OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1940, to June 30, 1941

RICHMOND:
Division of Purchase and Printing
1941
LETTER OF TRANSMITTAL

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 6, 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)

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<th>NAME</th>
<th>COUNTY</th>
<th>OFFICIAL TITLE</th>
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<tbody>
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<td>ABRAM P. STAPLES</td>
<td>Roanoke city</td>
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<td>EDWIN H. GIBSON</td>
<td>Culpeper</td>
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<td>Henrico</td>
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<td>JOHN Q. RHODES, JR.</td>
<td>Louisa</td>
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<td>D. GARDNER TILER, JR.</td>
<td>Charles City</td>
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<td>Tazewell</td>
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<td>Bristol city</td>
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<td>Richmond city</td>
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<td>Charlotte</td>
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<td>CAROLIE L. BIESSEN</td>
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Attorneys General of Virginia
From 1776 to 1936

EDMUND RANDOLPH ............................................ 1776-1786
JAMES INNES .............................................. 1786-1796
ROBERT BROOK .............................................. 1796-1799
PHILIP NOBORN NICHOLAS .................................. 1799-1819
JAMES ROBERTSON ........................................... 1819-1834
SIDNEY S. BAXTER .......................................... 1834-1852
WILLIS P. BOOCOCK ........................................ 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
RUFUS 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

3. Hicks, Evelyn v. Commonwealth. From Hustings Court of City of Portsmouth. Robbery.

Cases Decided in the Supreme Court of Appeals of Virginia

8. Commonwealth of Virginia, etc. v. Carson G. Mason, Committee, etc. From Circuit Court of City of Richmond. Action on implied contract. Affirmed.

Cases Decided in the Supreme Court of the United States


Cases Pending in the Supreme Court of the United States


Cases Decided in United States District Courts


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


30. 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 of City of Richmond. Injunction.


33. Evans, Emma F. v. Consolidated Indemnity and Insurance Company and John M. Purcell, Treasurer. Circuit Court of City of Richmond. Receivership.
44. Lucerne Cream and Butter Corporation v. Milk Commissioner. Circuit Court of City of Richmond. Attack upon regulation of the Milk Board fixing differential in the selling price of milk delivered in glass and paper containers.
48. Pinner, Pearlie Hale v. Chas. H. Snellings, et als.—Members of State Board of Embalmers, etc. Circuit Court of City of Richmond. Petition for mandamus.
54. Smith, Jr., H. M. v. Public Indemnity Co., etc., and John M. Purcell, Treasurer of the Commonwealth. Circuit Court of the City of Richmond. Receivership.


70. 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 of City of Richmond. Receivership.

71. Walters, John W., et al. v. State Highway Commission and Board of Supervisors. Circuit Court of Gloucester County. Suit to have public road closed.


OPINIONS

AGRICULTURE AND IMMIGRATION—Power of Department to make Five-Year Contract to Purchase Electric Power.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 29, 1940.

Honorable L. M. Walker, Jr.,
Commissioner of Agriculture,
Commonwealth of Virginia,
Richmond, Virginia.

My Dear Mr. Walker:

I am in receipt of your letter of August 27, from which it appears that your department is considering making a contract with the Central Virginia Electric Cooperative, at Lovingston, Virginia, for the purchase of electric power to be used in connection with Lime Grinding Plant No. 2, in Appomattox County. It appears that one of the terms of the proposed contract is that it is to remain in effect for a period of five years. You desire to know whether or not your department can bind the State for such a period.

In my opinion, you could not validly contract for a period extending beyond June 30, 1942, which is the end of the current biennium. If there are funds in the appropriation to the Department of Agriculture for this purpose for the current biennium, I am of opinion that you may make a contract for that period, but, since you do not know that the Legislature will continue the appropriation after June 30, 1942, I am of opinion that you should not agree on behalf of the State to purchase power for a period beyond that date.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Profits—Distribution to Localities

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 26, 1941.

Honorable Sidney C. Day, Jr.,
Assistant Comptroller,
Richmond, Virginia.

Dear Mr. Day:

This is in reply to your letter of June 23, 1941, in which you asked whether, in my opinion, a county, city or town could claim that, by virtue of paragraph (ff) of section 17-a of the Alcoholic Beverage Control Act (chapter 144, Acts 1940), it is entitled to at least the amount it received for the year ending June 30, 1939, from the profits from the sale of alcoholic beverages even though the population of said county, city or town is less, according to the 1940 census, than it was according to the 1930 census.
Section 16 of the Alcoholic Beverage Control Act (chapter 94, Acts 1934) provides that two-thirds of the actual profits derived from the sale of alcoholic beverages in excess of $1,675,000.00 shall be distributed to the several counties, cities and towns of the Commonwealth on the basis of the population of the respective counties, cities and towns according to the last preceding United States census. By chapter 144 of the Acts of 1940, there was added to the Alcoholic Beverage Control Act a new section—17-a—levying a State tax upon alcoholic beverages. In this new section is paragraph (ff), which reads:

"Provided, however, that the counties, cities and towns shall in no event receive from the profits from the sale of alcoholic beverages less cash revenue than was received by such counties, cities and towns for the year ending June thirtieth, nineteen hundred and thirty-nine."

It was evidently thought possible that the imposition of this State tax might reduce the profits from the sale of alcoholic beverages, of which the counties, cities and towns received a designated share. It was evidently the purpose of paragraph (ff) to insure that the receiving of revenue by the State in the form of taxes should not result in reducing the amount to be received by the localities if the imposition of the State tax resulted in decreasing the amount received by the Alcoholic Beverage Control Board in the form of profits. It is my opinion that the purpose of this paragraph was not to insure any particular locality's receiving the same amount of revenue as it had received in 1939 if the 1940 census disclosed a decrease in its population. Moreover, paragraph (ff) speaks of counties, cities and towns as a group, and does not provide that any particular locality shall receive at least the same revenue it had received in 1939.

It is my opinion, therefore, that the localities should now receive, as their proportionate share of the profits of the Alcoholic Beverage Control Board, two-thirds of the profits derived from the sale of alcoholic beverages in excess of $1,675,000.00, or, if this sum be less than was distributed to the localities in 1939, they should, as a group, receive the same amount distributed to them in that year. The basis for distributing this sum among the respective counties, cities and towns should be the population of the respective localities as shown by the 1940 census.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., February 7, 1941.

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

DEAR MR. RICHMOND:

This is in reply to your letter of February 1, regarding the petition presented to the judge of the Circuit Court of Scott County asking for an election on the question of whether or not the sale of alcoholic beverages should be permitted in that county.

You state that the petition was signed by a large number of qualified voters who live in the town of Gate City, the only incorporated town in the county having a population of more than nine hundred people, as well as by qualified voters living in the county outside of Gate City.
You ask whether the petition is in the proper form to permit the judge to call an election for the town and county in which both the voters of the town and of the county would vote at the same time, and also whether the result of the election would bind the town of Gate City.

This office has on a number of occasions ruled that, under Virginia Code (Michie's 1936) section 4675(30)—the local option provision of the Alcoholic Beverage Control Act—each town having a population of nine hundred or more inhabitants is a separate local option unit or district, and that portion of the county not included within the limits of a town of such size is another separate local option unit or district. In other words, for this purpose, an election which may be held for a county is for a territory exclusive of the towns therein of the prescribed population. Such election can be had only upon a petition of the required number of voters living in that territory and is participated in only by such voters, and only decides the question for such territory.

I refer you again to the opinion rendered to Honorable Roland E. Chase, Clintwood, Virginia, under date of July 1, 1935, a copy of which was sent to you on November 13, 1940, and also to the opinion rendered to Honorable S. Heth Tyler, then Chairman of the Alcoholic Beverage Control Board, under date of April 19, 1934, a copy of which is enclosed.

While I do not have the petition which has been presented to the judge of the Circuit Court of Scott County before me, I assume that it purports to be a petition for an election for the county. This being true, it is my opinion that the signatures of residents of the town of Gate City should be disregarded. If there are the required number of petitioners from the county exclusive of those residing in the town, the petition, in my opinion, would warrant the calling of an election for the county. In such election the voters of the town would not be entitled to participate, nor would the election have any effect upon the town.

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


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., July 2, 1940.

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

MY DEAR HUNTER:
This is in reply to your letter of June 22, in which you request my opinion upon the two following questions:

First: Does the Alcoholic Beverage Control Board possess regulatory powers over the sale of intoxicating beverages in the Shenandoah National Park?

The respective jurisdictions of the State and of the United States over the lands embraced in the Park are governed by section 7 of chapter 371, page 988, of the Acts of the General Assembly of Virginia for the year 1928. You will note that this section cedes exclusive jurisdiction to the United States over the territory included within the Park area with the reservation in the State of certain powers, such reservation not including the power to regulate the sale of intoxicating beverages.

It is my opinion, therefore, that the Alcoholic Beverage Control Board of Virginia does not have jurisdiction or power to regulate the sale of alcoholic beverages on the lands embraced within the Shenandoah National Park.
Your second question is whether or not the Alcoholic Beverage Control Board has jurisdiction to issue licenses for the sale of wine and beer within the Park area.

The section of the Act above referred to reserves in the State the right "to tax persons and corporations, their franchises and properties" on said lands. The license issued by the Board may be said to combine the function both of a regulatory license and a revenue license. In so far as the statute imposes a license charge upon the licensee, it may be said to be a revenue measure, and, therefore, to constitute a State tax upon the business of selling wine or beer, or both.

It is my opinion, therefore, that the Board has authority to issue a license and collect the State tax imposed on the conduct of the business of a wine or beer licensee conducted within the Shenandoah National Park.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL BOARD—Taxes on Alcoholic Beverage Sale of Entire Business by Retail Licensee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 11, 1940.

HONORABLE JOHN N. SEBRELL,
Chairman,
Alcoholic Beverage Control Board,
Richmond, Virginia.

DEAR MR. SEBRELL:

This is in reply to your letter of July 9, in which you request my opinion upon the question whether or not the 10% tax imposed by Chapter 144 of the Acts of 1940 is by said Act levied and, therefore, to be collected upon alcoholic beverages sold by a retail licensee of the Board who sells his entire business.

In my opinion, upon consideration of the whole Acts, the tax is restricted to alcoholic beverages sold by manufacturers or wholesalers to retail licensees, and where a retail licensee sells his licensed business, and along with it the stock of wine on hand, the tax should not be levied and collected thereon. If this were not true, the wine stock of a retailer who should sell his business July 1, 1941, would be subject to two separate taxes of 10% each. Clearly this was not intended.

I can see no reason to distinguish between a sale made next year and one made at the present time in so far as the levying of the tax upon the stock of wine sold is concerned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Cost of Printing Uniform Warrants, Committal Cards, and Release Cards.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 9, 1941.

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

DEAR MR. DOWNS:

This will acknowledge your letter of April 3, in which you request my opinion upon the question whether or not it would be a legitimate expense or charge
against the appropriation “for criminal charges” to defray the cost of printing and distributing uniform committal and release cards, and also uniform warrants of a particular color to distinguish Commonwealth cases from cases arising under local ordinances. You have handed along with your request letters from quite a large number of the judges of the circuit and city courts of the Commonwealth, in which they generally express the view that it would be helpful to the administration of the criminal laws to provide such warrants and cards.

In view of their information in the matter and the broad general nature of the appropriation, it is my opinion that it would be proper to pay out of same the cost of printing and distributing such warrants and cards.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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APPROPRIATIONS—To Virginia School for Deaf and Blind—Transfer of Item to Another Purpose.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 9, 1941.

DR. ROWLAND EGGERT
Director of the Budget,“
Capitol Building,
Richmond, Virginia.

DEAR DOCTOR EGGERT:

This is in reply to your letter of April 7, which I quote as follows:

“The general appropriation act for the biennium of 1940-1942 reappropriates to the Virginia School for the Deaf and the Blind at Staunton an item of $25,000 brought forward from the preceding biennium for a gymnasium.

“The Board of Visitors of the Staunton School has asked the Governor to approve the transfer of this item to an item of $32,000 appropriated for the year ending June 30, 1941, for land and structures at the Virginia School for the Deaf and the Blind at Staunton. The object of this proposed transfer is to make available $57,000 and to expend this fund for the construction of a dormitory at the Staunton School.

“Will you please advise me whether in your opinion the Governor can legally authorize the transfer of the aforesaid item of $25,000 for a gymnasium to the appropriation of $35,000 for land and structures, so that the entire amount may be applied to the construction of a dormitory.”

I believe that the union of these two appropriations for capital expenditures for structures on land in the manner you suggest is authorized, if the Governor approves same, by the provisions of section 61 of the Appropriation Act of 1940.

Sincerely yours,

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

APPROPRIATIONS FOR SCHOOLS—Constitutional Appropriation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 30, 1940.

Dr. Rowland Egger,
Director of the Budget,
Governor's Office,
Richmond, Virginia.

My dear Dr. Egger:

I am just in receipt of your letter of September 28, in which you ask for my opinion "as to whether the State Board of Education can legally disburse to the public schools the constitutional appropriation of $2,080,389.59 or any part thereof without the certification required by the general appropriation act herein referred to." The constitutional appropriation to which you refer is that required by section 135 of the Constitution, which reads in part as follows:

"The General Assembly shall apply the annual interest on the literary fund; that portion of the capitation tax provided for in the Constitution to be paid into the State treasury, and not returnable to the counties and cities; and an amount equal to the total that would be received from an annual tax on the property of not less than one nor more than five mills on the dollar to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; * * *.*"

You will observe that section 135 of the Constitution is in the form of a mandate to the General Assembly and that no conditions are attached to the appropriation, nor is the General Assembly authorized to attach any conditions thereto other than that the appropriation is to be used for the schools of the primary and grammar grades for the equal benefit of all of the people of the State.

The General Assembly of 1940 has complied with this constitutional mandate (Acts 1940, p. 766, at pp. 786-789).

In your letter you refer to the following paragraph of the Appropriation Act of 1940, relating to the appropriation to the Department of Education (pp. 788 and 789 of the Acts of 1940):

"It is further provided that no funds allocated to any county or city under this appropriation shall be paid except to reimburse expenses actually incurred in the payment of salaries to the teachers in the public schools of said county or city. Such reimbursement shall be paid only after submission of evidence to the satisfaction of the State Board of Education that the amount for which reimbursements is claimed has actually been expended for the payment of teachers' salaries, that the increased funds made available under this act have been used exclusively to increase the salaries of teachers in the employ of said city or county, and that the expenditures of the said city or county for the payment of teachers' salaries have not been reduced from that of the preceding year."

Your inquiry in effect raises the question of whether the conditions contained in the above quoted paragraph apply to the constitutional appropriation. In my opinion they do not. As I have already pointed out, section 135 of the Constitution is mandatory and imposes no condition on the appropriation required thereby, nor does it authorize the General Assembly to impose any condition. It is a fundamental principle of statutory construction that as far as possible statutes should be so construed and so restricted in their application as not to conflict with a constitutional provision and as if the necessary limitations upon their interpretation had been expressed in each case. Applying this principle,
it is my view that the above mentioned condition which has been attached by the General Assembly to the paying out of the appropriation for schools should not be construed to apply to the constitutional appropriation and that the General Assembly did not so intend.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Library Purposes—How Funds Disbursed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 15, 1940.

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

DEAR MR. BROWN:
I am in receipt of your letter of October 11, in which you refer to the County Free Library Fund authorized by section 365 of the Code, and ask whether this fund should be disbursed pursuant to the provisions of section 2724 of the Code on warrants signed by the Clerk of the Board of Supervisors and countersigned by the Chairman of the Board of Supervisors, or whether the fund should be disbursed on checks or warrants of the Board of Trustees of the County Free Library System.

While the section provides that the funds appropriated or contributed for library purposes shall constitute a separate fund, it does not provide any machinery for the disbursements to be actually made by the Board of Trustees. In the absence of such specific provision, I am of opinion that the disbursements should be made on warrants as prescribed in section 2724 of the Code.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Transfer of Appropriation for Payment of a Deficit to Some Other Object.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 12, 1940.

DR. ROWLAND EGGGER,
Director of the Budget,
Governor's Office,
Richmond, Virginia.

MY DEAR DR. EGGGER:
Your letter of August 23 presents the following question:

"I am writing to ask for your opinion as to whether the Governor can legally authorize a transfer from an appropriation for the payment of a deficit, under the terms of section 61 of the general appropriation act for the 1940-42 biennium, where it is found that no deficit has been incurred or where an unexpended balance remains in such deficit appropriation after the payment of the deficit which was in fact incurred to some other object within the department or agency for which such deficit appropriation is made."
Section 61 of the current Appropriation Act (Acts 1940, at page 876) provides for the "* * * transfer, within the respective department, institution or other agency, (of) any such appropriations from the object for which specifically appropriated or set aside to some other object deemed the more necessary in view of later developments, subject, however, in every case, to the consent and approval of the Governor, in writing, first obtained * * *." (Italics supplied)

It is reasonably plain from a consideration of section 61 as a whole and the quoted language in particular that the section represents legislative recognition of the fact that in preparing a budget covering a period of two years it is practically impossible to estimate with minute accuracy the exact sums that it will be necessary to expend for the various activities of a department or agency. The Legislature, therefore, provided for transfers of funds within a department or agency from one object for which the funds may have been appropriated to another object "deemed the more necessary in view of later developments". I think it fair to assume, however, that the Legislature had in contemplation affirmative activities, so to speak, of a department or agency for which specific appropriations were made, as distinguished from an appropriation to take care of an authorized deficit incurred in the preceding biennium.

It is my opinion, therefore, that an appropriation to pay a deficit of a department or agency is not such an "object" as contemplated by section 61 from which transfers may be made. If such transfers were authorized by the Governor in a case where the anticipated deficit did not exist in whole or in part, the real effect would be to increase the total appropriation made to the department or agency by the General Assembly for its regular activities, and I cannot believe that such a result was intended.

While the question is not raised, and without intending to pass on it, I suggest that the authority contained in section 61 should be rather strictly construed for the reason that, if too liberal a construction were placed thereon, the question of unwarranted delegation of legislative power might arise.

Replying to your second question, I do not know of anything that would constitute the deficit appropriation to Madison College an exception to the views I have herein expressed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—To Special Board Receiving Revenues Under Act Recreating Same.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 27, 1940.

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

My dear Mr. Downs:

I am in receipt of your letter of July 16, in which you ask the following question:

"I should appreciate it very much if you would give me your opinion as to whether an appropriation from the general fund of the Commonwealth as provided for in the appropriation bill is the amount which a special board should receive when the act creating the special board provided that the revenue received by this board should be credited to a special fund and used only for the purpose of financing the activities of that board."
You illustrate your question by the case of the State Board of Examiners in Optometry. It seems that the general law relating to this board was amended in 1938 (Acts 1938, at page 995) and the amended Act included a provision that the fees collected by the board should be applied to the payment of the expenses of the board. However, the Appropriation Act of 1938 made a specific appropriation to the board for each year of the biennium (Acts 1938, at pages 833 and 903) and the Act further contained the provision that all fees collected by the board should be paid into the general fund of the State treasury (Acts 1938, at page 953).

The two Acts were approved at the same time and, being in conflict in the respect I have indicated, it is my opinion that the provisions in the Act dealing specifically with the Board of Examiners in Optometry must prevail. This is the construction that has been placed upon the two Acts by the Comptroller and the Director of the Budget and in my opinion it is the proper construction.

I should not care to express any general opinion as to all other Acts dealing with special boards of the character you indicate. It is my view that each case should be separately passed upon in the light of the particular statutes involved. Also, before attempting to express an opinion in any case, I should like to be advised as to the administrative practice which, as you know, is entitled to weight.

Your second question is more or less a hypothetical one and relates to the proper construction of section 186 of the Constitution, and especially that portion of it prohibiting an appropriation from being made which is payable more than two years and six months after the session of the General Assembly at which the appropriation is made.

I think it would be unwise to attempt to give you a general answer to your hypothetical question. If you have any particular Act of the General Assembly in mind concerning which you desire my opinion, I shall be glad to give it if you will refer me to the Act in question.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Unexpended Balances—Use to Satisfy Contracts.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 8, 1940.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

MY DEAR COLONEL HODGES:

This is in reply to your letter of October 4, in which you refer to the opinion of this office of June 20, 1938, with reference to the distribution of unexpended appropriations at the end of the biennium. The following conclusion was reached in that opinion:

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

"It is obvious that any other construction of the general laws of the State would impose a rigidity and lack of flexibility upon the carrying on of the business of the State which could accomplish no good purpose and might be exceedingly detrimental.

"As to the method adopted by the Comptroller for making this fund available, I think that is within the discretion of the Comptroller and merely a matter of proper accounting in his office.

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

You now ask the following question:

"Is your opinion that payments can be made 'after the said 10th day of July', limited by the provision of section 186 of the Constitution of Virginia that 'no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing same'? Under the circumstances recited in your opinion, should the Comptroller, to put the question another way, continue to make payments beyond the 'two years and six months' period specified in section 186 of the Constitution of Virginia?"

I do not think that the principle set out in my former opinion would be affected by the fact that the actual payment of the money may not be made within the two years and six months period specified in section 186 of the Constitution. You will recall that I indicated in my conference with you and in my former letter I expressed the view that the method of making this fund available would be within the discretion of the Comptroller and a matter of proper accounting in his office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ATTORNEY GENERAL—Salaries of Employees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 21, 1940.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

DEAR COLONEL HODGES:

This is in reply to your letter of October 18, which I quote below:

"We have received your payroll for the period beginning July 1, 1940, and ending October 15, 1940, providing for an increase in salary of $25 per month, effective July 1, 1940, for Walter E. Rogers, Senior Attorney.

"No authorization from the Governor has been filed with the Comptroller covering this increase in salary as required by Section 3 of the Appropriation Act of 1940.

"Please advise me with regard to the legal authority I have for authorizing this payment."
Mr. Rogers' salary is not fixed for the current biennium by the Appropriation Act, and you will recall that at about the beginning of the biennium I approved an increase in his salary of $25 per month. The matter was held up pending the decision of our Supreme Court of Appeals in the case of Commonwealth of Virginia v. Dodson, Clerk. The decision in this case was handed down by the Court on October 14 of this year.

You are, of course, familiar with the fact that section 3 of the Appropriation Act of 1940 concluded with the following sentence:

"It is further provided, however, that neither the provisions of this section or of Chapter 88 of the Acts of 1926 shall apply to the Legislative and Judiciary Departments, or to any appropriations made in this Act to said departments."

