to aesthetic considerations, to justify the regulation. See opinion of Hinman J., in *State v. Kierman*, *supra*, 165 Atl. at p. 604.

I find no decisions of our own Court of Appeals dealing with the subject, and a dogmatic opinion by this office as to the validity of an ordinance such as you propose would seem unjustified by the authorities, nor could it serve any useful purpose.

I can only advise you that in my opinion the provisions of Code section 3030c, authorizing "ordinances imposing licenses upon and otherwise regulating" such junkyards, afford ample legislative authority for an ordinance imposing reasonable restrictions of the kind which you suggest; that the constitutionality of such an ordinance might be upheld under the authority of such decisions as *State v. Kierman*, *supra*, but that a similar restriction incorporated into a general zoning ordinance would probably be less subject to attack on constitutional grounds, since the latter could not be condemned as resting on purely aesthetic consideration.

Cordially yours,

ABRAM P. STAPLES,  
*Attorney General.*



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