The quoted provision was vetoed by Governor Price, this being one of the seven vetoes involved in Commonwealth v. Dodson, Clerk, supra. In that case this veto was sustained. However, the grounds upon which the Court sustained the veto were not that the provisions could be vetoed as an item, but that "it was superfluous" and was merely declaratory of existing law. The Court, in connection with this veto, speaking through Mr. Justice Holt, said:

"These vetoed provisions purport to take away from the preceding paragraph a power which in fact was not there if that paragraph is construed as it should be construed. When the Legislature said that it (i.e., the vetoed provision of section 3) should not apply to the Legislative or Judicial Departments, it but restated what was already law."

In other words, the Court has held, in effect, that, subject to limitations not pertinent here, the approval of the Governor is not necessary in making expenditures of the appropriations to the Legislative and Judiciary Departments.

The Attorney General is classified by our Constitution as a part of the Judiciary Department. See Article 6, Section 107 of the Constitution of Virginia. Likewise the Attorney General is classified in the Appropriation Act of 1940 as a part of the Judiciary Department. See Acts 1940, page 766, at page 769.

Applying the holding of our Court in the case of Commonwealth v. Dodson, Clerk, supra, to the situation presented in your letter of October 18, relative to Mr. Rogers' salary, I am of opinion that the approval of the Governor is not necessary as a condition precedent to making the payment specified in the payroll referred to by you. This payroll has received the approval of the Attorney General and that in my opinion is sufficient to authorize you to make the payment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BAIL—Authority of Bail Commissioner or Clerk of Circuit Court to Grant.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 28, 1941.

Hon. O. B. Chilton, Clerk,
Circuit Court of Lancaster County,
Lancaster, Virginia.

My dear Mr. Chilton:

Please pardon my delay in replying to your letter of March 25, which has been due to unavoidable circumstances. For purpose of reply I quote below the inquiry you make:

"I desire to secure an opinion from you as to whether I, as the clerk of the circuit court of this county, or in the capacity as bail commissioner, (the last regularly appointed bail commissioner having departed this life and
no one having been appointed in his place) have the right of authority to bail a prisoner charged with a misdemeanor or felony, to appear before the trial justice court. Following the practice set by the former bail commissioner (now deceased), I have bailed many such prisoners, but the question has lately been raised as to the validity of such acts, and I would appreciate very much an early reply."

The authority of a court, judge, clerk of court and a bail commissioner to admit to bail is found in sections 4829 and 4830 of the Code of Virginia, as amended (Michie 1936). Section 4829 provides that "a court, or a judge thereof in vacation, in which any person is held and to be tried for a criminal offense, may, upon motion before said court, or upon a petition to the judge thereof in vacation, hear testimony and admit such person to bail *. * *." Special attention is directed to the words: "court *. * * in which any person is held and to be tried for a criminal offense."

In my opinion, it is plain from a consideration of section 4829, and especially the quoted language, that the jurisdiction of a court (of record) or the judge thereof to admit to bail is limited to cases in which the person applying for bail is held and to be tried in such court. My conclusion is, therefore, that the authority of a court of record or the judge thereof to admit to bail is restricted to cases where the person is to be tried in that court and that, therefore, neither the court nor the judge may admit to bail any persons held for trial before a trial justice or other tribunal than the particular court in question.

Section 4830 provides:

"A bail commissioner or the clerk of the circuit court of any county *. * * shall have the same powers to admit to bail as the circuit *. * * court of such county *. * * or the judge thereof would have if application as hereinafter provided had been made to the said court or judge."

This language also definitely limits the authority to admit to bail of the bail commissioner or the clerk of the circuit court to such cases as are held and to be tried in such court, as set out in section 4829. The conclusion, therefore, follows that neither the bail commissioner of the county nor the clerk of the circuit court may admit to bail any person held for trial before a trial justice court.

The question has also been asked whether in cases where a justice of the peace or a trial justice has refused bail the judge of the court of record of the county or the clerk thereof or the bail commissioner of the county can grant such bail.

Since the jurisdiction of a court of record or the judge thereof or a bail commissioner to admit to bail is limited to cases where the person is held and to be tried in the court of record, I am of opinion that neither the court nor the judge nor the clerk nor the bail commissioner has authority to admit to bail where the trial justice or the justice of the peace has refused bail in cases held for trial before the trial justice.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BAIL—Form of Recognizance.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General.
Richmond, Va., May 9, 1941.

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

My dear Mr. Downs:
I have your letter of May 7, enclosing copy of a proposed form for criminal
warrants and requesting my opinion as to certain questions in connection therewith.

On the back of the warrant is printed a blank form for an order reciting that the prisoner has been let to bail upon a recognizance. As now written this order would recite that the condition of the recognizance is to appear before the court to answer the charge, etc. "or to await the action of the grand jury of the county upon the within charge". You first request my opinion as to whether it would be proper to include this latter provision in the condition of a recognizance taken by the issuing justice.

As this office has previously held, it seems clear that the power of a justice of the peace to admit accused persons to bail, originally conferred in chapter 192 of the Code of Virginia (Michie 1936), has been preserved by the provisions of Code section 4897-f, paragraph (7). The condition of recognizances taken under that chapter is prescribed in some detail by Code section 4973. The statutory language is quite broad, and a recognizance given in strict accordance therewith would seem to bind the obligors for appearance before any court in which the charge is tried until it is disposed of, regardless of whether the case is sent to a grand jury or not. In any event, I know of no authority for taking a recognizance on any other conditions than those prescribed by this section.

It is suggested, therefore, that the proposed form be amended in the following manner to conform to the statute: after the word "Virginia", appearing in the fifth line from the end of your form as written, the following might be substituted:

" * * * and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void or by order of a competent court."

It is my opinion that such a recognizance could properly be taken by the issuing justice, and, if the case were sent to the grand jury, would continue to bind the obligors until the charge was finally disposed of.

You next ask whether the condition of such a recognizance could properly be extended so as to bind the accused to keep the peace.

Code section 4973 also provides in express terms that any court or justice taking such a recognizance may direct that it be upon the further condition that the person accused shall keep the peace and be of good behavior for such time not exceeding one year as the court or justice shall direct. Accordingly it would be proper to amend the proposed form by adding thereto, at the end:

" * * * and upon the further condition that the said ................. shall keep the peace and be of good behavior for a period of ................. days from the date hereof."

This latter condition could be struck out in any case, at the direction of the officer taking the recognizance.

Cordially yours,

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

BAIL—Justice of Peace—Power to Grant in Felony Cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 13, 1941.

HON. JESSE B. WILSON,
Trial Justice for Albemarle County,
Charlottesville, Virginia.

MY DEAR MR. WILSON:

I am just in receipt of your letter of March 10, in which you inquire as to the authority of a justice of the peace to admit to bail a person charged with a felony in the light of the provisions of sections 4828, 4987-f(7), and 4987-f(8) of the Code.

Section 4987-f(7) of the Code, as amended in 1940 (Acts 1940, pp. 125, 351) provides that:

"Justices of the peace within their respective counties * * * shall also have power to grant bail in any case in which they are now authorized by general law to grant bail * * *.”

Section 4828 of the Code you are, of course, familiar with, as evidenced by your letter.

In view of the language of section 4987-f(7), I am of opinion that a justice of the peace still has the power to admit to bail as provided in section 4828, which includes the power to admit to bail in certain felony cases as set out in the section.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Appropriations for Public Welfare—Reallocation of Funds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
February 24, 1941.

HONORABLE FRED B. GREEAR,
Attorney for the Commonwealth,
Norton, Virginia.

MY DEAR MR. GREEAR:

This will acknowledge receipt of your letter of February 15, from which I quote as follows:

“As of July 1, 1940, Wise County’s local Board of Public Welfare and the State Board of Public Welfare requested certain allowances for old age assistance, aid to dependent children, aid to blind, general relief and administration. These budgetary requests were presented to the Board of Supervisors for Wise County, which Board declined to allow them in full as requested, but made allowances in each category on a smaller basis than the request.

“At the end of the half year the local Welfare Board shows that it has lacked $2,637.00 of spending one-half of the total amount allocated for all categories. This balance, however, is reflected in three of the items, while aid to dependent children has consumed over half of its allocation during the first six months.

“The local Welfare Board has requested the Board of Supervisors to
re-allocate the County's portion of these various categories so as to increase
the funds for aid to dependent children during the last six months of this fiscal
year."

644) provides that the local Board of Public Welfare shall "submit quarterly and
annually to the boards of supervisors, ** a budget, approved by the commis-
sioner, containing an estimate and supporting data setting forth the amount of
money needed to carry out the provisions of this act."

I take it from your letter that the appropriation originally made by the board
of supervisors carries sufficient funds, it is estimated, to take care of the needs
of the various categories; that there is now a balance on hand in some categories
and a shortage in aid to dependent children. When the purpose of the whole Act
is considered, I can see no reason why, if the Welfare authorities approve it, the
board of supervisors may not make the reallocation that you suggest. I cannot
think that it is contemplated by the Act that there should be a failure to provide
aid to dependent children when there is sufficient money in the budget to accom-
plish this purpose as well as to carry out the other assistance.

You next ask if the board of supervisors has authority to make additional
appropriations for various items of the welfare budget from unappropriated funds
in the general county fund during the current year.

This office has heretofore expressed the opinion that the board may do this
where the necessity therefor exists.

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

BOARD OF SUPERVISORS—Appropriation of Funds for Schools in Ex-
cess of School Levy.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
February 28, 1941.

HONORABLE VERNON L. DUNCAN,
Attorney for the Commonwealth,
New Kent, Virginia.

My Dear Mr. Duncan:

This will acknowledge receipt of your letter of February 27, in which you
ask the following question:

"Will you please render your opinion as to whether or not it is legal for
the board of supervisors to take money from the general funds and transfer
same to the school funds in excess of the school levy?"

Section 698 of the Code as amended in 1940 (Acts 1940, pp. 51, 346) provides
in part as follows:

"Each county and each city is authorized to raise sums by a tax on all
property, subject to local taxation, of not less than fifty cents nor more than
one dollar on the one hundred dollars of the assessed value of the property
in any one year to be expended by the local school authorities in such coun-
ties and cities in establishing, maintaining and operating such schools as in
their judgment the public welfare may require. In lieu of making such school
levy, the board of supervisors in the counties and the council in the cities,
may, in their discretion, make a cash appropriation from the general county
or general city levy of an amount not less than the sum required by the county
or city school budget provided by section six hundred and fifty-seven, approved
by the board of supervisors of the county or council of the city, in no event
to be less than the amount which would result from the laying of the minimum school levy authorized by this section for the establishment, maintenance and operation of the schools of such county or city without express permission of the State Board of Education. In addition to this, the board of supervisors of any county, or the council of any city, may appropriate from any funds available such sums as in the judgment of such board of supervisors of such county or council of such city may be necessary or expedient for the establishment, maintenance and operation of the public schools in such county or city.

The quoted portion of the section first fixes a minimum and maximum county school levy and then provides that in lieu of making the levy the board of supervisors may make cash appropriations for schools, such cash appropriation in no event to be less than the amount which the minimum levy would yield. Then the last sentence of the quoted section provides that, in addition to this cash appropriation which is made in lieu of the regular school levy, the board of supervisors may make additional appropriations for schools where the board deems such additional appropriations to be necessary or expedient "from any funds available". This office has heretofore expressed the opinion that under this authority of the board of supervisors to make additional appropriations for schools it may, if the funds are available, appropriate such sums as may be necessary for the establishment, maintenance and operation of the schools, even though the additional appropriation causes the amount of money used for schools to be in excess of an amount which the maximum levy of one dollar would raise. In other words, even where the county has already laid the maximum levy for schools, the board of supervisors may make an additional appropriation from any funds available for such school purposes where the levy does not yield a sufficient amount.

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

BOARD OF SUPERVISORS—Authority to Furnish Uniforms to Virginia Protective Force.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 31, 1941.

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

MY DEAR MR. WHITE:
I am in receipt of your letter of March 27, from which I quote as follows:

"This morning there was presented to the board of supervisors of this county a request to contribute funds to assist in equiping the company here of the Virginia Protective Force. This company is composed of men from the City of Staunton, town of Waynesboro, and county of Augusta, and the board has been given to understand that both Staunton and Waynesboro have agreed to make an appropriation towards the uniforms for the company.

"I have examined the Code and have not been able to find authority in the board making such a contribution. However, I understand that possibly two or three counties have taken this action and therefore I am writing you to ask that you please advise whether the authority exists for the board of supervisors of a county to contribute money for the purpose of buying or having made uniforms for the Virginia Protective Force."
It is manifest that members of the Virginia Protective Force should be properly uniformed when performing their duties. The unit of this force composed of men from Staunton, Waynesboro and the county of Augusta, should the occasion arise, will undoubtedly be used to promote the safety and general welfare of the inhabitants of Augusta county. Under section 2743 of the Code, the board of supervisors is authorized “to adopt such measures as they (it) may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of” the county.

In my opinion, under this section the board of supervisors clearly has the authority to make a proportionate appropriation toward the uniforms of the company of the Virginia Protective Force mentioned by you.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Budget System of Shenandoah County—Transfer of Funds to County School Board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JULY 10, 1940.

HONORABLE MILTON C. HOLLINGSWORTH,
Superintendent of Schools,
Woodstock, Virginia,

My Dear Mr. Hollingsworth:

I am in receipt of your letter of July 5 in which you ask if, in view of the provisions of Chapter 203, Acts of the Assembly of 1926, providing a budget system for Shenandoah County, the Board of Supervisors may transfer to the County School Board funds for the purpose of completing the payment of teachers' salaries.

I call your attention to Section 8 of the Act providing for an item of “emergencies” amounting to 10% of the estimated County Levy. I suggest that it would be proper to transfer from this “emergencies” fund to the County School Board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Chairman—His Term and Removal.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 12, 1941.

HONORABLE A. O. LYNCH,
Commonwealth's Attorney for Norfolk County,
Norfolk, Virginia.

My Dear Mr. Lynch:

This is in reply to your letter of June 11, which is as follows:

“At the first meeting of the members of the Board of Supervisors of Norfolk County in January, 1940, after their election in November, 1939, one of their members was chosen as chairman in accordance with Section 2712 of the Code of Virginia, which provides as follows:

“They shall, at their first meeting after their election, choose one of their members as chairman, who shall preside at such meeting, and all other meetings during the year, if present; but in case of his absence from any meeting, the members present shall choose one of their number as temporary chairman.’
"The member so chosen continued to preside as chairman until the meeting held on June 10, 1941, at which meeting a majority of said members voted to choose some other member of said Board as chairman. The authority of the members of the Board to change their chairman at this time has been questioned, and I have been directed by the members of said Board to request a formal opinion from you as to whether or not the members of said Board have the authority to make a change in their chairman at this time.

"Will you kindly furnish me with your opinion in this matter at your earliest convenience?"

In my conversation with you this morning in relation to the question raised by your letter, you stated that the board of supervisors has not elected another chairman, but that the resolution referred to above was merely an expression of intention to elect some other member chairman at a future meeting. The question presented, therefore, is whether a chairman of the board of supervisors, elected at the first meeting after their election, is elected for the entire term of office of members of the board, or whether he is elected merely for a term of one year.

Section 2711, the section immediately preceding that from which you quote in your letter, provides that the board shall have regular sessions once each month, and that the meeting held in July shall be known as the annual meeting of the board, and that held in January as its semi-annual meeting; and also provides for special meetings to be held at such other times as may be necessary. The provision contained in section 2712 that the chairman elected at the first meeting "shall preside at such meeting, and all other meetings during the year, if present", in my opinion, was intended to make it clear that said chairman shall preside not only at the regular monthly and the annual and semi-annual meetings, but at all special meetings which might be held during the course of any year during his term.

In this connection, it is significant that the statute does not provide for any other election of a chairman except at that meeting immediately following the election of all of the members of the board by the voters of the county, and, in my opinion, if it had been intended that the term of office should only be for one year, the statute would have expressly so provided, and would also have provided for annual elections.

I am strengthened in this view by the fact that the statute has been construed for many years throughout the State as providing for a four year term for the chairman. I have consulted on this question with Honorable L. McCarthy Downs, Auditor of Public Accounts, whose duties require him to become familiar with the practice in connection with the proceedings of boards of supervisors and elections of their chairmen throughout the State, and he has advised me that it is the uniform practice in all of the counties to elect the chairman for a term of four years, and that no annual election has been held so far as he knows in any county. You also stated to me this morning that it has not been customary in Norfolk County to have an annual election of a chairman, and that the chairman elected at the first meeting of the board after their own election has served for the entire four years for which the members themselves are elected.

While this administrative construction is not necessarily conclusive as to the proper interpretation of the statute, nevertheless, as our Supreme Court of Appeals has repeatedly held, it should be followed in the absence of some controlling reason to the contrary. Hunting v. Commonwealth, 166 Va. 229, 242, and cases cited therein.

I am therefore of opinion:

First. That the term of the chairman of the board of supervisors is for the entire term for which he and the other members are elected; i. e., four years.

Second. That the statute confers no power on the board of supervisors to remove a chairman who has been elected in accordance with the provisions of section 2712. The removal of such an officer can, in my opinion, be accomplished only for misconduct in office through ouster proceedings as provided by section 2705 of the Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
BOARD OF SUPERVISORS—Duty to Furnish Sheriff an Office.

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

Mr. W. B. Abbott,
Sheriff of Craig County,
New Castle, Virginia.

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

"An office for the sheriff of Craig county is not available in the court house. Under the law is the board of supervisors required to furnish the sheriff an office elsewhere or make him an allowance for renting an office?"

Section 2854 of the Code provides that, if there be space available in the court house, the board of supervisors shall provide offices for certain officers including the sheriff, but, if there is no such space available, such offices "may be provided by said board of supervisors * * * elsewhere than in the court house of said county or city." The statute does not appear to make it mandatory upon the board of supervisors to furnish an office for the sheriff or to make him an allowance for renting the same if there is no such office available in the court house.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Duty to Provide Office Quarters for County Board of Public Welfare.

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

Honorable T. Moore Butler,
Attorney for the Commonwealth,
Covington, Virginia.

My Dear Mr. Butler:
I am in receipt of your letter of November 14, which reads as follows:

"Will you please give me an opinion whether or not the Board of Supervisors of Alleghany County, Virginia, must provide office quarters for the Alleghany County Board of Public Welfare in the courthouse or elsewhere, without charge to the said Board?

"In the event that you should rule that the Board of Supervisors does not have to furnish said quarters, could the said Board of Supervisors rent office rooms in the courthouse to the said Alleghany County Board of Public Welfare and charge it a monthly rental for same?"

The Alleghany County Board of Public Welfare is an agency of the County of Alleghany and, while there is no statute specifically requiring the county to provide office quarters for the Board, I should say that on principle, if the county has offices available for the Board, they should be furnished without charge. As you know, all the money spent in Alleghany County under the Public Assistance Act is spent for the benefit of the citizens of the county and the money so spent consists in a large part of county funds.

In reply to your second question, if the county does not have available offices for the County Board of Public Welfare, I think the Board would have authority to rent offices, but I do not think that it is contemplated that this local county
agency should have to pay the county rent for county offices that are available. The county would in effect be charging itself rent. As you will recall, under the Public Assistance Act the county in the first instance defrays the entire costs of the public assistance in such county and is simply reimbursed by the State and Federal Governments to the extent prescribed by statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Power to Provide Bounty for Skunks and Ground Hogs.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 31, 1941.

HONORABLE VERNON L. DUNCAN,
Attorney for the Commonwealth,
New Kent, Virginia.

MY DEAR MR. DUNCAN:

I have your letter of July 24, requesting my opinion as to whether the Board of Supervisors has authority to provide for the payment of bounties on skunks and ground hogs.

As you point out, counties are given express statutory authority to offer premiums or bounties for the killing of certain specified birds and animals, but skunks and ground hogs are not among the animals specifically named. Code sections 2729, 3305 (49).

In view of these statutes, dealing specifically with the authority of the Board of Supervisors in this respect, it seems to me quite doubtful whether the general police power of the county can be said to include the power to offer other premiums in addition to those expressly provided for. While the question is not entirely free from doubt, and can be conclusively determined only through adjudication by the courts, it is my opinion that your Board of Supervisors is without authority to offer bounties or premiums for the scalps of skunks and ground hogs.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Power to Provide Fuel to Cook Food of Prisoners or to Heat Home of Jailor.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 22, 1940.

HONORABLE E. HAGAN RICHMOND,
Commonwealth's Attorney,
Gate City, Virginia.

DEAR MR. RICHMOND:

I have your letter of August 15, in which you request my opinion upon the question whether or not the board of supervisors of a county is required by law to provide fuel for the cooking of food for prisoners or for heating the home of the jailor and his family.

Section 2857 of the Code provides that the board of supervisors shall provide for the necessary heating, beds and bedding for the State, county and city prisoners in the jails of the Commonwealth. It does not seem that this is broad enough to compel the county to provide the other fuel to which you refer. However, section 3510 of the Code prescribes the fees which are to be paid to a jailor out of...
the State treasury and also the amount which shall be paid him out of said treas-
ury for keeping and supporting the prisoners.

This office has construed section 3510 as not applying to the compensation of
a jailor for keeping and supporting prisoners committed for violation of county
or town ordinances. It has been the general view of this office that the compensa-
tion for these prisoners is a matter of contract or agreement between the board
of supervisors or a town council and the sheriff who is by law the jailor. The
custom has grown up in some counties of providing fuel for heating the quarters
occupied by the sheriff and his family, or his deputy who happens to act as jailor,
and also providing fuel for preparing food as an element of the contract relating
to the care, support and custody of county and town prisoners, and where this is
done I see no legal objection thereto as the question of compensation to be paid
for these prisoners convicted of violating local ordinances is essentially a matter
of contract.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Power Over School Budget.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 23, 1940.

MR. MILTON C. HOLLINGSWORTH, Superintendent,
Shenandoah County Public Schools,
Woodstock, Virginia.

MY DEAR MR. HOLLINGSWORTH:

I have your letter of August 15, supplementing your former letter of August 6.

It appears from your letter that you are under the impression that the board of
supervisors is required to adopt a school budget satisfactory to the school board
and appropriate money therefor.

The law vests in the board of supervisors the final authority with reference
to the appropriation of public funds and the school board is in the position of
having to do the best it can with the funds appropriated. No legal question of
acceptance or refusal of the budget adopted by the board of supervisors can, there-
fore, arise and I see no objection to the school board going ahead with the plan
you suggested in your former letter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Power to Provide a Fee for Obtaining a
Building Permit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 27, 1940.

HONORABLE PAUL E. BROWN,
Attorney for the Commonwealth,
Fairfax, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of August 21, inquiring as to the authority of
the board of supervisors of your county to provide for a fee to be paid for obtain-
ing a building permit from the commissioner of the revenue.
In my opinion, section 262-b of the Tax Code is the statute authorizing Fairfax county to provide that a building permit shall be secured from the commissioner of the revenue. This section expressly provides that no fee shall be charged for any such permit. I am, therefore, of the opinion that the board of supervisors does not have the authority to provide for the fee. I am glad to note that the opinion I have expressed coincides with your view.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Powers—To Pay Compensation to Members of Local Board of Health.

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

HONORABLE PHILIP KOHEN,
Attorney for the Commonwealth,
Buchanan, Virginia.

MY DEAR MR. KOHEN:

Please forgive the delay in replying to your letter of August 29, which was in some way mislaid in the process of removing our offices to the new State Library Building.

You state that your county, together with the county of Alleghany, is served by a local health department or unit and by a local health officer appointed by the State Board of Health, such service being financed partly by the State and partly by the two counties. The opinion of this office is requested as to whether the secretary or any of the other members of the Board of Health for Botetourt county should receive compensation from the county for their services.

It should be noted at the outset that one, ex officio, member of the Board is the Chairman of the Board of Supervisors, who is required by law to serve on the Board (Code section 1492) and who receives a salary as compensation for all his official duties. Code section 2769. As this office has previously held, under the statutes just cited this officer clearly cannot receive additional compensation for serving on the local Board of Health.

The statute providing for the creation of local Boards of Health makes no provision for the compensation of any of the members thereof as such, but provides that the secretary, if he serves also as local health officer (as is not the case in your county) "shall receive such compensation as the Board of Supervisors may deem proper." (Code section 1498.)

The statute does not, however, provide that the other members shall not be compensated, and I know of nothing in the law which would prohibit the Board of Supervisors from spending county funds for this purpose if the Board deems such an expenditure advisable.

It is my opinion, therefore, that the Board of Supervisors may, in its discretion, provide compensation for the members of the local Board of Health other than the Chairman of the Board of Supervisors, whose regular salary must be taken to include compensation for such services.

Cordially yours,

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

BOARDS OF SUPERVISORS—Power to Enact Ordinance Concerning Bear Hunting.

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

HONORABLE T. MOORE BUTLER,
Commonwealth's Attorney,
Covington, Va.

MY DEAR MR. BUTLER:

I have your letter of October 16, requesting my opinion as to the authority of your Board of Supervisors, under Chapter 167 of the Acts of 1940, to pass an ordinance making it lawful to hunt and trap black bear in the snow in Alleghany County during open season.

The 1940 Act, to which you refer, provides that the Boards of Supervisors of Alleghany and Highland Counties may adopt ordinances fixing the open season for the hunting and trapping of foxes and bear, and prescribing the times at which and the conditions under which the same may be hunted with dogs. I cannot find, however, anything either in this statute or elsewhere in the law which would empower your Board of Supervisors to alter the provisions of general law prohibiting the hunting and trapping of game animals in the snow, as set forth in Code section 3305(36)(g).

I must advise, therefore, that, in my opinion, an ordinance such as you describe would be invalid.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Power to Appoint Special Police Officers.

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

HONORABLE G. A. MASSESBURG,
Member of the House of Delegates,
Hampton, Virginia.

DEAR MR. MASSESBURG:

With reference to our conversation a few days ago, I do not find any statute at all which would authorize the board of supervisors of a county to appoint special police officers. Even in the special acts relating to counties having certain population and areas, the appointing power is vested in the judge of the circuit court.

It may be that there is some special act relating to Elizabeth City County which is not carried into the Code, but, if so, I have not been able to find it. I have found no statute which in any case or under any conditions authorizes the appointment of special police officers by a board of supervisors in any county.

The principal sections applicable in the Michie 1936 Code are 4797-4805, inclusive, and also the following sections in the 1940 supplement to said Code—sections 4803h and 4803j.

If I can be of any further service in the matter, please do not hesitate to call on me.

Cordially yours,

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

BOARDS OF SUPERVISORS—Power to Cancel Bonds Held in Sinking Fund.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 3, 1940.

Hon. A. O. Lynch,
Commonwealth's Attorney for Norfolk County,
Norfolk, Virginia.

My Dear Mr. Lynch:

This is in response to your letter of November 22, in which you request my opinion as to the power of your board of supervisors, acting under chapter 352 of the Acts of 1940, to purchase bonds of a Drainage District located within the county, paying for the same with moneys held in a county sinking fund, and thereafter to cancel the bonds in consideration of the increase in taxable values arising out of the drainage project.

The 1940 statute referred to authorizes the board of supervisors to extend aid to the Drainage District out of general county revenues and also, as you point out, to "invest" moneys held in any county sinking fund in the bonds of such Districts.

While I am not advised as to the particular sinking fund involved, I cannot conceive of any sinking fund which it would be proper to use for the retirement of Drainage District obligations. Hence, I concur in your opinion that, if the county wishes to relieve the landowners of the burden of these obligations in consideration of the increase in taxable values referred to, it may do so out of general county revenues, but that any bonds purchased by moneys held in a county sinking fund must be retained in said fund.

Cordially yours,

Abram P. Staples,
Attorney General.

BOARDS OF SUPERVISORS—Powers—To Make Appropriations to Regional Defense Councils.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 6, 1941.

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

Dear Governor Price:

This is in reply to your letter of May 26, in which you request my opinion upon the discretionary authority of the board of supervisors of a county to appropriate money to be used to defray the expenses of Regional Defense Councils. You suggest that I talk with General Anderson for the purpose of securing information as to the nature of the work to be done.

I have had a talk with General Anderson, and also have examined the manual, explanatory of the work of the Council, from which it appears that the Virginia Defense Council was created to aid the National Defense Council and to speed national defense by helping to mobilize the State’s resources.

The Regional Defense Council is designed to handle in more intimate and direct detail the problems arising from defense activities in each region. The establishment of military camps has resulted in the concentration of thousands
of additional men in various localities in the State, and also in the movement of families of officers and enlisted men into these localities, and near these congested population areas have arisen, and are constantly arising, problems of housing, school accommodations, recreation, and other facilities to meet the increased needs. The work of the Regional Council is directed to these problems and consists of ascertaining the pertinent facts, and planning, coordinating, and assisting in the solution of the particular problems encountered. Other incidental problems which are constantly arising relate to the general welfare and health of the community, law enforcement, disaster planning, and providing training courses in first aid nursing.

While the foregoing is but a brief synopsis of a part of the activities of the Council, it is sufficient, in my opinion, to justify the board of supervisors in concluding that money appropriated for the purpose would have a direct and beneficial result in promoting the health, safety, and general welfare of the county.

While it is the duty of the board of supervisors to carefully and cautiously scrutinize appropriations made to any agency not specifically created by law or expressly authorized by statute, I am of the opinion that the present emergency which has been declared by the President of the United States to exist, and the industrial and other defense activities which have followed and are developing as a result of congressional action, renders the purpose hereinabove referred to well within the field of those legitimate governmental activities for which county funds may be appropriated by the board of supervisors in the exercise of a sound discretion.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

BOARD OF SUPERVISORS—Power to Raise School Levy—Limit.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., April 4, 1941.

HONORABLE A. L. PITTS, JR.,  
Commonwealth’s Attorney,  
Dillwyn, Virginia.

MY DEAR MR. PITTS:

This will acknowledge receipt of your letter of April 1, in which you ask whether or not under the law the board of supervisors of Buckingham County may raise the school levy and if the law limits the amount to which the levy may be raised.

Unquestionably I think the board of supervisors may raise the school levy so long as it does not exceed the limit prescribed by law. As to the limit, I refer you to section 698 of the Code, as amended in 1940, which is printed in the 1940 Supplement to Michie’s Code of Virginia of 1936. You will observe that this section goes into the matter in detail and it will, I presume, give you the information you desire.

In connection with your question I call your attention to Chapter 102a of the Code relating to the county budget and especially to section 2577m(4) requiring thirty days’ notice to be given before any local tax levy is increased. I presume that all of the requirements of this Chapter relative to the county budget have already been complied with. The school budget, as you know, is included as a part of the county budget. See section 658 of the Code.

Very truly yours,

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

BOARD OF SUPERVISORS—Power to Make General Levy to Repay Literary Fund Loan.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 4, 1941.

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

DEAR DR. HALL:

I refer to our telephone conversation of today, in which you advised that one of the counties of the State has borrowed money from the literary fund for the erection of schools in one or more districts of the county. You state that the board of supervisors has been making a levy in each of the districts in which the school was erected to repay the loan made for the erection of the school in such district. However, in each case the loan has been made to the county itself and not to the district, the board up to this time simply electing to levy special district taxes. You state that a further building program is contemplated by the county and that the board of supervisors now desires, instead of making district levies to repay the literary fund loans, to include a sum sufficient to repay such loans in the general county levy, and ask if in my opinion this may be done.

This office has heretofore expressed the opinion that a loan made from the literary fund is an obligation of the entire county. See section 638 of the Code. I have also heretofore expressed the view that, while the board of supervisors may, if they elect, make a district levy to repay the loan, this is not compulsory and the general county levy may be made. Therefore, if the board of supervisors now desires to repay these loans out of the general county levy instead of continuing the district levies, in my opinion, the board has authority so to do. You will understand, of course, that in expressing this view I am assuming that these loans were originally made to the county itself and not to the districts in which the school buildings are located.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Powers to Provide Bookcases for Office of Commonwealth's Attorney.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 10, 1941.

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

MY DEAR MR. BUTLER:

This is in reply to your letter of June 7, 1941, in which you state that the office of the Commonwealth's attorney of Alleghany County is located in the court house of said county. You ask if the Board of Supervisors has legal authority to purchase bookcases for this office out of county funds, the bookcases to remain the property of the county.

Section 2854 of the Code, which imposes upon the Board of Supervisors of every county the duty of providing a court house for the county, provides in part as follows:

"* * * and the board of supervisors of each county, or the council of each city shall, if there be offices in the courthouses of the respective counties and cities, available for such purposes, provide offices for the treasurer, Commonwealth's attorney, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city,
and if such offices are not available in the courthouse, same may be provided
by said board of supervisors or council, if they deem it proper, elsewhere than
in the courthouse of said county or city * * *.

Since bookcases are necessary equipment for the Commonwealth's attorney's
office, it is my opinion that the Board of Supervisors may expend money to pur-
chase same as a necessary incident in providing an office.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Spending Money on Paving Street in Town.

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

HONORABLE T. MOORE BUTLER,
Attorney for the Commonwealth,
Covington, Virginia.

MY DEAR MR. BUTLER:
I am in receipt of your letter of March 11, from which I quote as follows:

"There is a street in the corporate limits in the Town of Covington, Vir-
ginia, known as Alleghany Avenue. The residences on one side of this street
are outside of the corporate limits in Alleghany County. The street, itself,
lies wholly within the corporate limits of the Town of Covington. The Town
Council desires the Board of Supervisors of Alleghany County to assist finan-
cially with the paving of the said street. The Council has agreed to put up
one-half of the costs and has requested the Board of Supervisors of Alleghany
County to put up the other half of the costs to pay for the paving of the said
street under a proposed WPA project.

"Will you please give me an opinion as to whether or not the Board of
 Supervisors can legally pay one-half of the costs of paving the aforesaid
street?"

I can find no statute which gives to the Board of Supervisors of Alleghany
County the authority to appropriate county funds for the paving of a street in the
Town of Covington.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF SUPERVISORS—Special Meeting—Notice Required.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 26, 1941.

HON. C. CHAMPION BOWLES,
Attorney for the Commonwealth,
Goochland, Virginia.

MY DEAR MR. BOWLES:
This will acknowledge receipt of your letter of March 24, in which you in-
quire concerning the notice required under section 2715 of the Code as amended
for a special meeting of the board of supervisors. You set out a number of hypo-
thetical situations, which from the nature of my reply it is not necessary to repeat.

In my opinion, the only special meeting of the board of supervisors that may
be held without complying with the provisions of section 2715 of the Code is a
special meeting at which all of the members are present. In such a case I think
the minutes of the meeting should show that the notice required by section 2715
was waived by all of the members and that the requirement of notice as to the
matters to be considered was also waived by all of the members.

In reply to your fifth inquiry, it seems to me that section 2715 contemplates
that, even when the notice of the special meeting is served by the sheriff, such
service should be made on each member five days before the special meeting.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Mayor—Eligibility—Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 30, 1940.

HONORABLE LAWRENCE H. HOOVER,
Commonwealth’s Attorney,
Harrisonburg, Virginia.

Dear Mr. Hoover:

This is in reply to your letter of November 23, in which you ask if Mr. Her-
bert P. Snapp is eligible to fill the vacancy of the office of mayor for the Town
of Grottoes, Virginia.

You state that Mr. Snapp lives several hundred yards outside of the corporate
limits, receives his mail at the Grottoes Postoffice, votes at the Grottoes precinct,
and still owns property in the town; that he moved to his present location outside
the town some years ago while serving as mayor, and continued to fill the office
during the remainder of his term without objection from anyone.

Section 32 of the Constitution of Virginia provides that every person qualified
to vote shall be eligible to any office in the State, or in any county, city, town or
other subdivision wherein he resides, except as otherwise provided in the Consti-
tution. This, in my opinion, has reference to legal domicile and not merely a
place where a person may reside but which has not been adopted as such.

If, therefore, Mr. Snapp has retained the Town of Grottoes as his legal domi-
cile, he is eligible to fill the vacancy of the office as mayor. If this is not true,
however, he would be ineligible for this office by virtue of the provisions of sec-
tions 2703 and 2704 of the Code of Virginia.

Whether or not a person has changed his legal domicile is a question gov-
erned by all the facts and circumstances of the case. In this instance, I do not
feel that the facts in my possession are sufficient upon which to base an opinion.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Power to Pass Ordinance Paralleling A. B. C. Act.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 19, 1940.

HONORABLE C. F. WHITLEY,
City Attorney,
Municipal Building,
South Norfolk, Virginia.

Dear Mr. Whitley:

This is in reply to your letter of November 14, in which you inquire as to
whether or not this office has ever rendered an opinion to the effect that a mu-
municipal corporation may pass ordinances paralleling section 50 of the alcoholic
beverage control law with reference to the possession of alcoholic beverages.
No such opinion has ever been given, in view of the fact that section 65 of the
alcoholic beverage control law prohibits any county, city of town from passing
any ordinance regulating the possession of alcoholic beverages in Virginia.
In 1938 an amendment was adopted, which is chapter 129 of the Acts of 1938,
that permits local ordinances regulating the sale of wine and beer on Sunday.
Localities may also parallel the statute prohibiting the driving of a motor vehicle
under the influence of intoxicating liquors. I know of no other laws relating to
alcoholic beverages which may be so paralleled.
Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Town Treasurer—Bond of.

HONORABLE WILLIAM RICHARD SAUNDERS,
Commonwealth's Attorney,
Bedford, Virginia.

My Dear Mr. Saunders:
This is in reply to your letter of November 27, in which you request my
opinion upon the question whether or not, under the provisions of section 22 of
the Charter of the Town of Bedford (Acts 1912, chapter 165) and the general
provisions of section 3034 of the Code of Virginia, the Town Council has discre-
tion in fixing the penalty of the bond of the treasurer of said Town.
It is my opinion that the Town Council does have this discretion.
You sent me with your letter a copy of the resolution of the County School
Board of Bedford County, requiring the county treasurer to pay over to the town
treasurer of Bedford the proportionate part of the school taxes contemplated by
section 653 of the Code of Virginia, as amended. Section 653 of the Code re-
quires this payment to be made by the county treasurer to the town treasurer
when the latter has been properly bonded. If the county treasurer is of opinion
that the Town Council has abused its discretion in fixing the amount of the bond
and that said treasurer has not been properly bonded, I believe that he would be
justified in raising this question and taking the matter up with the Town Council.
If the Town Council insists that its discretion has not been abused, and the county
treasurer still disagrees upon that point, he may decline to make the payment and
the question of whether or not there has been an abuse of discretion in fixing the
penalty of the bond may be determined by a writ of mandamus to compel the
county treasurer to make the payment.
Of course, I am not in a position to form an opinion upon the question of
what is the proper penalty of a bond of this kind, and cannot undertake to pass
upon the question whether or not the amount of the penalty fixed is within the
proper discretion of the Board.

Very truly yours,

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

CLERKS—Commission on Taxes Collected by Delinquent Tax Collector.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 5, 1941.

Hon. E. Hagan Richmond,
Attorney for the Commonwealth,
Gate City, Virginia.

My Dear Mr. Richmond:

Your letter of February 1 reached this office on February 3 in the absence of Senator Staples and too late to reply thereto in time for you to receive it on February 4.

You desire the opinion of this office on whether or not the clerk of the circuit court of Scott county is entitled to a five per cent commission on delinquent local taxes alleged to have been collected by a delinquent tax collector of Wise county. You state that the taxes on which the clerk claims commission are taxes which, if collected by the delinquent tax collector, did not pass through the clerk's hands and indeed which were never received by the county. I assume that the collections, if made, represented taxes on real estate which had been sold to the Commonwealth for the benefit of the county on account of the non-payment thereof.

I know of no statute which provides for commission to the clerk in such a case. Indeed I know of no statute which provides for a commission of five per cent to the clerk on account of taxes collected by a delinquent tax collector and which do not pass through the clerk's hands. On this question I enclose a copy of an opinion given you under date of June 4, 1937. I also enclose a copy of an opinion of this office under date of June 17, 1938, to Honorable Robert R. Jones, Attorney for the Commonwealth of Powhatan County, in which the view is expressed that there is no statute which provides for the payment of a commission of five per cent to the clerk of a court on account of the collection of local taxes on real estate where such taxes are collected by an attorney appointed by the board of supervisors for this purpose.

Very sincerely yours,

W. W. Martin,
Assistant Attorney General.

CLERKS—Deputies—Bonds of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 20, 1940.

Honorable George T. Tyson,
Clerk of Northampton County,
Eastville, Virginia.

My Dear Mr. Tyson:

I am in receipt of your letter of November 15, from which I quote as follows:

"Judge Nottingham has just called my attention to section 3382a concerning women as deputy clerks, which is in part as follows:—"

"'Any female over the age of 18 years may be appointed deputy clerk by the clerk of any court of this Commonwealth, and with the consent of the court, may qualify and give bond as such.'"

"The general law as to deputies, section 2701, makes no requirement as to bond of deputies, and same has been amended since the enactment of section 3382a. I am wondering whether, in view of this, women should be required to give bond as deputy clerks. If so, should that bond be made payable to the Commonwealth of Virginia or to the clerk?"
Section 2698, prescribing bonds to be given by public officers, does not require a bond of a deputy and, as you state, section 2701 of the Code, providing for the appointment of deputies, does not require that a deputy shall give bond. Of course, the clerk may require a bond of his deputy for his own protection. The provision enabling the eighteen year old deputy to execute a bond would seem to be intended to remove the ordinary disability of infancy with respect thereto, should same be required by the clerk or by some other law.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General

Clerks—Deputy Clerk—Power to Administer Oath to Administrator.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 21, 1941.

HONORABLE E. BLACKBURN MOORE,
Member of the House of Delegates,
Berryville, Virginia.

My Dear Blackburn:

This is in reply to your letter of January 20, in which you request my opinion upon the question of the authority of the deputy clerk of the circuit court to administer the required oath to an administrator who is qualifying upon his decedent's estate.

Section 274 of the Code provides that any oath which is not required to be made in court may be administered by a deputy clerk of a court. The deputy was authorized to administer an oath by an amendment to this section which was made in 1932 (Acts 1932, page 339).

I find nothing in the statutes which require the oath of administrator to be administered by the court or in court.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

Clerks—Deputies—Authority to Carry Concealed Weapons.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 3, 1940.

MR. K. E. FULLER, Deputy Clerk,
Circuit Court of Dickenson County,
Clintwood, Virginia.

My Dear Mr. Fuller:

I am in receipt of your letter of November 29, in which you inquire whether you as deputy clerk may carry a concealed weapon.

Section 4534 of the Code deals with the subject of carrying concealed weapons and prescribes the punishment therefor. However, the section does not apply to certain officers, including a conservator of the peace. No exception is made for a clerk or his deputy, and I can find no statute designating a clerk or his deputy as a conservator of the peace. An exception is made for a collecting officer while in the discharge of his official duty, but from what you state I doubt whether this exception, even if you could be held to be a collecting officer, would cover all of the times during which you desire to carry the concealed weapon.
I call your attention to the fact that under section 4534 the circuit court may grant permission to carry a concealed weapon. This would seem to be a solution for your problem.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Fees—Felony Cases—Nolle Prosse.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., December 3, 1940.

Hon. J. T. Clement, Judge,
Seventh Judicial Circuit,
Chatham, Virginia.

My Dear Judge Clement:
I am in receipt of your letter of November 30, in which you refer to section 3506 of the Code, providing for a fee to a clerk of $2.50 “for each case of felony tried in his court”. You ask my opinion as to whether this fee should be taxed in case of a felony which is nolle prosse.

As you state, in such a case the clerk has already done most of the work required for a trial, but, nevertheless, I do not understand that a nolle prosse can be considered a trial. The statute expressly stipulates that the fee shall be charged in the case of a felony which is nolle prosse.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Fee Allowed Under Section 2552 of Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., September 4, 1940.

Honorable J. H. Irby, Clerk,
Circuit Court of Nottoway County,
Nottoway, Virginia.

My dear Mr. Irby:
I am in receipt of your letter of August 29, relative to the fee allowed a clerk under section 2552 of the Code.

This office has expressed the opinion on several occasions that in criminal cases arising before a trial justice the fee of 25 cents should be taxed as a part of the costs. Where it is so taxed, obviously the clerk would not bill the Commonwealth for it again. If the fee is so taxed and is paid by the defendant, then naturally it would not be paid by the Commonwealth, but if it is not paid by the defendant, then it is a proper charge against the Commonwealth.

The provision in section 2553 that the clerk shall include in an execution for a fine his fee for recording the certificate simply means that the above described fee should be included in the execution if it has not already been paid, and the clerk should also include in the execution his fee for issuing the same.

Very sincerely yours,

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

CLERKS— Fees—Recording Installment Payment on Fines.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 20, 1940.

Hon. Eugene W. Chelf,
Attorney for the Commonwealth,
Salem, Virginia.

My dear Mr. Chelf:
I am in receipt of your letter of December 17, with further reference to the question raised in your letter of December 5 as follows:

“It has been the custom in this county for a long time for the trial justice in certain cases to allow defendants in criminal cases to pay fines and costs in installments. Such fines and costs are reported to the clerk of the circuit court, who enter them as judgment in the judgment lien docket, pursuant to section 2552 of the Code, which provides that he shall be paid a fee for such of twenty-five cents, payable out of the State treasury. Subsequently, as such installments are paid to the trial justice and reported to the clerk, he enters the amount paid in the judgment lien docket to the credit of the judgment, and he has customarily charged a fee of twenty-five cents for each installment he credits.

“Mr. Roy K. Brown, the clerk of the circuit court, has recently received a statement from the Assistant Comptroller for the sum of $15.75 for criminal costs erroneously charged to and paid by the Commonwealth during the calendar year of 1938, as indicated by the Auditor of Public Accounts in his report to the Governor dated October 10, 1940. This sum covers numerous fees charged by Mr. Brown as above mentioned.”

You desire the opinion of this office as to “whether or not the clerk is entitled to this 25 cent fee for recording installment fines paid to the trial justice.”

From my examination of the statutes I can find no authority for this fee to the clerk to be paid by the Commonwealth as a part of the criminal costs. As you state in your letter, the clerk is entitled to the fee of 25 cents for recording the fines in the book prescribed by section 2552 of the Code. The statute (section 2566 of the Code) also provides for a fee of $1 for the clerk for reporting the fine to the State Comptroller. However, I can find no authority for the payment of the fee to the clerk by the Commonwealth for recording each installment payment on a fine. When the fine has been fully paid, it may be that the clerk can collect a fee from the judgment debtor for entering satisfaction of the judgment, but I do not think that the statutes authorize the payment of the fee by the Commonwealth under the circumstances stated by you.

Very sincerely yours,

Abram P. Staples,
Attorney General.

CLERKS— Fees—For Indexing Papers Returned by Trial Justice Prematurely.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 14, 1941.

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

Dear Mr. Downs:
I am in receipt of your letter of January 10, in which you enclose one from Honorable Philip Williams, Trial Justice of Shenandoah County, dated Decem-
ber 28, 1940. Mr. Williams refers to section 4987-j of the Code, which provides with certain exceptions not pertinent here that all papers connected with any proceeding before a trial justice should be kept by the said trial justice for two years and then returned to the clerk's office of the circuit or corporation court, as the case may be, and properly filed, indexed and preserved by the clerk, who shall receive the same fees as are now allowed for receiving, filing and indexing like papers returned by justices of the peace. It appears that the clerk of the circuit court of Shenandoah county has secured from the trial justice papers which have not been kept in the trial justice's office for two years and are, therefore, not yet due to be sent to the clerk's office. However, they were turned over to the clerk and he has indexed them, and the question is whether he is entitled to be paid his fees at this time.

I am of the opinion that the clerk is not now entitled to the fees for indexing these papers. In effect what has happened is that the clerk has voluntarily indexed the papers at a time prior to the time the law contemplates that they should be so indexed. He has rendered a voluntary service for which no fee is provided. Under the statute the papers should be kept in the office of the trial justice for two years and there is no fee provided for indexing such papers until after they have been so kept for two years and then turned over to the clerk.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Fees in Criminal Cases When Jury Waived.

HONORABLE A. B. CORRELL, Clerk,
Circuit Court of Montgomery County,
Christiansburg, Virginia.

MY DEAR MR. CORRELL:

This will acknowledge receipt of your letter of January 15, in which you direct attention to section 3506 of the Code providing that "for each case of felony tried in his court, to be charged only once, the sum of two dollars and fifty cents." You then state:

"Since I have been Clerk of the Circuit Court of Montgomery County I have charged only for felony cases in which a jury was impannelled and sworn, but not for felonies where the defendant waived his right for a trial by jury, pleaded guilty, and accepted the judgment of the court. What I would like to know is whether or not, in your opinion, I am entitled to receive the $2.50 provided by this section of the Code in cases where the defendant pleaded guilty and was tried by the Judge without the intervention of a jury. If I am entitled to these fees, will it be in order for me to bill the State for all such cases not heretofore charged for from the beginning of my term of office, January 1, 1936, or is there a limitation as to the time in which an account must be rendered to the Comptroller in such cases?"

In my opinion, a plea of guilty by the defendant charged with a felony, followed by the judgment of a court, a jury having been waived, constitutes a trial. It follows that in such cases you are entitled to the fee provided by the section.

As you know, the only source from which the payment of these back fees can be made is the appropriation for criminal charges in the current Appropriation Act. Generally speaking, it has been the view of this office that it is contemplated that only current expenses shall be paid out of the appropriation for
criminal charges covering the biennium beginning July 1, 1940. However, in any event, it will be necessary for your account to be certified by the judge of your court pursuant to section 4961 of the Code. I suggest, therefore, that the matter be presented to the judge for his consideration and, if the judge is disposed to execute the certificate to the comptroller, I suggest that this be done and the account forwarded to the comptroller. If that officer then desires the opinion of this office as to whether he is authorized to make the payment, it will be given to him upon request.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Renunciation of Wills—Where Recorded.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 24, 1941.

HONORABLE J. W. BAKER, Clerk,
Frederick County Circuit Court,
Winchester, Virginia.

My dear Mr. Baker:
I am in receipt of your letter of February 21, which reads as follows:

“May I have the benefit of your opinion as to the proper place for a renunciation of a will made either by husband or wife, in writing and acknowledged, as prescribed by law, to be recorded?”

Section 5276 of the Code provides in effect that, where renunciation of a will is made by a husband or wife and is in writing, such renunciation shall be recorded in the clerk's office of the court in which the will is recorded. The section does not specifically state in what book the renunciation shall be recorded, but, in my opinion, the proper place would be in the will book. The clerk of the chancery court of the City of Richmond, wherein a great number of wills are recorded, advises me that renunciations in that court are recorded in the will book, and this practice appears to me to be the correct one.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Minimum Allowance Out of County Treasury—Halifax County.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 8, 1941.

HONORABLE E. G. LACY, Clerk,
Halifax, Virginia.

My dear Mr. Lacy:
This is in reply to your letter of April 2, which for convenience I quote as follows:

Sections 2726n through 2726y provide the annual allowance to be made by the Boards of Supervisors in the various counties to be paid sheriffs and
clerks. Section 2726r deals with counties beginning with G and H, but in fixing the minimum and maximum, the Clerk for Halifax County is omitted in said election.

"Please advise me what, in your opinion, is the minimum and maximum salary that the Board of Supervisors may pay the clerk of Halifax County."

Inasmuch as the salary of the clerk of the court of Halifax County is not embraced in any of the exceptions provided for in section 2726 of the Code, it seems clear that the maximum and minimum provided for by that section must prevail. Halifax County comes within the group of those counties containing over 40,000 population, and said section provides that unless exception is made in the following sections the salary of the clerk and the sheriff shall be not less than $1,000 nor more than $1,500.

It follows, therefore, that I am of opinion that this is the provision which governs the minimum and maximum amounts of the salary that the board of supervisors may fix for the clerk of Halifax County.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS—Recordation of Powers of Attorney of Corporations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 12, 1940.

HONORABLE MARVIN A. TROUT, Clerk,
Circuit Court of Warren County,
Front Royal, Virginia.

MY DEAR MR. TROUT:

I am in receipt of your letter of July 10, in which you state that it has been your practice to record in the deed book powers of attorney of corporations whose charters are recorded in your office. You desire to know whether your practice is correct or whether these powers of attorney should be recorded in the charter book.

The statute, section 3854 of the Code, is silent on the subject, but I am advised that the practice of the other clerks of court in the State is the same as that which has prevailed in your office. I suggest, therefore, that you follow your present practice and record these instruments in the deed book.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

CLERKS—Retention of Instruments Filed for Docketing Under Section 5202a of Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 29, 1940.

HONORABLE MARVIN A. TROUT,
Clerk of Warren County,
Front Royal, Virginia.

MY DEAR MR. TROUT:

Please pardon my delay in replying to your letter of August 1, which has been due to absence from the city and the press of other matters.
You ask if you should retain in your office instruments filed for docketing with you under section 5202a of the Code, as enacted in 1940 (Acts 1940, page 248). This section provides for the docketing in the clerk's office of mortgages, chattel mortgages, and deeds of trust on live stock or poultry.

The last General Assembly, amending section 5189 of the Code (Acts 1940, page 252), dealing with the filing for docketing of similar instruments covering other classes of personal property, provided that such instruments, after being docketed, should be returned to the party filing the same. In my opinion, therefore, the clerks will be justified in accepting this as the policy announced by the General Assembly in this respect, and may return to the parties filing the same instruments docketed under section 5202a of the Code.

As to the liability to the recordation tax on a deed of trust under this section, in my opinion the tax should not be charged unless the instrument is recorded at length in the deed book, as distinguished from docketing it in the miscellaneous lien book.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGE OF WILLIAM & MARY—Appropriation—Operation of Richmond and Norfolk Divisions.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 24, 1940.

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

My dear Dr. Hall:

I am in receipt of your letter of September 25, enclosing a communication from Mr. A. H. Foreman, a member of the Board of Visitors of the College of William and Mary, in which the opinion of this office is requested on whether the Board of Visitors of the College "is acting within the law when it expends on the operation, maintenance, etc. of its Norfolk and Richmond Divisions any of the funds which have been appropriated to the College by the General Assembly from the general treasury of the Commonwealth." You also ask that you be advised on this point.

The Appropriation Act of 1940 (Acts 1940, page 766, at page 800) makes an appropriation for the maintenance and operation of the College of William and Mary of $239,319 for the first year of the biennium and $228,885 for the second year of the biennium. There is nothing in the Act to prevent the Board of Visitors from using a part of these appropriations from the general fund for the operation and maintenance of the Norfolk and Richmond Divisions of the College, and I am, therefore, of opinion that the Board of Visitors may use these appropriations for this purpose. You are, of course, familiar with section 42 of the Appropriation Act, which provides that no State institution of higher learning shall engage in the operation of any new or additional extension school, day school, or junior college, or in the teaching of any new or additional courses of study or extension course, without the approval of the State Board of Education and the Governor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COMMISSION OF FISHERIES—Jurisdiction—Over What Waters—
Commission of Game and Inland Fisheries.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 2, 1940.

B. Drummond Ayres, Esq.,
Attorney at Law,
Accomac, Virginia.

My Dear Mr. Ayres:

I have your letter of November 28, in which you request my opinion upon
the question of the respective jurisdictions of the Commission of Fisheries and the
Commission of Game and Inland Fisheries in certain fresh waters below tide-
water. As you state, the statutes on this subject are quite complicated and it is
somewhat difficult to reconcile all of them.

Generally speaking, the Commission of Fisheries has charge of the enforce-
ment of industrial fishing, while the Commission of Game and Inland Fisheries is
related primarily to fishing by sportsmen. Of course, one source of conflict is
caused by certain fish which are usually known as game fish but are also useful
from an industrial standpoint.

Section 8 of the 1930 Act seems to contemplate that brackish and fresh water
streams, creeks, bays, including Back Bay, inlets and bays in the tidewater coun-
ties, come within the jurisdiction of game fishing, while other waters are segre-
gated to commercial fishing. I think it very doubtful that subsection 9 of section
3146 of the Code, as amended in 1936, could be construed as intending to transfer
to the Commission of Fisheries jurisdiction over the waters primarily devoted to
game fishing.

You will note that section 9 refers to the fish and shellfish industry and says
that the Commissioner shall enforce the laws in the tidewaters, and waters in
which the State has joint jurisdiction. I am inclined to the view that this would
probably be construed to mean that the Commissioner should enforce these laws
in all tidewaters, and other waters subject to the jurisdiction of the Commission.
The question is a very troublesome one, however, and I think that it is very im-
portant that the two commissions should get together and settle the question of
where their lines of jurisdiction begin and end. There does not seem to be any
arbitrary rule which can satisfactorily serve as a test of jurisdiction, but it does
seem that the two bodies should be able to reach an agreement pursuant to the
authority conferred upon them by the 1938 Act.

If I can be of any service in bringing about an agreement, I shall be very glad
to cooperate in the matter. I might suggest that the waters in which it has been
customary in the past for commercial fishing to be practiced upon a substantial
and profitable basis should be left within the jurisdiction of the Commission of
Fisheries, while waters in which such commercial fishing has not been carried on
should be assigned to the Commission of Game and Inland Fisheries. I have no
doubt that the members of the two Commissions are sufficiently familiar with the
facts to be able to segregate the waters if this should be agreed upon as a satis-
factory basis of division.

Sincerely yours,

Abram P. Staples,
Attorney General.
COMMONWEALTH’S ATTORNEYS—Duties—Bond Issue of Magisterial District.

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

My Dear Mr. Ackiss:
This is in reply to your letter of November 12, from which I quote as follows:

"I have recently been requested by the County School Board of Princess Anne to prepare all necessary documents and conduct the necessary proceedings with reference to a proposed bond issue to be voted upon by the voters of a magisterial district for the construction of schools in that district. As you know, the duties required of the Commonwealth’s Attorneys to be performed for the School Board are not very well defined.

"I shall appreciate your opinion as to whether or not the above service is required of me by law as Commonwealth’s Attorney, or am I entitled to reasonable compensation therefor as a private practitioner. I have always been of the opinion that the duties of the Commonwealth’s Attorney to the School Board was to give legal advice and opinions."

I can find no statute which places upon the Commonwealth’s Attorney the duty of rendering the service described by you. This office has frequently expressed the opinion that the School Board may employ the Commonwealth’s Attorney, or any other practicing attorney, to perform necessary legal services. I am, therefore, of opinion that the School Board may employ you in this matter to perform the services for a fee to be agreed upon. It is well in such cases, I think, for the fee to be agreed upon in advance.

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

COMPTROLLER—Paying Part of Criminal Expense Account While Holding Contested Items in Abeyance.

HONORABLE LEROY HodGES,
State Comptroller,
Richmond, Virginia.

My Dear Colonel Hodges:
I am in receipt of your letter of February 24, in which you state that frequently your office receives criminal expense accounts with minor errors therein, although part of the account is plainly correct. You state that it is your practice as to the errors that appear to call the matter to the attention of the judge approving the account before payment is made. You desire to know, however, "whether or not it would be proper for the Comptroller to pay items on a bill which appear to be proper, and hold contested item or items in abeyance pending further correspondence with the judge."

It seems to me entirely proper for you to pay that part of the account which
REPORT OF THE ATTORNEY GENERAL

is entirely correct and hold the balance in abeyance provided the matter can be handled satisfactorily from an accounting standpoint. I can think of no good reason why the officer should not receive as soon as possible the money which is admittedly due him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONSERVATION COMMISSION—Authority to Pay Dues of Director of Division of Publicity and Advertising in National Association of Accredited Publicity Directors.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 14, 1941.

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

DEAR MR. SMITH:

This will acknowledge your letter of January 4 addressed to Mr. Kelly, of this office, in which you request my opinion as to the legal authority of your commission to pay the initiation fee and dues of Mr. J. Stuart White in order to obtain his membership in the National Association of Accredited Publicity Directors. Mr. White is Director of your Division of Publicity and Advertising.

From an examination of the charter and by-laws of the association in question it appears to be an organization composed of individuals engaged in the business or profession of directing public relations, usually on behalf of private business concerns. The primary purposes of the organization are to establish and maintain high professional standards and to foster the development of improved technique in the publicity and advertising field.

In my opinion the propriety of making such an expenditure is primarily a matter of policy for the determination of the Commission. If your Commission feels, upon a consideration of the nature of this organization and its proceedings, that the expense of maintaining Mr. White's membership would be a good investment for the Commission, I know of no legal limitation upon the power of the Commission to expend public funds for this purpose.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 3, 1940.

MR. B. DRUMMOND AYRES,
Attorney at Law,
Accomac, Virginia.

MY DEAR MR. AYRES:

Your letter of June 20 was received during my absence of several days from the office.

With respect to the application of the Virginia Conservation Commission for assignment of a bathing beach opposite Seashore State Park, it is my opinion that the application should be granted, but that the Commission should not be required to pay the rent prescribed for applicants generally by Code section 3197.
This statute unquestionably confers upon the Commission of Fisheries the power and authority to assign such areas for bathing beaches, but in so far as it would require the Commonwealth in effect to pay rent to itself, this section would seem to fall within the general rule that the State is exempt from the operation of statutory provisions which would impose restrictions or liability upon it, in the absence of express language to the contrary. See 25 R. C. L., Statutes, section 32.

As to the application of the National Park Service for a similar assignment opposite government property at Yorktown, I concur in your view that there is nothing in Code section 19c, or elsewhere in the law, to exempt the United States government from paying to the Commonwealth the rent prescribed by the Legislature in Code section 3197.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

CONSERVATION COMMISSION—Disposal of Flags in State Museum.

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

HONORABLE ROWLAND EGGER,
Director of the Budget,
Capitol Building,
Richmond, Virginia.

My Dear Dr. Egger:

I have your letter of January 13, requesting my opinion as to the authority of the Virginia Conservation Commission to transfer certain flags which are now held in the State Museum to the Confederate Memorial Institute. You state that the flags in question are in need of repairs which the Institute is equipped to make and that the flags would be more appropriately exhibited in the collection at Battle Abbey than in the State Museum.

Under the provisions of Virginia Code (Michie 1936) section 585(47)a, the Conservation Commission is charged with the duty of maintaining and caring for the State Museum and all flags and other exhibits therein. This section authorizes the Commission to "dispose of any flags, pictures", etc., "which for any reason may be or may become unfit or unsuited for exhibition purposes", but makes no provision for the disposal of any museum property under any other conditions.

It is my opinion, therefore, that, unless the flags in question have become unfit or unsuited for exhibition as provided by this statute, the Commission cannot legally make the proposed transfer without further legislative authority.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

CONTRACTS—State Agency Requiring Independent Contractor to Carry Insurance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 8, 1941.

DR. LEWIS E. JARRATT,
Director of Hospital Division,
Medical College of Virginia,
Richmond, Virginia.

Dear Dr. Jarratt:

I have your letter of January 2, enclosing a proposed agreement with the Cut Rate Window Cleaning Company for the cleaning of windows, glass doors, etc.,
in the new hospital building. You request my opinion as to whether under the law you must require the contractor to carry both public liability and workmen's compensation insurance.

I am unable to find anything either in the Workmen's Compensation Act or elsewhere in the law which would impose on your institution any legal responsibility for the maintenance of workmen's compensation insurance by an independent contractor in such a case, nor are you legally required to demand that such contractor carry public liability insurance. This office has previously advised that it is proper for a public agency to carry public liability insurance or to require it of contractors dealing with the agency, but this is entirely a matter of policy and not one of legal necessity.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

CONTRACTORS—Regulation of—Independent Contractor With Federal Government.

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

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

My Dear Mr. Bigger:

This will acknowledge receipt of your letter of December 12, in which you ask the following question:

"The Board desires to have your opinion as to whether Chapter 431, Acts of 1938, as amended by Chapter 409, Acts of 1940, entitled an Act to Regulate the Practice of General Contracting in Virginia, applies to a contractor who under a contract with the Federal Government undertakes construction thereunder on Federal Government property."

The United States has exclusive jurisdiction of all lands acquired by it for military and naval purposes prior to 1936. My information is that most lands owned by the Government for this purpose were acquired prior to that time, and I should say, therefore, as a general proposition that, the United States having exclusive jurisdiction over such lands, the Act creating the State Registration Board for Contractors would not apply to a contractor whose sole business in Virginia consists of a contract with the Federal Government for construction work on such property.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CORONER—Duty to Make Preliminary Inquiry.

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

Honorable A. S. Harrison, Jr.,
Commonwealth's Attorney,
Lawrenceville, Virginia.

My Dear Mr. Harrison:

This is in reply to your letter of November 19, in which you request my opinion upon the question whether or not under the provisions of section 4806 of
the Code, as amended by Acts of 1940, it is the duty of a coroner to make a preliminary inquiry or investigation in the cases of sudden death referred to in said section in the absence of a request so to do from the Commonwealth's Attorney.

It is my opinion that said section divides the duties of the coroner into two divisions or classes: the first consisting of an informal preliminary investigation or inquiry to determine facts from which it may be ascertained whether or not a formal inquest, at which witnesses will be heard, is necessary or proper. The statute seems to contemplate that the facts ascertained as a result of this preliminary investigation should be reported to the Commonwealth's Attorney or the Judge of the Court, and, if the Commonwealth's Attorney or Judge of the Court deem it proper that a formal inquest should be held, the coroner would be requested to conduct such an inquest.

Obviously, it is necessary for some person to make a preliminary investigation before it can be ascertained whether or not a formal inquest is necessary, and it seems to be the purpose of the statute to impose this duty upon the coroner rather than upon the Commonwealth's Attorney or the Judge of the Court, while at the same time vesting in one or both of the latter offices the duty of determining, in the light of the facts disclosed by the coroner's preliminary investigation, whether a formal inquest should be held.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CORPORATIONS—Preferred Stock of Holding Companies as Legal Investment for Fiduciaries.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 7, 1941.

HONORABLE M. R. MORGAN,
Commissioner of Banking,
State Office Building,
Richmond, Virginia.

My Dear Mr. Morgan:
This will acknowledge receipt of your letter of January 2, from which I quote as follows:

"Will you please advise this office if the preferred stock of an industrial corporation carrying on no industrial operations directly, but simply a holding company owning common stocks of various subsidiary corporations engaged in industrial operations will qualify as a legal investment for fiduciaries under section 5431, sub-section 17, of the Code. Should such corporations be classified as financial or industrials?"

I presume that you refer to sub-section 18 of section 5431 instead of sub-section 17, since your inquiry is directed to preferred stock. The section does not define the term "industrial corporation," but from a consideration of all of the language of sub-section 18, in my opinion, the term "industrial corporation" is used in the sense of an actual operating industrial corporation as distinguished from a pure holding company. The verbosity of the sub-section certainly seems to me more applicable to an operating company and, in my opinion, it is to this character of corporation that the sub-section refers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COSTS—Civil Cases—Expense of Jury.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 7, 1940.

HONORABLE HARVEY B. APPERSON,
Attorney at Law,
Boxley Building,
Roanoke, Virginia.

DEAR HARVEY:

This is in reply to your letter of October 29, in which you ask if, in my opinion, the party against whom a judgment is secured in a civil case should be assessed with the costs of summoning the jury and with the mileage and compensation allowed to the members of the jury.

Section 6007 of the Code of Virginia (Michie 1936) provides that the compensation and mileage of jurors in civil cases are to be paid out of the county or corporation levy. With the exception of section 6005 of the Code, which provides that the court may, in its discretion, cause the entire costs of a special jury to be paid by the plaintiff or defendant, I find no statutory provision whereby either party to a civil case may be assessed with the compensation paid to jurors or the expense of summoning them. Chapter 136 of the Code (sections 3517-3537, both inclusive), which deals with costs in civil cases and the items to be assessed as such, makes no reference to the expense of summoning a jury to try a case.

I am informed by the clerks of the Law and Equity Court and of the Circuit Court of the city of Richmond, wherein most of the jury cases in this city are tried, that it has never been the practice in those courts to assess the expenses of the jury as part of the costs in civil cases. In my opinion, this is the correct procedure to follow.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Proceedings Against Sheep-Killing Dogs.

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

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

DEAR MR. LEE:

This is in response to your letter of November 14, in which you request my opinion as to how the costs of proceedings under section 3305(71) may be paid and as to whether, in cases where the dog in question is condemned, such costs may be taxed against the owner.

I find no express provision of any statute as to how these costs shall be paid, but call your attention to the fact that Code section 3305(14), which provides for the establishment of a game protection fund, provides that such fund "shall be used for the payment of the salaries, allowances, wages and expenses incident to carrying out the provisions of the hunting, trapping, inland fish and dog laws * * *"

In the light of this Code section it would be proper, in my opinion, to pay the costs of proceedings under Code section 3305(71) out of the appropriation to the Commission of Game and Inland Fisheries "for administration of the laws relating to game and inland fisheries" (Acts 1940, p. 839), by which the game fund is appropriated for the biennium 1940-1942.

As to the taxation of such costs against the owner of the dog the law is again
not entirely clear. It would seem, however, that such costs might properly be so
taxed under the general provisions of Code section 3525. In this connection I
call your attention to the language of the court in the case of Childers v. Common-
wealth, 171 Va. 456. Referring to proceedings under section 3305(71), the court
said:

" * * * we may readily concede that the owner of a dog charged with
sheep-killing may appear in court to refute that charge, and in such manner
become liable for costs. * * *" (171 Va. at p. 459).

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Taxation of in Cases Against State Board of Embalmers and
Funeral Directors.

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

HONORABLE H. H. MARTIN,
Clerk of Corporation Court,
Lynchburg, Virginia.

MY DEAR MR. MARTIN:

I am in receipt of your letter of June 28 with reference to taxing the costs
in a case in the Corporation Court of Lynchburg, in which the Court directed
that a license be issued by the State Board of Embalmers and Funeral Directors.
The statute (section 1722, Michie's code of 1936) provides that all monies received
by this Board shall be paid into the State treasury. The General Assembly, in
turn, makes a specific appropriation for the expenses of the Board. Inasmuch as
the Board does not retain for its expenses the monies collected, but is supported
by an appropriation out of the general fund as other State Departments, in my
opinion the case should be treated as other Commonwealth cases, which would
mean that the costs should not be taxed to the Board but to the Commonwealth.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Applicability of Code Section 2904 to Madison County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 18, 1941.

MR. T. H. LILLARD,
Sheriff of Madison County,
Graves Mill, Virginia.

DEAR MR. LILLARD:

I am in receipt of your letter of February 17, in which you ask if section 2904
of the Code is applicable to Madison County.

You will observe that this section relates to the proportion of the costs and
expenses of the judge, clerk of court, Commonwealth's attorney and the sheriff
which shall be borne by the county and a city of second class within such county.
Inasmuch as no city of the second class is located in Madison County, I do
not think that the section is applicable to the county under existing conditions.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COUNTIES—District Bond Issue—Validity—Rate of Levy for.

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

HONORABLE JOHN W. GILLESPIE,
Commonwealth's Attorney,
Tazewell, Virginia.

MY DEAR MR. GILLESPIE:

This is in reply to your letter of December 24, along with which you enclose a copy of a letter to you from Messrs. Storey, Thorndike, Palmer and Dodge, attorneys, of Boston, Massachusetts, relating to the question of the validity of certain bonds which have been issued by Maiden-Spring School District in the county of Tazewell. You request my opinion upon the following questions which are raised by this letter.

The first question presented is whether or not the provisions of section 698 of the Code should be construed as limiting the rate of levy for district bonds issued pursuant to section 673 of the Code.

The letter to you from the Boston attorneys quotes from said section 698, as amended by the Acts of 1936. Since that time the section has been twice amended, the last time by the Acts of 1940 as found in the Michie 1940 Cumulative Supplement. The language quoted by said Boston attorneys from the Act as reenacted in 1936 has been changed so as to read as follows:

"For capital expenditures and for the payment of indebtedness, the board of supervisors of counties and the council of cities, may levy a special county tax, a special district tax or a special city tax, as the case may be, and for existing district indebtedness created prior to September first, nineteen hundred and thirty-six, a special district tax and a special city tax, not exceeding twenty-five cents each on the one hundred dollars taxable values; to be spent in the county, district, or city where raised; * * *;"

It will be noted that the amendment authorizes the levy of a special county tax or a special district tax without prescribing any limitation on the amount thereof. It is my opinion that the limitation of twenty-five cents applies only to a special district tax for existing district indebtedness created prior to September 1, 1936, and does not apply to the special levy for future capital expenditures or for the payment of indebtedness contracted since September 1, 1936.

I do not construe section 136 of the Virginia Constitution as imposing upon the General Assembly a mandatory duty to limit the amount of tax which may be levied for the payment of an indebtedness, or interest thereon, incurred for capital expenditures. It is my view that this provision should be construed as limiting the amount which may be raised by such local taxation where the sums are expended directly for the establishment and maintenance of schools, but has no application to levies to take care of bond issues.

It is my opinion that the amendment of section 698 of the Code contained in the Acts of 1940, page 346, has the legal effect of removing any limitation upon the amount which may be levied by the board of supervisors as a special district tax for the payment of an indebtedness incurred as evidenced by bonds issued under section 673 of the Code.

The second question is whether or not the provisions of said section 673, which authorizes the issuance of the bonds "whenever it shall be necessary for a county to erect a schoolhouse", should be construed as applicable only to a single schoolhouse, or requiring a separate bond issue for each separate schoolhouse, or whether it should be construed as permitting a single bond issue for the purpose of providing for the erection of two or more schoolhouses.

It is my opinion that the use of the singular in the statute is without legal significance, and that a single bond issue is authorized for the erection of two or
more schoolhouses in the same district. The reason for this is quite obvious. If, as apparently is the case here, there is need for several schoolhouses in a district, and it would be necessary to provide each separately, they all might be defeated by those voters in the parts of the district not being benefited by the specific loan voted on. When the matter is treated as a single project, however, and the needs of the residents of the district as a whole are being provided for, the qualified voters are permitted to express their wishes without bias or prejudice among the several sections of the district.

Your third question arises from the fact that the maturities of the bonds as advertised for sale exceed the time permitted under section 2741b of the Code, the last bonds being two years too late in maturing. You state that it would be necessary to correct the maturity dates to conform to the statute, and inquire whether, in my opinion, the bonds may be reassigned to the highest bidder under the advertisement which incorrectly stated the maturity dates, or whether it will be necessary to readvertise the sale of the bonds.

I can find no provision in the statute which requires bonds issued under section 673 of the Code to be advertised for sale at all, although this is a very general custom.

I do not have before me the proceedings of the board of supervisors, or the resolutions adopted by the board in submitting the question of the loan to the voters of the district. It may be that independent of statute the board of supervisors is committed to a public advertisement of the sale. If this is true, inasmuch as the contemplated change in the maturity dates might increase the price received for the bonds, I believe that there should be a readvertisement. However, if the board has not committed itself to a sale of the bonds in this manner, I am of opinion that they have authority to sell them at private sale, and, if in their judgment the sale is a wise one, they may sell the bonds to the company which became the purchaser pursuant to the former advertisement. This question, of course, is dependent upon facts which I do not have available, and upon which, therefore, I am unable to express an opinion.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Expense of Auditing Accounts of Local Boards of Public Welfare.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 3, 1940.

HONORABLE T. MOORE BUTLER,
Commonwealth’s Attorney,
Covington, Virginia.

MY DEAR MR. BUTLER:

This is in reply to your letters of June 17 and June 26, requesting my opinion as to whether or not the expense of an audit of the local board of public welfare for your county should be borne by the county or by the State.

Your question would seem to depend upon a construction of Code section 2577n, which requires the Auditor “annually to audit all accounts and records of every county, except counties whose boards of supervisors have their said accounts audited annually by a licensed certified public accountant *** insofar as they relate to local funds”, at the expense of the county.

Under the Virginia Public Assistance Act of 1938, the funds administered by each local board of public welfare are appropriated by the Board of Supervisors
and the county general fund receives reimbursements from the State in proportion to the amount of such appropriations.

It is my opinion that the funds thus administered by the local boards must be deemed "local funds" within the meaning of Code section 2577n, and that the accounts and records of the county board of public welfare, like the accounts and records of any other local officer or agency, are required to be audited at the county's expense under the terms of Code section 2577n.

I regret that I was unable to provide you with this opinion before the meeting of your Board of Supervisors on June 30, as requested in your last letter. I had thought it proper to inquire of the Auditor of Public Accounts whether there was anything in the administrative practice adopted by his office to indicate a conclusion contrary to that stated by me above, and did not receive his reply until yesterday.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

COUNTIES—Ordinance—Paralleling Sections 1211 (j)-1211 (v) of State Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,*
RICHMOND, VA., March 15, 1941.

HON. EDWARD P. SIMPKINS, JR.,
Commonwealth's Attorney for Hanover County,
Mutual Building,
Richmond, Virginia.

MY DEAR MR. SIMPKINS:

This will acknowledge receipt of your letter of March 11, in which you ask the following question:

"I would like to have your opinion as to whether the Board of Supervisors of Hanover County has authority to pass an ordinance paralleling the Act of the Assembly set forth as Code Sections 1211(j) to 1211(v), and in said ordinance to make it unlawful for any public establishment or person holding a restaurant license from the State of Virginia to have in his possession any adulterated, misbranded, or ungraded milk, regardless of the purpose for which this milk may be possessed. ***

Section 1211(t) of the Code provides that the preceding sections "shall not apply to cities and towns which have ordinances regulating the production and distribution of milk and cream with provisions more rigid than those incorporated in" the preceding sections, with no reference to an exception for counties. As you know, the Act is a general one relating to milk and cream, and it is made the duty of the State Department of Agriculture to enforce it and issue permits under the Act. I can find no authority granted to the Board of Supervisors to pass an ordinance paralleling the Act and making it more rigid. I might also call your attention to the fact that, even if the Board of Supervisors of the County had this power, then, of course, the Act would have to be enforced by the authorities of the county and independent of the Department of Agriculture. Certainly a county could not in the absence of statutory authority pass a valid ordinance imposing duties upon the State Department of Agriculture.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COUNTIES—Police Officers—Fees from State in Criminal Matters—Mileage.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 2, 1940.

Honorable William F. Hudgins, Clerk,
Circuit Court Princess Anne County,
Princess Anne, Virginia.

My Dear Mr. Hudgins:
I am in receipt of your letter of August 1, in which you state that:

"Judge White has requested me to write to you with reference to the police officers of Princess Anne county being allowed mileage by the State for bringing prisoners to jail and taking them to court for trial."

You will recall, of course, my letter of December 26, 1939, addressed to you, relative to the construction of section 3511 of the Code. This section in effect provides that no police officer who receives a salary or allowance out of the treasury of his county or corporation shall receive any fees for services in a criminal case from the State. The section does not prohibit such an officer from receiving mileage.

In my opinion, therefore, under the provisions of section 4960 of the Code, the judge of the court may allow mileage to such an officer for the service mentioned by you. I am assuming, of course, that the officer uses his own car.

Very sincerely yours,

Abram P. Staples,
Attorney General.

COUNTIES—Taxation on Carnivals and Shows.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1940.

Honorable Geo. C. Reedy,
Attorney for the Commonwealth,
Warsaw, Virginia.

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

"I will appreciate it very much if you will advise me whether, in your opinion, section 153a of the Tax Code, which empowers counties to impose a license tax on carnivals and shows, means that the tax can be imposed on each individual show in a carnival, or whether the entire carnival is subject to only one tax."

You will observe that section 153a of the Tax Code defines a carnival. Therefore, if the subject of the license comes within the scope of the prescribed definition of a carnival, I am of opinion that the local license should be on the carnival as a whole, as distinguished from the various shows making up the carnival.

Very sincerely yours,

Abram P. Staples,
Attorney General.
COUNTIES—Validity of Peddlers License Requirement.
COMPATIBILITY OF OFFICERS—Member of County Board of Public Welfare—Mayor of Town.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 14, 1941.

HONORABLE HANSEL FLEMING,
Attorney for the Commonwealth,
Clintwood, Virginia.

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

"A man lives and has a farm in Wise county, Virginia, and raises his products on his farm. Will he have to pay a license to Dickenson county authorities to sell his products in Dickenson county?"

While this is a purely local question, I call your attention to section 192 of the Tax Code of Virginia, which provides that:

"No license tax may be imposed directly or indirectly upon those exempted from a State license by this section."

The section further provides that those who sell "ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits, or other family supplies of a perishable nature grown or produced by them and not purchased by them for sale" shall not be deemed to be peddlers under the section.

Your next question is as follows:

"A citizen of the Town of Clintwood, Virginia, was appointed a member of the Board of Public Welfare in Dickenson County. Later he was elected mayor of the corporation of the town of Clintwood, by the people in their regular election. Can he serve in both capacities?"

So far as I have been able to find there is nothing in the Public Assistance Act of 1938 which prohibits the mayor of a town from being a member of the county board of public welfare. However, so far as the eligibility to the office of mayor of a member of a board of public welfare is concerned, there may be something in the charter of the town which bears on this subject, which charter, of course, I do not have before me.

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

CRIMINAL LAW—Appointment of Counsel—Fees.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 7, 1940.

HONORABLE T. MOORE BUTLER,
Attorney for the Commonwealth,
Covington, Virginia.

MY DEAR MR. BUTLER:
This is in reply to your letter of November 5, in which you request my opinion upon the question whether under section 3518 of the Virginia Code as
amended, where the court appoints two attorneys to defend a poor person in a case of the type therein provided for, a fee of $25 each is required to be paid to both of said attorneys.

It is my opinion that said section 3518 contemplates the payment of only one attorney's fee of $25 in a case of the kind to which you refer.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Appointment of Counsel Under 4776 of Code of Va:

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 2, 1940.

Honorable J. L. FRAY,
Assistant Commonwealth's Attorney,
Culpeper, Virginia.

Dear Mr. Fray:

This is in reply to your letter of June 26, in which you ask for a construction of section 4776 of the Code of Virginia as amended by Chapter 218, page 345 of the Acts of Assembly 1940.

This Act reads as follows:

"No person shall be convicted of felony, unless by his confession of guilt in court, or by his plea, or by the verdict of a jury, accepted and recorded by the court. One accused of a felony may plead not guilty and, with his consent after being advised by counsel, which counsel shall be appointed for him by the court in all cases where he has no counsel of his own choosing and the concurrence of the attorney for the Commonwealth and of the court entered of record, he may waive a jury; in case of such waiver, or a plea of guilty, the court shall try the case."

By the amendment the last sentence was added. This sentence is almost identical with that portion of section 8 of the Constitution of Virginia dealing with the waiver of trial by jury except that it provides that the accused may consent to such waiver only after being advised by counsel, which counsel shall be appointed for him by the court in all cases where he has no counsel of his own choosing.

It seems clear, therefore, that the purpose of this section was to insure that accused persons should be advised by counsel before being induced to waive a trial by jury which is guaranteed to him by the Constitution. It is my opinion, therefore, that the construction placed by you upon this section as amended is the correct one and that the appointment of counsel, as required by this section, is only for the purpose of seeing that the accused is advised as to whether it is for his best interest to waive a jury trial.

Whether or not the accused, because of his poverty, is entitled to have counsel appointed to represent him throughout his trial is, in my opinion, governed by sections 3517 and 3518 of the Code.

It is to be noted that section 4776 does not provide that counsel appointed pursuant thereto shall be entitled to compensation from the public treasury. Attorneys are officers of the court and should represent indigent persons charged with crime whenever directed to do so by the court, regardless of their right to compensation. They are entitled to compensation from the State or the localities only when such is specifically provided. Section 3518 is the only section making such a provision, and to entitle the attorney to compensation the provisions of that section should be applicable.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
CRIMINAL LAW—Carrying Unconcealed Weapons.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 19, 1940.

HONORABLE M. S. BATTLE, Director,
Division of Motor Vehicles,
Richmond, Virginia.

My Dear Colonel Battle:

I am in receipt of your letter of July 18, from which I quote as follows:

"There is a matter that has come to the attention of this office that is causing us some concern, and I would appreciate your opinion relative thereto or any suggestions that you might have on the subject.

"There are some labor troubles in the trucking industries in this State, and it has been reported to me that the truck drivers are carrying fire arms—not concealed, but in plain view on a waist belt. At the terminals where the drivers, thus armed, walk around, it causes some irritation and uneasiness among the pickets."

You desire to be informed "whether the drivers of the freight-carrying trucks can carry revolvers" which are not concealed.

In my opinion, there is no statute prohibiting the carrying of revolvers that do not come within the prohibition against concealed weapons, and, therefore, your question must be answered in the affirmative.

You also desire to know if the pickets at the various terminals of the trucking concerns where the men are on strike may carry the revolvers that are not concealed.

I am of opinion that the pickets have this right just as any other citizen has. Indeed, as I have indicated, there is nothing in the statute to prohibit any person from carrying revolvers that are not concealed.

For your information, I may point you to certain sections of the Code which you may desire to consider.

Sections 4578 prohibits any person "without good and sufficient cause therefor" to carry a pistol on Sunday at any place other than his own premises.

Section 4795 provides that, if a person go armed with a deadly or dangerous weapon without reasonable cause to fear violence to his person, family or property, he may be required to give a recognizance.

Sections 4789 to 4792 deal with the giving of peace bonds under certain circumstances.

I appreciate the fact that the situation you describe may cause you some concern, but I do not know any way by which it may be handled other than by the State and local police officers in enforcing the criminal laws of the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Forfeiture of Weapons Used in Committing Crime.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 9, 1940.

HONORABLE EDWARD MEEKS, Judge,
Twenty-ninth Judicial Circuit,
Amherst, Virginia.

My Dear Judge Meeks:

I am in receipt of your letter of September 3, in regard to the forfeiture of weapons used in committing crimes.
From my examination of the statutes I have found none which provides for such forfeiture and, in the absence of statute, I know of no authority therefor. As you know, the doctrine of deodands was repudiated at an early date. I quite agree with you also that there is no authority for turning the weapon over to an individual. You are familiar with the statute dealing with the forfeiture of concealed weapons under certain circumstances, but I can find nothing else in the statutes on the subject of forfeiture of weapons used in committing crimes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Violation of Section 1818 of Code of Va.—Punishment for.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 9, 1940.

HONORABLE WILLIS E. COHOON,
Member House of Delegates,
Suffolk, Virginia.

Dear Mr. Cohoon:

This is in reply to your letter of July 5, in which you ask if a violation of section 1818 of the Code is punishable, under section 4782, as a misdemeanor for which no punishment is specifically prescribed.

Your attention is called to the fact that the sections codified by Michie as 1818, 1819 and 1820 consist of three sections of the same Act of the Legislature (chapter 389, Acts of Assembly of 1918, page 620).

The last clause of this Act reads as follows:

"* * * and shall any person or member of any firm, company, corporation or association, his or their clerk, agent, or servant violate this act they shall be guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding one hundred dollars, in the discretion of the court."

It is my opinion, therefore, that a violation of section 1818 is punishable by a fine not exceeding $100, as provided by this clause.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

DAIRY AND FOOD DIVISION—Foods: Adulterated or Misbranded—Labels.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 12, 1941.

Mr. S. S. Smith, Director,
Dairy and Food Division,
Department of Agriculture and Immigration,
Richmond, Virginia.

Dear Mr. Smith:

This will acknowledge receipt of your letter of February 4; requesting the opinion of this office as to a question arising under chapter 285 of Acts 1940, Virginia Code (Michie 1936) sections 1190(a)-1190(p).

You state that at one time a concern known as the Dunlop Milling Company manufactured and sold in Virginia corn meal which was ground by old fashioned
buhrstones driven by water power; that this meal was marketed as "Dunlop Water Ground" meal, and attained a wide and valuable reputation.

Subsequently the Dunlop Milling Company has sold all its equipment and its good will (which includes trade-mark rights) to the Davis Milling Company. This latter company continues to manufacture corn meal by the use of buhrstones, though water power is not used, and markets its product as "Dunlop Old Process" meal. Their label includes the true name and address of the manufacturer as specifically required by Code section 1190(k), paragraph (e).

The statute referred to prohibits generally the manufacture or sale of any food which is adulterated or misbranded, and in particular the use of any label which is false or misleading. It is suggested in your letter that the use of the term "Dunlop" in the Davis Company's label might lead the public to believe that this meal is the product of the Dunlop Milling Company and that it is strictly "water-ground" meal. The opinion of this office is requested as to whether this constitutes a violation of the statute.

From a consideration of the entire Act it is clear that the Legislature has not undertaken thereby to prohibit altogether the transfer of valuable trade-mark rights from one food manufacturer to another—it would be hardly reasonable to give such a sweeping and radical effect to a statute dealing in general with the use of adulterants and dishonest advertisements.

Accordingly it is the opinion of this office that no manufacturer's label may be deemed "misleading" within the statutory prohibition solely because it includes a trade-mark previously used by a different owner, and since the labels which you describe do not in any other respect misdescribe the Davis Company's product, their use does not violate the law.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DAIRY AND FOOD DIVISION—Inspection Fee for Mills.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 11, 1940.

Mr. S. S. Smith, Director,
Dairy and Food Division,
Department of Agriculture and Immigration,
Richmond, Virginia.

My Dear Mr. Smith:

I am in receipt of your letter of October 10, in which you refer to section 1239 of the Code, which requires among other things that wheat and corn millers shall register with the Dairy and Food Division on or before July 1 of each year and at the same time pay a registration or inspection fee based upon the operating "capacity" of the mill. You state that it has been contended by a miller that the word "capacity" refers to the average or usual run of the mill, whereas the Department has uniformly construed and applied the statute to mean that the fee is based upon the actual capacity of the mill, whether or not it is operated at such capacity.

I am of opinion that the construction of the Department is the correct one. I do not see how there can be any reasonable doubt about the fact that the word "capacity" means the actual number of barrels or bushels of grain that the mill can grind operating under normal circumstances. If the basis of the tax was the actual average run made by the miller, as distinguished from the capacity of the mill, then the situation would arise of mills of the same capacity paying entirely different fees. Surely this was not contemplated by the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
DIVORCE LAWS—Alimony—Enforcement of Virginia Decree in Another State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1940.

HONORABLE E. HUGH SMITH,
Heathsville, Virginia.

My Dear Judge Smith:

As promised in my letter of October 15, I have investigated the question presented in yours of the 8th and have examined the pertinent authorities bearing thereon.

In the first place, as suggested in your letter, it seems clear that a married woman who has brought suit in equity for a divorce and obtained an alimony decree in such proceedings, cannot thereafter institute criminal proceedings against her husband or former husband, under Chapter 80 of the Code. This much seems to have been definitely settled by the cases of Wright v. Wright, 164 Va. 245, 178 S. E. 884, and Boaze v. Commonwealth, 165 Va. 786, 183 S. E. 263. Accordingly there can be no possibility of extraditing the defendant for want of a valid criminal charge against him in this State.

As to the enforcement of the alimony decree in another state or the District of Columbia, to which the defendant may have removed, the decisions of the various states are in conflict.

It is quite well settled that a foreign alimony decree is entitled to "full faith and credit" only to the extent that the plaintiff may demand a simple money judgment at law for installments which are actually delinquent. Lynde v. Lynde, 181 U. S. 183. The courts of some states have gone farther and have granted equitable relief, such as contempt proceedings, sequestration, etc., for the enforcement of foreign alimony decrees. German v. German, 122 Conn. 155, 188 Atl. 429; Bruton v. Tearle, 59 P. (2d) 953 (Calif. 1936). In most states, however, and in the District of Columbia such methods of enforcement are denied, and the holder of a foreign alimony decree may only sue upon such decree for a money judgment at law in the amount of delinquent alimony installments. Lynde v. Lynde, 162 N. Y. 405, 56 N. W. 979; Grant v. Grant, 64 App. D. C. 146, 75 F. (2d) 665; Weidman v. Weidman, 274 Mass. 118, 174 N. E. 206.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF MOTOR VEHICLES—Authority to Pay Expenses of Contests Designed to Stimulate Interest in Traffic Control.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 21, 1940.

Dr. ROWLAND EGGER,
Director of the Budget,
Commonwealth of Virginia,
Richmond, Virginia.

My Dear Dr. Egger:

I am in receipt of your letter of August 27, in which you state that the Division of Motor Vehicles is contemplating holding a contest among the four divisions of the State police as a means of stimulating an interest in safety and traffic control. It appears that it is planned that two silver cups or other trophies will be purchased, one to go to the winning division and the other to the winning district, and that the winning groups will be presented with a trophy at a banquet attended
by all participating officers. It is said that $100 a year will cover the major items. The expenses of these contests will be paid out of the appropriation made by the General Assembly "for promoting highway safety" (Acts 1940, 766, at page 784).

You desire my opinion as to whether the funds of the Division of Motor Vehicles can legally be expended for the purposes above outlined.

My view is that whether or not the proposed expenditures may be made is more a question of fact than of law. If in the opinion of the Comptroller and the Director of the Division of Motor Vehicles these expenditures will contribute to carrying out the purposes of the appropriation, namely, promoting highway safety, I see no reason why they would not constitute legitimate expenditures.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

DIVISION OF MOTOR VEHICLES—Power to Compel Witnesses to Attend and Give Testimony at Hearings.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., APRIL 21, 1941.

COLONEL M. S. BATTLE, DIRECTOR,  
DIVISION OF MOTOR VEHICLES,  
RICHMOND, VIRGINIA.

DEAR COLONEL BATTLE:  
This is in reply to your letter of April 10, 1941, in which you state that the Division of Motor Vehicles is authorized, pursuant to section 18 of the Motor Vehicle Operators' License and Liability Law, as amended by chapter 389, Acts of 1934, section 2154(187) of Michie's Code, to revoke or suspend the operation privileges after a hearing. You also state that the Division is authorized to hold hearings under section 2 of chapter 272, Acts of the General Assembly of 1932, as amended, section 2154(205) of Michie's Code, for the purpose of determining the propriety of restoring the operation and registration privileges to those persons who have failed to satisfy judgments. In connection with these hearings, you ask for my advice concerning the following questions:

"(a) Has the Division of Motor Vehicles the authority to summon witnesses to establish the Commonwealth's case against an operator?  
"(b) If such is the authority, would the summons be issued in the name of the Commonwealth or the name of the Division of Motor Vehicles and by whom would it actually be signed?  
"(c) If a person who is so summoned fails to appear could he be punished for contempt?  
"(d) In the event that a witness attends one of these hearings under summons, if same is issued, or otherwise, would that witness be entitled to a fee and mileage allowance? If so, what fee and out of what funds could it be payable?  
"(e) In the actual conduct of these hearings by the Director or by a person designated by him, could a person appearing as a witness either by summons or otherwise, be punished for his failure to testify and conduct himself properly during the hearing? If so, would the hearing officer have the right to impose a fine upon the individual or have him held until the same is paid?"

Since the Division of Motor Vehicles is authorized to hold hearings on certain questions, it is my opinion that it may request the attendance of witnesses to give
information concerning matters to be investigated. Such request may be issued in
the name of the Division of Motor Vehicles or the officer holding the hearing.

However, I know of no statute by which witnesses may be compelled to at-
tend hearings held by the Division of Motor Vehicles, or pursuant to which they
may be punished for contempt for failure to appear when requested to do so, or
for failure to testify or to conduct themselves properly during the hearing when
they do appear, nor do I find any statute entitling a witness who does testify at
hearings held by the Division to a fee or mileage allowance.

A number of State agencies are authorized to hold hearings upon questions
affecting the matters subject to their administration. In the case of some of them,
specific statutory authority is given to compel the attendance of witnesses and a
method is provided by which such witnesses may be punished for contempt for
failure to appear or give testimony.

It is my opinion that, since in the case of the Division of Motor Vehicles no
specific provision is made whereby witnesses may be compelled to attend hearings
and may be punished for contempt for failure to do so, the extent of the authority
of the Division is to request the attendance of witnesses and a failure on the part
of the individual, requested to appear, to comply with such request cannot be pun-
ished. It is also my opinion that, since there is no statute entitling witnesses who
do appear to a fee or mileage allowance, no such compensation may be paid to such
witnesses by the Division of Motor Vehicles.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF MOTOR VEHICLES—Authority to Employ Additional
Police in Case of Emergency.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 4, 1940.

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

DEAR GOVERNOR PRICE:

This is in reply to your letter of December 3, in which you request my opinion
upon the question whether the provision contained in the 1940 Appropriation Act,
restricting the number of motor vehicle police which may be employed during the
current biennium, has the legal effect of repealing until July 1, 1942, the powers
of the Director of Motor Vehicles to employ, with the approval of the Governor,
additional police officers for specified periods of time, in cases of emergency, as
provided in section 7 of the Motor Vehicle Code.

Said section 7 (Acts 1932, p. 618), consists of the following:

"In case of emergency, the director, with the approval of the governor,
shall have authority to appoint additional police officers, who may or may
not be residents of this State, to serve for specified periods of time. The
police officers so appointed shall receive such compensation as the director
shall approve. Such police officers shall have the same powers and perform
the same duties as the regular police officers appointed by the director."

The provision you refer to, contained in the 1940 Appropriation Act, p. 783,
in connection with the appropriation to the Division of Motor Vehicles for em-
ploying State police, is as follows:

"Provided that during the biennium ending June 30, 1942, there shall at
no time be employed a total combined number of State police patrol officers,
chief inspectors, or other police, greater than the number authorized by the
general appropriation act for the biennium which ends June 30, 1940."

The question presented is whether this provision is so repugnant to section 7
above quoted as to have the legal effect of temporary repealing said section during
the biennium.

Section 7 is not expressly repealed and it is a well settled rule of construction
that repeals by implication are not favored, but that conflicting provisions should
be reconciled, so far as possible, to avoid same. Approaching the question with
this principle in view, it is clear that during the biennium which ended June 30,
1940, the special police contemplated by section 7 above could have been employed
and compensated out of the appropriation for employing the State police patrol
during said biennium. Therefore, in as much as the employment of these special
police was "authorized by the general Appropriation Act for the biennium which
ended June 30, 1940" (construing same as in pari materia with said section 7), I
am of opinion that they may be employed now and compensated out of the current
appropriation "for State police patrol". Such employment, in my opinion, vio-
lates neither the letter nor the spirit of the above quoted provision of the 1940
Appropriation Act. It was manifestly intended to apply only to the regular offi-
cers, inspectors and patrolmen and not to those temporarily employed to serve in
case of emergency.

In order to authorize the employment of the additional police, I am further
of opinion that there must be a concurrent finding by the Governor and the Director
that an emergency does in fact exist. Upon this question of fact, I, of course,
am in no position to express an opinion.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DEPARTMENT OF LABOR—Powers in Regard to Fire Escapes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 25, 1940.

HONORABLE THOS. B. MORTON, Commissioner,
Department of Labor and Industry,
Richmond, Virginia.

My Dear Mr. Morton:

I have your letter of October 24, requesting my opinion upon several questions
relating to the powers conferred upon you by Code section 3141, which relates to
the construction and maintenance of fire escapes on certain buildings.

You first inquire as to the proper interpretation of the word "city" as used
in this statute. Since the statute provides for action by the councils of both cities
and towns, and since only an incorporated community could have a council, it is
my opinion that the word "city" is used to designate an incorporated community
of 5,000 or more persons. Cf. Code section 2972.

In response to your other questions, I must advise that the statute confers no
authority whatever on the Commissioner of Labor with respect to fire escapes in
cities and towns in which boards or commissions of public safety have been es-
lished, or in counties, cities, or towns in which regulations have been adopted
defining the character and design of such fire escapes, regardless of whether the
Commissioner of Labor approves the design so selected and regardless of the ex-
tent to which the regulations may or may not be enforced.

Cordially yours,

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

DOG LAWS—Compensation for Puppies Killed by Dogs.

COMMENWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 25, 1941.

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

My Dear Mr. Epes:

This will acknowledge your letter of January 21, requesting the opinion of this office as to whether compensation may be paid out of the dog fund for the loss of valuable puppies which have been killed by a dog. You state that the owner of the puppies raises dogs for sale.

As you point out, Code section 3305(75) provides that such compensation may be paid for the loss of livestock and poultry, and section 3305(61) provides that:

"(b) The word 'livestock' includes cattle, sheep, goats, swine and enclosed domesticated rabbits or hares."

The question is, therefore, whether the puppies to which you refer are also included within the term "livestock" as used in Code section 3305(75).

While this statute has never been construed by our own courts, the courts of other States have frequently had occasion to consider the question whether dogs may be deemed "livestock" as that term is used in statutory provisions for the protection of animals and their owners, and it seems well settled that they may not. Howard & Herrin v. Nashville, etc. Ry. Co., 153 Tenn. 649, 284 S. W. 894; Henderson v. Lancaster & Wallace, 2 La. App. 680; Moore v. Charlotte Electric, etc. Co., 136 N. C., 554, 48 S. E. 822; Richardson v. Florida, etc. Co., 55 S. C. 334, 33 S. E. 466.

Unquestionably the term "livestock" is not commonly used, even if it can be properly used, to include dogs. In view of this fact and of the authorities just cited, it is the opinion of this office that Code section 3305(75) does not authorize compensation to the owner of a dog which is killed by another dog. In further support of this view your attention is called to the fact that under any other construction of the statute compensation could be demanded and paid to the owner of a grown dog killed in a fight with another dog. Such a result would be clearly outside the contemplation and purpose of the statute.

Very truly yours,

The Attorney General of Virginia,
By:

JOS. L. KELLY, JR.,
Assistant Attorney General

DOG LAWS—Poultry-Killing Dog— Destruction of.

COMMENWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 5, 1940.

Mr. V. R. Chowning,
Game Warden,
Senora, Virginia.

Dear Mr. Chowning:

In response to your letter of October 3, your attention is called to Code section 3305 (71), which is section 70 of the Game, Inland Fish and Dog Code.
This section deals with the control of dogs found guilty of chasing or killing poultry and live stock generally, and provides among other things as follows:

"* * * any person finding a dog committing any of the depredations mentioned in this section, shall have the right to kill such dog on sight. * * * "

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

DOG LAWS—Poultry-Killing Dog—Destruction of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 24, 1940.

HONORABLE WILLIAM B. SANDERS,
Attorney for the Commonwealth,
White Stone, Virginia.

My dear Mr. Sanders:

I have your letter of October 21, requesting my opinion as to whether, under Code section 3305 (71), one may kill a dog found in the act of killing poultry. As you point out, this section expressly provides that:

"* * * any person finding a dog committing any of the depredations mentioned in this section, shall have the right to kill such dog on sight * * * ."

One of the depredations mentioned in this section is "killing fowls". While this statute provides less summary remedies for the control of dogs not found in the act, but guilty of killing stock or poultry and, while on the trial of such a dog for the killing of poultry he must be proved to be "a confirmed poultry killer", the language of the Act seems to me unambiguous in providing that a dog actually found in the act of killing poultry may lawfully be killed on sight by any person.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absent Voters—Necessity of Application to State Reasons for Absence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 17, 1940.

MR. FRANCIS S. MILLER,
General Registrar,
Harrisonburg, Virginia.

My dear Mr. Miller:

This is in reply to your letter of September 16, in which you ask if under the absent voters' law it is necessary for a person who applies for a ballot by mail to state in his application why he is to be absent from his precinct on election day.

When the application is made by mail, I can find no such requirement in the statute. You will observe that section 203 of the Code provides that, if the application is made by a voter in person, when he is within his city, town or precinct, the application shall be accompanied by an affidavit to the effect that such
voter expects to be absent, and the reason therefor, but there seems to be no similar requirement when the application is made by mail.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Capitation Tax—Payment by Agent.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 18, 1941.

HONORABLE R. L. BURKE,
County Treasurer,
Appomattox, Virginia.

MY DEAR MR. BURKE:

This is in reply to your letter of April 17, in which you request my opinion upon the question whether or not it is a violation of law for a person to transmit to you and pay his capitation tax through an agent, and whether such a payment would be deemed a personal payment within the meaning of the Constitution and laws requiring personal payment of capitation taxes as a prerequisite to voting.

It is well settled by the decisions of our Supreme Court of Appeals that the payment of the capitation tax in the manner to which you refer constitutes a proper personal payment within the meaning of our statute. In the case of Tilton v. Herman, 109 Va. 503, 507-508, the Supreme Court of Appeals said:

"So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll taxes required of him, and paid them out of his own estate or funds because he wished to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer, or to one of his deputies, or sent by check drawn on a bank in which the drawer has funds to meet its payment, or by the hand of the taxpayer's clerk or duly authorized agent; " ** "

You further inquire whether or not the treasurer would be justified in requiring written evidence in the form of a letter from the taxpayer as to the authority of the agent to pay said capitation tax, in order that the treasurer may be satisfied that the payment is a personal one by the taxpayer.

In my opinion, this is a reasonable requirement as the laws impose upon the treasurer the duty of determining whether or not a capitation tax has been personally paid.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Commissioner of Elections—Eligibility of—Party Affiliations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 3, 1940.

MR. F. L. BILLUPS, Secretary,
Electoral Board of Mathews County,
Mathews, Virginia.

MY DEAR MR. BILLUPS:

In response to your letter of June 26, addressed to Mr. Kelly of this office, I will advise that there is nothing in the election laws to prevent the appoint-
ELECTIONS—
1. Printing of Ballots.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 20, 1940.

MR. W. H. DUKE, Chairman,
Norfolk County Electoral Board,
Route 1, Box 96,
Portsmouth, Virginia.

MY DEAR MR. DUKE:
I am just in receipt of your letter of September 19, in which you advise me that Norfolk county has adopted the purchasing agent plan, and you desire to know whether or not the ballots for the coming November election should be printed and purchased under the supervision of the Purchasing Agent.

Sections 155, 156 and 158 of the Code deal generally with the printing and distribution of ballots. A reading of these sections will disclose that many safeguards are provided for the secrecy and proper printing of the ballots. These sections further make it the duty of the electoral boards of counties and cities to cause the ballots to be printed, and prescribes in detail the duties of these boards.

In my opinion, the purchasing agent law should not be construed, and was not intended to be construed, to relieve electoral boards of their duties in connection with the ballots which they have been performing for so many years.

You also ask whether or not in the election to be held in November, under chapter 407 of the Acts of 1940, relative to the creation of the Hampton Roads Sanitation District, separate ballot boxes should be used.

Section 3, subsection (b) of the Act provides for separate ballots, but there is no requirement that separate ballot boxes be used. The election is to be held under the supervision of the regular election officers. In my opinion, it will not be necessary to use separate ballot boxes.

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

FLECTIONS—Form of—Soil Conservation District, Chapter 394, Acts of 1938.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 25, 1940.

HONORABLE W. H. OVERBEY,
Trial Justice for Campbell County,
Rustburg, Virginia.

MY DEAR MR. OVERBEY:
I have your letter of September 24, from which I quote as follows:

"The Secretary of the Campbell County Electoral Board requested me to obtain from you an official opinion as to the printing of ballots for the
election of supervisors for the Soil Conservation District as provided in section 6 of chapter 394 of the Acts of Assembly of 1938. The Secretary of the Board would like to know whether or not he can place the names of the candidates for the election of the soil conservation supervisors on the same ballot that will be used at the general election in November or whether he has to print a separate and distinct ballot. For your information the election of the soil conservation supervisors has been called at the same time as our general election this fall."

Section 6 of the Act to which you refer simply provides that "the names of such nominees shall be printed upon ballots * * *". The State Soil Conservation Committee is empowered to fix the date for holding the election after giving due notice thereof. Where the committee selects general election day, I know of no reason why the names of the nominees may not be printed on the regular ballot. The statute seems to be silent on the subject and, in the absence of any requirement that a special ballot be used, I am of opinion that the regular ballot may be used.

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

ELECTIONS—Judge or Clerk of Election—Who May Serve as.

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

MR. WILLIAM A. J. KELLEY,
Registrar,
R. F. D. 11,
Richmond, Virginia.

MY DEAR MR. KELLEY:

Replying to your letter of October 26, I beg to advise that section 149 of the Code provides that "no person shall act as a judge or clerk of any election * * * holding any elective office of profit or trust in the State or in any county, city or town thereof." Therefore, the fact that a person is employed by the State or county does not necessarily disqualify him from acting as a judge or clerk of election. If such person, however, holds an elective office of profit or trust in the State, or in any county, city, or town, he may not act as judge or clerk of election.

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

ELECTIONS—Polling Booth, Location of by Electoral Board.

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

MR. W. I. GREEN,
Secretary Electoral Board,
Chatham, Virginia.

DEAR MR. GREEN:

This is in reply to your letter of October 28, in which you state that you have a polling place in your county which is a small store probably twenty by thirty or forty feet, in which is located a post office. You also state that during
an election people are constantly coming in and out around the ballot boxes. You ask if it would be proper to move the polling place about two hundred yards from this store into another store in the same precinct where you would have available a room which is entirely separate.

I agree with you that the polling place now in use is not such as is contemplated by law. I call your attention to section 161 of the Code of Virginia, which provides that "save the judges of election and clerks, no person other than the elector offering to vote shall be within forty feet of the ballot box."

In my opinion, it would be perfectly proper for the Electoral Board to change the polling place to a different store, as you suggest. This is not a change of a "voting place" within the meaning of sections 143 and 144. I am of the opinion that the voting places referred to there are the villages or other places within an election district which have been designated as the voting places of such district. One sentence of section 144 reads as follows:

"* * * Provided, however, that if in any election district or voting place therein there be not twenty qualified voters within the bound of said election district or voting place sought to be abandoned or abolished then the said petition shall be signed by a majority of the qualified voters of said election district. * * *"

Obviously "voting place", as used therein, refers to a community.

It may frequently be necessary to designate a different building as a polling place. For instance, the person owning the building may not permit it to be so used, or the building may be destroyed by fire, etc. In such cases, or whenever for other practical reasons it is necessary to designate a different building as a polling place, it is my opinion that it can be done by the Electoral Board and should not be done under the provisions of sections 143 and 144 of the Code.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars, Compensation of.

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

HONORABLE R. D. STONER, CLERK,
FINCASTLE, VIRGINIA.

DEAR MR. STONER:

This is in reply to your letter of November 8, in which you ask for my opinion regarding the days registrars in counties and towns may sit for the purpose of registering voters.

Section 98 of the Code of Virginia (Michie 1936) provides, in part, as follows:

"Each registrar in the cities and towns of this State shall annually, on the third Tuesday in May, at his voting place, proceed to register the names of all qualified voters within his election district not previously registered in the said district, in accordance with the provisions of this chapter, who shall apply to be registered, commencing at sunrise and closing at sunset, and shall complete such registration on the third Tuesday in May. Thirty days previous to the November elections each registrar in this State shall sit one day for the purpose of amending and correcting the list, at which time any qualified voter applying, and not previously registered, may be added. * * *"

It is my opinion that this section fixes two days—the third Tuesday in May and a day thirty days previous to the November elections—as regular registra-
tion days upon which registrars in towns may sit for the purpose of registering voters, and that it fixes only one day—a day thirty days previous to the November elections—as the regular registration day upon which registrars in counties may sit for this purpose. For their services performed on any of these registration days, registrars are entitled to the sum of $3.00 by virtue of section 200 of the Code.

In addition to the registering of voters on the regular registration days, registrars are required, at any time previous to such days, to register any voter entitled to vote at the next succeeding election who may apply to them to be registered. For so registering persons on days other than the regular days of registration, registrars are entitled to the sum of ten cents for each name.

You also ask if registrars are required to post notices of registration and, if so, is there any provision of law providing compensation for such service.

As was pointed out by this office in an opinion given to Honorable M. W. Fuller, Clerk of the Circuit Court of Henrico County, on November 17, 1938, section 96 of the Code, which originally provided that $1.00 should be paid to registrars for posting notices, was amended in 1938 (Acts 1938, page 246), at which time the clause providing for their compensation for posting notices was omitted from the statute. I find no other provision of law providing for any compensation for this service. However, since section 98 of the Code still requires registrars to post such notices, it is my opinion that it is their duty to do so, and that this service is now in the category of certain other services required of registrars for which no compensation is provided.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—
1. Registrations—Registration After Sundown.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 9, 1940.

Honorable Charles R. Fenwick,
Member of House of Delegates,
Arlington, Virginia.

My dear Mr. Fenwick:
I am in receipt of your letter of October 8, in which you ask first:

“(1) The law provides that the last day for registration shall be thirty days prior to the general election, and that the registrar shall sit on that date. Some of the registrars sit until sundown; others sit to midnight. Those sitting to sundown have refused to register persons who applied between then and midnight. Your ruling in this respect will be appreciated.”

This office has frequently ruled that a registrar may register after sundown and up until midnight.
Your second question I quote below:

“(2) ‘A’ paid his 1937 poll taxes, moved out of the State before assessable for 1938; returned after January 1, 1938, paid his 1939 poll taxes. Question: Can he vote in the 1940 election under these conditions?”

If when “A” moved out of the State he definitely abandoned his legal residence here and established it somewhere else, then I am of opinion that, if he returned to the State after January 1, 1938, and re-established his legal residence...
here, he may vote in 1940 with the payment only of his 1939 capitation taxes. In other words, he should be treated as any other new resident and the only capitation taxes "assessed or assessable" against him for the three years next preceding the election are capitation taxes for 1939. Of course, I am assuming that Mr. "A" meets the other requirements of the election laws.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 9, 1940.

Mr. P. B. Beck,
Route 1,
Cambria, Virginia.

My dear Mr. Beck:
I am in receipt of your letter of October 8, in which you ask a number of questions concerning residence of voters. The real effect of all of your questions is to ask if an individual may retain his legal residence at some place other than the place where he may be temporarily residing.

This office has frequently expressed the opinion that this may be done. The question of a person's legal residence is largely one of intention of the individual involved. Once a legal residence is established, it remains with the person until he establishes one somewhere else. A person may physically reside at some other place than his legal residence for long periods of time and still retain his legal residence at the place he originally established it. You will see, therefore, that a person's right to vote, so far as his residence is concerned, must be determined by the facts in each particular case. As I have indicated, however, because a person may be temporarily residing at some other place than his legal residence does not mean that he may not continue to vote at such legal residence.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence—Married Woman.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 23, 1940.

Honorable George S. Swain,
Treasurer of City of Suffolk,
Suffolk, Virginia.

My dear Mr. Swain:
This will acknowledge receipt of your letter of October 22, from which I quote as follows:

"In December, 1937, Mrs. Annette P. Monteville went from Suffolk, Virginia, to the home of her parents in Ohio, due to the inability of her husband to find employment here. However, he remained here, and she returned the latter part of 1938. Her State capitation tax has been paid for the years 1937 and 1939, the tax for the year 1938 not having been paid.

"It is my opinion that, inasmuch as she and her husband were not
legally separated, her residence remains the same as his; therefore, she would not be eligible to vote in the coming Presidential election.”

The question that concerns you seems to be whether or not this individual's residence is controlled by that of her husband. I call your attention to section 82-a of the Code (Michie, 1936), the last sentence of which reads as follows:

“For the purpose of registering and voting, the residence of a married woman shall not be controlled by the residence or domicile of her husband.”

In addition, our Supreme Court of Appeals in the case of Commonwealth v. Rutherford, 160 Va. 524, has held that a married woman may establish a legal residence separate from that of her husband.

Therefore, if Mrs. Monteville actually abandoned her legal residence in Virginia in 1937 and did not return until the latter part of 1938 as a legal resident, I am of opinion that the only capitation tax for which she is liable to qualify her to vote this year is the capitation tax for the year 1939. It is, of course, unnecessary to state that this individual must have complied with the other requirements for registering and voting.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Special Elections—Voters—Qualifications.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 20, 1941.

HONORABLE J. P. DALTON,
Treasurer of Nansemond County,
Suffolk, Virginia.

MY DEAR MR. DALTON:

This is in reply to your letter of March 18, with which you enclose a letter addressed to you by Honorable Norman R. Hamilton, of Portsmouth, Virginia, relating to the qualifications of persons becoming of age and persons recently moving into the State to register and vote in a special election for a member of Congress of the second congressional district to be held on April 8, 1941.

PERSONS RECENTLY BECOMING OF AGE.

Under the rulings of this office, persons who have become twenty-one years of age after January 2, 1940, and during said year, and on January 1, 1941, may register on or prior to April 8, 1941, and vote at said election upon payment of the capitation tax which will be assessable against them for the year 1941. Persons becoming of age during the year 1941, and on and after January 2 of said year, and on or before April 8, 1941, may register and vote upon payment of the capitation tax for the year 1942.

PERSONS ESTABLISHING A NEW RESIDENCE IN VIRGINIA.

Persons who have established such a residence on or after January 2, 1940, and prior to April 9, 1940, may register and vote in said special election without the payment of any capitation tax, as no such tax was assessable against them for the year 1940 or any of the three years preceding 1941. Persons who moved into the said State between the dates indicated will have been residents of the
ELECTIONS—Special Elections—Who Qualified to Vote.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 29, 1941.

Honorabe Sidney S. Kellam,
Treasurer, Princess Anne County,
Princess Anne, Virginia.

My Dear Mr. Kellam:

Your letter of January 24, asking who would be qualified to vote in the event a special election is called to fill the vacancy in Congress caused by the resignation of the Honorable Colgate W. Darden, Jr., has been received at this office in the absence of the Attorney General.

Assuming that the special election is called to be held prior to the second Tuesday in June of this year, I beg to advise that pursuant to section 83 of the Code it is provided:

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

With reference to the treasurer's list, I enclose a copy of an opinion dated April 8, 1938, to the Treasurer of Chesterfield County, which will give you the opinion of this office on this point.

Very truly yours,

W. W. Martin,
Assistant Attorney General.

ELECTIONS—Special—To Fill Vacancy in Congress—When May Primary Be Held.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 3, 1941.

Honorabe James M. Robertson,
Member of the House of Delegates,
619 Western Union Building,
Norfolk, Virginia.

My Dear Mr. Robertson:

I have your letter of January 7, in which you ask the following question:

"May a primary election be held under the provisions of Chapter 15 of the Virginia Election Laws, or any other Virginia statute governing primaries, for the purpose of nominating a party candidate for Congress where a special election is called to fill a vacancy and the special election is to be held between the months of January and August?"
The only statutes in Virginia relating to primary elections are contained in chapter 15, being sections 221 to 250, inclusive, of the Code.

Section 222 provides that "This chapter shall apply to the nomination of candidates for such offices as shall be nominated by a direct primary and to no other nominations. * * * All nominations made by a direct primary shall be made in accordance with the provisions of this chapter".

Sections 223 provides as follows:

"Primaries for the nomination of candidates coming within the terms of this chapter shall be held as follows: (a) A primary for the nomination of candidates to be voted for at the general election shall be held on the first Tuesday in August next preceding such election; * * *"

It will be noted that this is the only primary election provided for except a primary to be held on the first Tuesday of April of each year, for the nomination of candidates for municipal offices. This would have no application, of course, to a candidate for Congress in a district consisting of both counties and cities.

Section 226 of the Code contains this provision:

"This chapter shall not apply to the nominations of presidential electors, nor to the nominations of candidates to fill vacancies, unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries."

In view of the foregoing quoted statutory provisions, it appears quite clear that there is no provision in the laws for the holding of a primary to nominate a candidate for Congress where such nominee is to be a candidate at a special election to be held between the months of January and August.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voters—Eligibility—Residence—Capitation Tax of New Resident.

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

Mr. J. K. Groseclose, Registrar,
Blacksburg, Virginia.

My Dear Mr. Groseclose:
I am in receipt of your letter of July 17, reading as follows:

"Man and wife moved here from West Virginia November 6, 1939; paid Virginia taxes July 7, 1940. Are they eligible voters in coming November election?"

Section 82 of the Code provides that:

"Every citizen of the United States * * * who has been a resident of the State one year * * * next preceding the election in which he offers to vote * * * shall be entitled to vote * * * ."

The general election this year falls on November 5, as of which date the individuals you mention will have been residents of this State for exactly one year. I am, therefore, of opinion that so far as the residence requirement is concerned they are eligible to vote.
I am further of opinion that you may register these individuals without evidence of their having paid any capitation taxes at all. Section 93 of the Code provides that a person, to register, must have paid his capitation taxes assessed or assessable against him for the three years next preceding the election. Inasmuch as these individuals were not residents of Virginia on January 1, 1937, January 1, 1938, or January 1, 1939, they are not assessable with any capitation taxes for the three years next preceding the election, and, in accordance with the consistent ruling of this office, they may register and vote this year without the payment of any capitation taxes at all.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Who Eligible to Vote—Persons Paying Poll Tax Without Being Assessed.

HONORABLE HANSEL FLEMING,
Commonwealth’s Attorney,
Clintwood, Virginia.

DEAR MR. FLEMING:

This is in reply to your letter of August 7, in which you ask if a person who has paid his capitation tax to the treasurer of the county without being assessed by the commissioner of the revenue, as required by section 420 of the Tax Code, is a legal qualified voter and entitled to a vote.

In Smith v. Bell, 113 Va. 667, 75 S. E. 125, it was held that under the provisions of section 21 of the Constitution persons who are assessable with poll taxes and have paid them to the treasurer are not disfranchised simply because they have not previously been assessed by the commissioner of the revenue and obtained a certificate of assessment.

It is my opinion, therefore, that persons paying their poll taxes in the manner described are entitled to a vote.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

EMBALMERS AND FUNERAL DIRECTORS—Licenses—Persons Licensed in Another State.

HONORABLE CHARLES R. FENWICK,
Arlington, Virginia.

DEAR MR. FENWICK:

This is in reply to your letter of October 4, in which you request an opinion concerning section 1720 of the Code of Virginia, which deals with the requirements for a person desiring to become a licensed embalmer in this State. You ask if the provisions of this section are mandatory in the case of a person licensed as an embalmer in another State and who wishes to obtain a license in Virginia.

The last paragraph of section 1721 of the Code of Virginia provides:
"The board may recognize licenses issued to embalmers or funeral directors by State boards of embalming and State health authorities of other States; and upon the presentation of such licenses and the payment of a fee of twenty-five dollars, may issue to the lawful holders thereof the embalmer’s or funeral director’s license herein provided for. Such reciprocal license shall be renewed annually upon the payment of such renewal fee fixed by section seventeen hundred and twenty-b upon the same terms and conditions as provided herein and the rules and regulations of the said board of renewal. No person shall be entitled to a reciprocal license as a funeral director or embalmer, unless he gives proof that he has, in the State in which he is legally licensed, complied with requirements substantially equal to those set out in this chapter relating to funeral directing and embalming."

It is my opinion that, under this provision, the Board may grant a license to a person who holds a license as an embalmer in another State without requiring such person to meet the provisions of section 1720, if it finds that such person has, in the State in which he is legally licensed, complied with requirements substantially equal to the requirements of section 1720.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

EMBALMERS AND FUNERAL DIRECTORS—Licenses—Apprentices.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 8, 1940.

Mr. F. C. STOVER, Secretary,
State Board of Embalmers and Funeral Directors,
Strasburg, Virginia.

Dear Mr. STOVER:

This is in reply to your letter of October 4, 1940, in which you state that there are a few apprentice embalmers in the State who have graduated from an embalming school, but who have not served all of their apprenticeship and who come within the age limit of twenty-one to thirty-five, and are thus subject to the selective service draft. You further state that, should these boys be drafted and are required to serve the balance of their apprenticeship, after leaving the army, before taking the examination required before they can secure a license as an embalmer, it is doubtful if many of them would pass the examination because they would be rusty on the work they had in the embalming school.

You ask if the State Board of Embalmers and Funeral Directors would have a right to permit these boys to take the examination at the present time, withholding their license until after they have completed the apprenticeship required by law.

In my opinion, this cannot be done. Section 1720 of the Code of Virginia provides that a person shall not only have graduated from a school of embalming, but shall also have served two years as an apprentice before he may apply for a license as an embalmer, and that upon his application he shall be required to take an examination to determine his knowledge, skill, and other qualifications. The examination is required in order to be sure that everyone receiving a license is qualified to act as an embalmer at that time. If a person has forgotten what he has learned in an embalming school at the time he applies for a license, the object of this section—the protection of the public—would be defeated if he were granted a license.

Very truly yours,

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

EMBALMERS AND FUNERAL DIRECTORS—License—Requirements for.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 22, 1941.

Mr. F. C. Stover, Secretary,
State Board of Embalmers and Funeral Directors,
Strasburg, Virginia.

Dear Mr. Stover:

This is in reply to your letter of May 16, 1941, in which you ask whether Mr. Lewis Royston may be granted an embalmer’s license by the State Board of Embalmers and Funeral Directors without being required to take the examination provided by statute, and also whether he may be permitted to take the examination without meeting the requirements now provided as a prerequisite to such action. From your letter, in which you quote from correspondence had with Mr. Charles G. Stone, attorney for Mr. Royston, it appears that the contention is made that Mr. Royston was engaged in the business of embalming prior to 1902; that for this reason he should be granted a license, even though he does not possess the qualifications now required, and that he should be granted such license without being required to take an examination.

For many years a license to engage in the business of embalming in this State has been required by the statute. In 1903 the law required every person thereafter desiring to engage in this profession to make application for a license to the State Board of Embalmers and Funeral Directors, and to satisfy the Board, upon due examination, that he possessed the necessary skill and knowledge. At that time section 14 of the law regulating embalming (which section 14 was carried into the Code of 1919 as section 1726) provided:

“This chapter shall not apply to undertakers or their assistants who have practiced embalming in this State for one year prior to January first, nineteen hundred and three, but such persons may become licensed, if they so elect, by complying with the provisions of this chapter.”

This provision had the effect of permitting a person who had engaged in this profession prior to 1903 to continue to do so without securing a license. It did not permit such person to secure a license without taking an examination, or without satisfying the Board that he did possess the necessary qualifications. In so far as it is material to the present question, the law regulating embalming remained the same until 1936.

At that time the law was substantially amended to regulate the business of funeral directing as well as embalming. Provision was made whereby those engaged in the business of funeral directing prior to 1936 could secure a license without taking an examination. However, no similar provision was carried into the law as to embalmers. Moreover, section 1726 of the Code was so amended as to no longer permit an embalmer who had engaged in the business of embalming prior to 1902 to continue in such business without a license.

It is my opinion, therefore, that a person who did not secure a license as an embalmer prior to 1936 must now meet the qualifications set forth in the law before being permitted to take the examination, and that he must successfully pass the examination given by the State Board of Embalmers and Funeral Directors before being entitled to a license.

Very truly yours,

Abram P. Staples,
Attorney General.
EMINENT DOMAIN—
(1) Orders, Judgments, Decrees, Etc.—Where Recorded.
(2) Transfer Lists—What Acreage to be Included in.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 4, 1940

HONORABLE FLOYD HOLLOWAY, Clerk,
Circuit Court of York County,
Yorktown, Virginia.

My Dear Mr. Holloway:
I am in receipt of your letter of October 25, in which you ask whether orders, judgments and decrees in condemnation cases should be recorded in the Chancery Order Book or the Common Law Order Book.

Your question seems to be answered in terms by section 5962a of the Code (Michie's Code, 1936) in the following language:

"In any proceeding brought for the condemnation of property, all proceedings, orders, judgments and decrees of the court shall be recorded in the chancery order book of said court."

Your next question is as follows:

"Another thing is after a condemnation proceeding has been completed and the transfer list is made up, will I include in the transfer list the total amount of acreage condemned by the State, including the part of the old road, or will I make the transfer for the amount condemned only. You may not exactly understand what I am trying to say and to be more explicit I am going to copy in this letter a short paragraph to give you an idea.

"Said strips or parcels contain 1.34 acres, more or less, of which 0.07 acre is included in the present right of way and 1.27 acres, more or less, additional land."

In my opinion, the amount of land condemned should be included in the transfer list only for the purpose of deducting the same from the acreage of the former landowner. However, I realize that at times this will be difficult to determine. For example, my information is that sometimes the old road is actually condemned since the State frequently does not own the fee, having an easement only. In other cases the State may have owned the fee in the old road. In any event, I am of the opinion that as a matter of law the acreage actually condemned should be included in the transfer list.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

EXTRADITION—Requirements Before Demand for Recognized.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 2, 1940.

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

My Dear Governor Price: Re: Abe Hoffberg.
This is in reply to the request of your secretary, Miss Allen, under date of
September 30, asking the opinion of this office as to the sufficiency of the papers in the above matter.

Code section 5070-c, enacted at the last session of the General Assembly, provides in part as follows:

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless in writing alleging, except in cases arising under section five thousand and seventy-f that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from such State, * * *"

The present case clearly does not arise under section five thousand and seventy-f, and the written demand of the Governor of North Carolina does not allege that the accused was present in that State at the time of the commission of the alleged offense.

The offense charged is that of failure to support an illegitimate child. Governor Hoey's demand alleges that the accused is charged with this offense in North Carolina and that he has fled from justice and taken refuge in Virginia. Nowhere in the executive demand is it stated that the accused was in North Carolina at the time of the offense charged and that he thereafter fled from that State.

I must advise, therefore, that in my opinion the papers in which extradition is sought in this case do not meet the requirements of Code section 5070-c.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEDERAL RESERVATION—State's Jurisdiction Over—Highway in Elizabeth City County.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 22, 1941.

HONORABLE J. WILTON HOPE, JR.,
Attorney for the Commonwealth,
Hampton, Virginia.

My Dear Mr. Hope:

This is in reply to your letter of March 20, in which you request my opinion upon the question whether or not the Commonwealth of Virginia or any of its political subdivisions has any jurisdiction over a road or highway in Elizabeth City County adjacent to Langley Field, which is a government reservation that was acquired in 1916. You state that the United States acquired a perpetual easement over the land embraced in the highway.

This question is answered by the provisions of chapter 382 of the Acts of 1918, which was then in force. In my opinion, the interest acquired by the United States as indicated in your letter is sufficient to confer exclusive jurisdiction in the Federal Government over the highway, and that neither the State nor the county would have any jurisdiction to regulate traffic thereon unless there has been some subsequent agreement entered into between the United States and the State or the county.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
FEDERAL RESERVATIONS—State's Jurisdiction Over—License Requirement as to Insurance Agent Doing Business on.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 9, 1941.

HONORABLE GEO. A. BOWLES,
Commissioner of Insurance,
State Office Building, Richmond, Virginia.

Dear Mr. Bowles:

This is in reply to your letter of March 25, in which you request my opinion upon the question whether or not an agent of a life insurance company soliciting life insurance contracts from selective service men stationed on government reservations is required to have a State agent's license.

The answer to your question would depend upon the time and circumstances under which the United States acquired its title or lease rights to the property on which the reservation is located. On all such reservations, the title to which was acquired by the United States prior to July 1, 1932. the United States has exclusive jurisdiction over the lands on which the reservations are located, and I do not believe a license would be required for an agent who confines his solicitation exclusively to the reservations.

On lands acquired or leased subsequent to the above date, however, the Commonwealth reserved certain jurisdictional rights which, in my opinion, would make it necessary that the agent have the license. I believe a license also would be necessary if the agent solicits these trainees or selectives at any time off of the reservation.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEDERAL SOLDIERS AND SAILORS RELIEF ACT—Applicability to Confessions of Judgments Under Section 6130a of Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 28, 1941.

HONORABLE H. M. WALKER,
Clerk of the Court,
Heathsville, Virginia.

Dear Mr. Walker:

This is in reply to your letter of April 21, in which you request my opinion upon the question whether or not the Federal Soldiers and Sailors Civil Relief Act of 1940 has any application to confessions of judgment pursuant to the provisions of section 6130a of Michie's Code.

Section 200 of the said Federal Act contains this provision:

"If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first executing an order of court directing such entry."

The Act also requires the appointment of an attorney for the defendant if he is in the service, and provides for stay of execution on judgments, attachments or garnishments in certain cases.
While I hesitate very much to express an opinion as to the construction of a Federal statute, I believe that the Act referred to does apply to confessions of judgment as well as other legal proceedings.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEES—Arrest—On Warrant Charging a Felony.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 2, 1941.

HON. J. CALLOWAY BROWN,
Trial Justice for Bedford County,
Bedford, Virginia.

My Dear Mr. Brown:
Your letter of May 27 presents an interesting question and one which I do not recall has ever been raised before. I imagine that the situation you describe does not frequently occur. The officer making the arrest does so under a warrant charging a felony, and I am of opinion that he is clearly entitled to the fee of $1.50 prescribed by section 3508 of the Code for making the arrest in such case.

However, I agree with you that, if the defendant is convicted only of a misdemeanor, he should not be taxed with the costs of making an arrest in a felony case. The only solution that I can think of in this situation is for the defendant to pay the fee for making an arrest in a misdemeanor case, namely, $1, and then the officer can include the additional 50 cents to which he is entitled in his account which is payable out of the appropriations for criminal charges.

If the defendant is acquitted, then I am of opinion that the officer is entitled to $1.50 to be paid out of the appropriation for criminal charges. I do not see any escape from the conclusion that the officer is entitled to his prescribed fee for making the arrest under a warrant charging a felony.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEES—Sheriffs, Sergeants, Constables—Arrest and Trial of Offenders Violating Motor Vehicle Laws.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 31, 1940.

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

Dear Mr. Downs:
This is in reply to your request for my opinion upon the question whether or not sheriffs, deputy sheriffs, sergeants, deputy sergeants and constables are entitled to be paid the usual fees incident to the arrest and trial of an offender for violation of the motor vehicle laws. You call attention to the provisions of section 2154(55) of Michie's Code, which is as follows:

"Every county, city, town or other political sub-division of the State shall also enforce the provisions of this act and of the motor vehicle laws of the State of Virginia through the agency of any constable, peace or police
officer, sheriff or deputy, provided that such officer shall be completely uniformed at the time of such enforcement or shall display his badge or other sign of authority, and with the further provision that all officers making arrests incident to the enforcement of this act and of the motor vehicle laws of this State shall be paid, fixed and determined salaries for their services, and shall have no interest in, nor be permitted by law to accept the benefit of, any fine or fee resulting from the conviction of an offender against any provision of this act or of the motor vehicle laws of the State of Virginia.”

In my opinion, the meaning of this section is not at all clear. The statute imposes upon counties, cities and towns the duty of enforcing the motor vehicle laws through the agency of any constable, peace or police officer, sheriff or deputy, and further seems to impose upon the counties, cities or towns the obligation of paying such officers as they may select to enforce said laws “fixed and determined salaries for their services”. The section then provides that said officers “shall have no interest in, nor be permitted by law to accept the benefit of, any fine or fee resulting from the conviction of an offender against any provision of this act or of the motor vehicle laws of the State of Virginia”.

Quite a number of questions arise out of the lack of clearness in the statute. The general laws impose on sheriffs and their deputies the duty of arresting persons violating the criminal laws of the State. If such an officer who has not been chosen as an enforcement agency by his county and is not paid any salary should arrest a person for violation of the motor vehicle laws, should this statute be construed as prohibiting him from receiving the usual arrest fee, or is this prohibition directed solely against those enforcing agencies who are being compensated on a salary basis by the county?

Then again, the prohibition against the officer accepting the benefit of any fee limits said benefit to a fee “resulting from the conviction of an offender”. Should this provision be construed as preventing, even in case of a conviction, the officer from receiving the same fee he would have received if there had been an acquittal?

This statute has been in force for many years and the administrative construction which has been placed upon same in the various counties would seem to me to have quite a controlling influence in the proper construction, due to the fact that the statute is very uncertain and indefinite in its meaning. For this reason I would suggest that the judges of the respective circuit courts, in certifying the fees of the officers for payment to the Comptroller, should place such interpretation upon the statute as in their opinions is proper under all the circumstances of their several counties.

It is further my opinion that any such account rendered to the Comptroller and ordered to be paid by the judge of the circuit court should be accepted by the Comptroller, and he should issue a warrant on the Treasurer for payment of same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FINES—Right of Arresting Officer to Part of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 13, 1941.

HONORABLE W. E. HOGG,
Trial Justice,
Newport News, Virginia.

MY DEAR JUDGE HOGG:

I have your letter of January 8, requesting my opinion as to whether the arresting officer is entitled to a portion of the fine assessed against a defendant for peddling without a license.
I am unable to find anything in the law providing for such disposition of fines in these cases. It is possible that the officer who raises this question has seen reference to such a statute in the Annotated Code of Virginia (Michie 1936) under Code section 2543. The very early statute there referred to, however, was omitted from the codification of revenue laws enacted at the session of 1839-40 and I have found no similar statute subsequent thereto.

If there can be pointed out some specific legislation which purports or is believed to allow the informer part of the fine in such a case, I shall be glad to have the same brought to my attention. In the absence of such legislation the entire fine must, of course, be paid into the literary fund.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

FINES—For Violations of State Laws or Town Ordinances—Who Receives.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 7, 1941.

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

Dear Mr. Bruce:

Your letter of May 21, addressed to Honorable L. McCarthy Downs, Auditor of Public Accounts, has been referred to this office for reply. In your letter you submit the following question:

"A great many arrests are made in the different incorporated towns of Wise County. I am informed that these cases are divided, those who cannot pay their fines are turned over to the Trial Justice for disposition, and those who can pay their fines are tried and fined in the different incorporated towns of the County. Those who are unable to pay their fines and turned over to the Trial Justice for disposition of their cases, are sent to the County jail, thus running up a large expense to the State.

"Should not the towns of the County take and prosecute all of these cases, or turn them all over to the Trial Justice? Should not the towns be required to pay the costs incurred in those cases turned over to the Trial Justice?"

The situation you describe is an unfortunate one. However, if the warrant under which a misdemeanant is being tried charges a violation of a town ordinance, then, of course, the town is entitled to the fine. If the warrant charges a violation of a State law, then the fine, if paid, should go to the State. The matter seems to be more or less under the control of the issuing officer. I should certainly say if the arrest is made by a State officer, the warrant should charge a violation of a State law. It goes without saying that, if the warrant does charge a violation of a town ordinance, then no fees or mileage may be paid out of the State treasury to the officer making the arrest.

I may also state for your general information that this office has previously expressed the opinion that where a person is tried under a warrant charging a violation of a State law and such person is so convicted and judgment entered, then there is no authority for changing the warrant so as to make it appear that the person was tried for a violation of a town ordinance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
FOREST CONSERVATION—Duty to Leave Trees for Seed Purposes.

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

MR. F. C. PEDERSON,
State Forester,
University Station,
Charlottesville, Virginia.

My Dear Mr. Pederson:

This is in reply to your letter of December 17, in which you request my opinion upon three questions relating to the interpretation of section 549-a of the Code, which is chapter 326 of the Acts of 1940, and which imposes upon every landowner who cuts, or any person who is responsible for cutting, or who procures another to cut for commercial purposes timber on land in certain counties, the duty of leaving a certain proportion of the trees for seed purposes.

Your first question is whether or not, in a case where a landowner has sold the timber prior to the effective date of the statute, the provisions of the statute must be complied with.

I am of opinion that the fact of the sale prior to said date does not affect the obligation of the statute, and that the trees must be left standing in accordance with its provisions.

You next inquire whether or not the statute places responsibility upon the seller or purchaser to comply with the Act.

The statute, in my opinion, places this duty upon the person who is responsible for cutting, or who procures another to cut, said timber for commercial purposes. This might vary according to the terms of the contract of sale, but generally speaking I would say the purchaser is the person who would be responsible for cutting the timber, and, therefore, is the person upon whom the duty is placed to comply with the statutory provisions.

Your third question is whether or not the purchaser would have a right of action against the seller by reason of the statutory provision reducing the amount of timber to be cut.

This is a question which might depend upon the construction of the contract, but, in any event, is one concerning which in my opinion it would not be proper for this office, or for you, to express any opinion, inasmuch as the question involves purely rights between private parties in which the State itself is not interested. It is a question which should be settled by private litigation if the parties are unable to agree, and comes within the domain of a private practitioner of the law.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

GAMBLING—Disposition of Confiscated Slot Machines.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 9, 1941.

HONORABLE W. E. CURTIS,
Sheriff of Stafford County,
R. F. D. 2, Box 97,
Fredericksburg, Virginia.

My Dear Mr. Curtis:

I have your letter of January 7, in which you state that the Trial Justice of your county has asked you to write and secure my opinion upon the question whether or not slot machines which have been forfeited to the Commonwealth
pursuant to the provisions of section 4694a of the Code of Virginia, as amended by Acts 1938, page 574, may be sold to persons outside the State, and the proceeds therefrom paid into the State Treasury or used for some charitable institution.

I can find no authority in the law for any such disposition of these machines. The last sentence in said section 4694a provides as follows:

"Any money so seized shall be forfeited to the Commonwealth and such article or apparatus shall be destroyed."

The apparatus referred to is the slot machine itself, and I can see no escape from the mandatory provisions of this section.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAMBLING—Destruction of Slot Machines Seized Without Warrant.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., January 14, 1941.

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

DEAR MR. MORTON:

This is in reply to your letter of January 13, in which you inquire whether or not slot machines seized by officers without a warrant for alleged violations of section 4694a of the 1940 Supplement to the Code may be released or destroyed by the trial justice.

In my opinion, in order for the trial justice to have jurisdiction over these machines, it is necessary for the search warrant to be issued as provided by said Code section, and for the machines to be seized thereunder.

Whether under all the circumstances the Commonwealth's Attorney feels he should cause the issuance of the warrant is, of course, a matter within his discretion. If the machines are seized pursuant to such a search warrant issued in accordance with law, then, in my opinion, it is mandatory that same shall be destroyed.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

GAME AND INLAND FISHERIES—Duties: To Prevent Pollution of Streams.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., June 9, 1941.

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

DEAR MR. NOLTING:

This will acknowledge receipt of your letter of June 7, requesting my opinion as to the duties of your Commission and its game wardens in connection with
enforcing that portion of the Game Code dealing with the pollution of water courses.

The only provisions of the Game Code with respect to pollution are those set forth in Virginia Code (Michie 1936) section 3305 (43), which make certain acts of pollution unlawful and provide a penalty therefor.

Virginia Code sections 3305(8) and 3305(16) in general terms make it the duty of the Chairman of the Commission and of game wardens to enforce the provisions of the game, inland fish and dog laws. Code section 3305(16) authorizes the Chairman of the Commission and all game wardens to arrest any person found in the act of violating any provision of the hunting, trapping, inland fish and dog laws, and section 4864 provides that:

"Every commissioner of the revenue, sheriff, constable or other officer shall give information of the violation of any penal law to the attorney for the Commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, * * * ."

It is my opinion, therefore, that any person found by a game warden or by the Chairman of the Commission in the act of polluting a stream in violation of section 3305(43) should be arrested forthwith, and that any such officer obtaining information giving him reasonable grounds to believe that such pollution is being committed should report the same to the local attorney for the Commonwealth.

In your letter you refer to a suggestion that the Commission may have authority to proceed by civil action against violations of the statute in question. It is entirely clear that an injunction suit or any other proceedings of a civil nature for the enforcement of a criminal law can be brought only pursuant to express statutory authority. I am unable to find any statute authorizing such proceedings for the enforcement of Code section 3305(43) and hence am of opinion that the Commission is without power to proceed in these cases except in the manner described above.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISHERIES—Right of Commission to Dispose of Water on Land Acquired by Deed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., July 9, 1940.

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

MY DEAR MR. COGBILL:

In compliance with your request that I advise you as to the authority of the Commission of Game and Inland Fisheries to grant to the County of Chesterfield a perpetual right to take water from Swift Creek above a certain dam which was conveyed to the Commonwealth of Virginia for the use of said Commission by the Virginia Electric and Power Company, I beg to advise you as follows:

By deed dated June 30, 1939, the Virginia Electric and Power Company conveyed to the Commonwealth of Virginia, Commission of Game and Inland Fisheries, the bed and basin of Swift Creek between certain points, and within a certain contour line shown on a plat recorded in the Clerk's Office of the Circuit Court of Chesterfield County, in Deed Book 197, page 36. Together with this land were conveyed the right to flood certain additional lands to an elevation shown on said plat, the right to construct, maintain, and so forth a certain tail race
below the dam of said pond, and the right to exercise all riparian rights and other appurtenant rights.

The conveying clause of this deed recites that the property and rights described are "to be used as a State park for the propagation of fish, fishing, boating, bathing, and other recreational activities". The conveyance is made on the express condition, and in consideration of the Commission's covenants, that the property and rights conveyed shall never be used for the development of hydro-electric power, all property and rights to revert in case of a breach of this condition and covenant.

The deed is further made subject to certain reservations and exceptions consisting of rights of way and fishing rights reserved to named persons, and a certain lease between the Power Company and one J. A. Furman covering bathing and boating rights.

The Commission's only statutory authority in connection with such property is found in Virginia Code (Michie 1936) section 3305(4), which gives the Commission the power "to acquire by purchase, lease, exchange, gift or otherwise, such lands and waters anywhere in this State as it may deem expedient and proper; to establish and erect thereon and therein such buildings, structures, dams, lakes and ponds as it may deem necessary and proper, and to conduct and carry on such operations for the preservation and propagation of game birds, game animals, fish and other wild life as it may deem proper to increase, replenish and restock the lands and inland waters of the State; to purchase, lease or otherwise acquire lands and waters for game and fish refuges, preserves or public shooting and fishing and to establish such lands and waters under appropriate regulations".

It is my opinion, therefore, that, in the absence of any statutory authorization, the Commission of Game and Inland Fisheries has no power to grant to the County of Chesterfield the right to use the water referred to.

It occurs to me, however, that, by reason of the limited purposes for which the property is conveyed, it might be advisable to acquire from the Virginia Electric and Power Company its consent to the use of the water for other purposes than "a State park for the propagation of fish, fishing, boating, bathing, and other recreational activities". It also might be advisable to secure a release from other persons having bathing and boating rights or other easements in the water. Securing these rights or waivers would, in my opinion, be helpful in the event the General Assembly authorizes the Commission to grant the desired right to the County of Chesterfield.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME LAWS—Minnow Seining in Certain Creeks—When Lawful.

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

Hon. John C. Caldwell,
Trial Justice,
New Castle, Virginia.

Dear Judge Caldwell:

I have your letter of July 10th. requesting my opinion as to whether under chapter 146 of the Acts of 1940 it is lawful to take minnows with a proper seine in the waters of Meadow Creek and Barbours Creek in Craig County after the closing of the trout season but during the open season for taking bass.

The act to which you refer provides that, "* * * it shall be lawful to take minnows to be used for bait, from the waters of Barbour's Creek, Craig's Creek, John's Creek and Meadow Creek, in Craig County, by means of nets or seines, during the open season for trout and bass, subject to the regulations of the Commission of Game and Inland Fisheries covering minnow seines."
As you point out, the statutory language is not entirely unambiguous, but the policy of the act seems to be that minnow seining in these streams should be permitted except during the months when it is unlawful to do the kinds of fishing for which minnows are commonly used—i.e., fishing for either bass or trout.

In my opinion the act is capable of being so construed, and I therefore concur in your view that minnows may be lawfully seined in these waters at any time during the open season for either trout or bass, or both.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

GENERAL ASSEMBLY—Eligibility of Members to Appointment as Judge of a Court.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 12, 1940.

HONORABLE C. G. QUESENBERY,
Member of the House of Delegates,
Waynesboro, Virginia.

MY DEAR MR. QUESENBERY:

This is in reply to your letter of September 7, in which you request my opinion upon the eligibility of a member of the General Assembly to appointment by the Governor to fill a vacancy in one of the circuit or corporation courts of the State.

Section 45 of the Constitution contains this provision:

“No member (of the General Assembly) 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.”

This provision has uniformly been construed as applying only to an actual election by the General Assembly itself, and does not affect the eligibility of a member to be appointed to any office.

The only difficulty which might arise would be in case the Governor should appoint a member of the General Assembly and a special session should be called, in which event he would be ineligible to be elected at any special session held during the time for which he was originally elected as a member.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GOVERNOR—Remission of Fines Imposed for Violation of Municipal Ordinances.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General.
Richmond, Va., March 17, 1941.

MISS LAURA H. ALLEN,
Secretary to the Governor,
Richmond, Virginia.

Re: George Bryant.

DEAR MISS ALLEN:

I have your letter of March 11, enclosing your file in connection with the above matter. On behalf of the Governor you request the opinion of this office
REPORT OF THE ATTORNEY GENERAL

as to whether the Governor has power to remit a fine which was imposed on this man for violation of a municipal ordinance.

Section 73 of the Virginia Constitution provides that the Governor shall have power "to remit fines and penalties under such rules and regulations as may be prescribed by law," as well as the power to grant reprieves and pardons after conviction. Virginia Code section 2569 prescribes the procedure by which the power to remit fines shall be exercised. Neither the Constitution nor the statute expressly includes or excludes cases in which the fine has been imposed for violation of a municipal ordinance.

While the question has not been passed upon by our own Court of Appeals, it seems well settled by the decisions of other states, under statutory and constitutional provisions which are at least as broad as our own, that the executive power to grant pardons and remit fines and penalties extends only to cases in which the applicant for clemency has been convicted of violating a state law. The general rule, apparently accepted in all the decided cases, is stated by the editors of Ruling Case Law in the following form:

"The power to pardon, except as limited by the constitutions, extends to every offense against the government known to the law, but is limited to offenses against the state as such. * * * The pardoning power of the executive does not extend to granting pardons for a violation of any municipal ordinance or remitting the fine imposed for such violation * * * ." (20 R. C. L., Pardons, §16.)

I find no authority whatever for a contrary view and the rule thus stated has been specifically applied in numerous jurisdictions. Paris v. Hinton, 132 Ky. 684, 116 S. W. 1197, 19 Ann. Cas. 114 and note; Allen v. McGuire, 100 Miss. 781, 57 So. 217; State v. Renick, 157 Mo. 292, 57 S. W. 713; City of Clovis v. Hamilton, 41 N. M. 4, 62 P. (2d) 1151.

In support of this view it might be added that various provisions of Code section 2569 providing for the manner of disbursing from the State treasury fines remitted by the Governor indicate that the statute contemplates only the remission of fines imposed for the violation of state laws.

It is my opinion, therefore, that the constitutional and statutory powers of the Governor to remit fines do not extend to cases in which the fine has been imposed for violation of a local ordinance.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GOVERNOR—Power to Appoint as Member of Military Board One Not Meeting Legal Qualifications.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., March 17, 1941.

HONORABLE S. GARDNER WALLER,
The Adjutant General of Virginia,
Richmond, Virginia.

MY DEAR GENERAL WALLER:
I am in receipt of your letter of March 12 in which you refer to section 2673(11) of the Code establishing the Military Board, and then state that the member of the Board described as "one other member to hold office during the pleasure of the Governor and to be appointed by him, such member to be an officer of the National Guard with Federal recognition and of more than three years service and above the rank of Captain" is not now eligible to serve on the Board, and that since the induction of the Virginia National Guard into Federal
service no officer is now available who fulfills the requirements specified in the quoted language above. You ask "if the Governor may legally appoint some other person pro tempore to fill the vacancy occurring by reason of the discharge of Colonel Bright, under Article 5, Section 73, of the Constitution of Virginia."

While the provision of the Constitution to which you refer confers upon the Governor the power to fill "vacancies in all offices of the State for the filling of which the Constitution and laws make no other provision," I do not think that this constitutional provision can reasonably be construed to give to the Governor power to fill a vacancy in office by appointing a person who has not the qualifications prescribed by law.

However, I call your attention to the well established principle that the term of office of an officer does not expire until his successor has been elected or appointed and qualified. There having been no successor to Colonel Bright appointed, it seems to me that he may hold over and continue to act as a member of the Board until his successor has been appointed and qualified.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HAMPTON ROADS SANITATION DISTRICT—Withdrawal of Political Subdivision From—Notice.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., March 19, 1941.

HONORABLE JAMES M. GARRETT,
Member House of Delegates,
Western Union Building,
Norfolk, Virginia.

MY DEAR MR. GARRETT:

This will acknowledge receipt of your letter of March 11, from which I quote as follows:

"Under the Sanitation District Law of 1938 as amended in 1940 (Chapter 351, 1940 Acts of Assembly) and the Act providing for the creation of the Hampton Roads Sanitation District (Chapter 407, 1940 Acts of Assembly) do the political subdivisions of the Hampton Roads Sanitation District which desire to give notice of their intention of withdrawing from the Hampton Roads Sanitation District, which was created by the voters of the District last November, have six months within which to file a resolution of intent to withdraw from the said District, (a) from the date of the certification of the results of the election by the Secretary of the Commonwealth, or (b) six months from the date of the appointment of the Commission, since over two months have elapsed since the creation of the District, and the Commission has not been appointed?

"Considerable doubt seems to have arisen as to the construction of Section 3; see 3(c) of Chapter 407 of the 1940 Acts (page 736), when compared with Section 4-a(f) of Chapter 351 of the 1940 Acts (page 621)."

"In other words, does Norfolk County, if it wishes to withdraw from the District, have to notify the Commission of such intention within six months from the certification of the results by the Secretary of the Commonwealth, or does it have six months from the appointment of the Commission, since same was not appointed within sixty days of the creation of the District?"

Section 4-a which was added to the Sanitation Districts Law of 1938 in 1940 (Acts 1940, p. 619) deals with withdrawal from a sanitation district cre-
ated under a special act of the General Assembly. It is there provided that any county or city may by an appropriate resolution of its governing body filed with the Commission give notice of its intention to consider withdrawing from the district. Such notice must be filed with the Commission within six months after the creation of the district. The Hampton Roads Sanitation District was created pursuant to Chapter 407 of the Acts of 1940, the Act providing in effect that the actual creation takes place when the Secretary of the Commonwealth certifies to the Governor that a majority of the voters have voted in favor of the creation. You state, however, that the Commission has not yet been appointed and more than two months have elapsed since the creation of the district as set out above.

Subsection (f) of Section 4-a of the Sanitation Districts Law reads as follows:

“In the event that the members of the commission shall not be appointed within two months after the creation of the district then the date of the first appointment of such members shall be deemed to be the date of the creation of such district for all the purposes of this section.”

The Commission not having been appointed within two months after the creation of the district, it seems to me plain under the quoted provision that a county or city may give notice of its intention to withdraw within six months from the first appointment of the members of the Commission. I see no conflict between the provisions of the sections of the two Acts to which you refer, for when read together subsection (f) of Section 4-a of the Sanitation Districts Law simply constitutes an exception to 3(c) of the Hampton Roads Sanitation District Act of 1940.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

HAMPTON ROADS SANITATION DISTRICT—Election—Form of Ballot.

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

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

GENTLEMEN:

I am in receipt of your letter of September 17, regarding the form of ballot to be used in an election to be held under authority of chapter 407 of the Acts of 1940.

Section 3, subsection (b) of the Act provides that the ballots shall be separate from other ballots and shall be in substantially the following form:

“Do you favor the creation of the Hampton Roads Sanitation District?

☐ YES
☐ NO”

Following the instructions as to the contents of the ballots, the section carries certain instructions as to how a person may vote “yes” or “no”, but there is no requirement that these instructions be printed on the ballots.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HAMPTON ROADS SANITATION DISTRICT—Chap. 407, Acts 1940—Writ of Election Pursuant to.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 14, 1941.

HONORABLE RAYMOND L. JACKSON,
Secretary of the Commonwealth,
Richmond, Virginia.

DEAR MR. JACKSON:

I have your letter of August 7th requesting my opinion as to whether under Chapter 407 of the Acts of 1940 the Governor should issue a writ calling an election under that statute if the election is to be held at the time of the General Election in November.

The only provision for a writ of election is contained in section 4-a, subsection 3, paragraph (b) of the act, where it is provided that a referendum shall be held—

"* * * either at the general election in November, nineteen hundred and forty, or at a special election to be held at such earlier time, not less than thirty days prior to the date fixed for such general election, as may be fixed by writ or proclamation of the Governor of the Commonwealth. Any such writ or proclamation shall designate a date for holding such special election not less than thirty days from the date of such writ or proclamation, and may be directed as writs of election are directed for an election district, or to fill a vacancy in the General Assembly or in Congress."

Under the language of this section it seems to me clear that the law contemplates the issuance of a writ of election only in case a special election is held at a time other than the date of the general election in November. I concur, however, in the suggestion contained in your letter that if the Governor, for any reason, wishes to issue such a writ, simply proclaiming that the election is to be held at the time of the general election, the issuance of such a writ would probably not affect the legality of the election.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

HOURS OF WORK OF WOMEN—Exception (d) of Section 1808—Restaurants.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 7, 1941.

HONORABLE C. CARTER LEE,
Commonwealth's Attorney,
Rocky Mount, Virginia.

MY DEAR CARTER:

This is in reply to your letter of March 4, in which you request my opinion upon the question whether or not a restaurant should be construed to be a "mercantile establishment" within the meaning of exception (d) of section 1808 of the Code as mended by Acts of 1928, page 770.

Under the peculiar wording of this statute, I do not believe it could be construed to include an establishment operated exclusively as a restaurant. You will observe that in the first sentence of this Code section the word "restaurant" is itself employed, as are also the words "mercantile or manufacturing estab-
lishment”. Obviously, the two words are intended to refer to different types of establishments.

It may be, however, that where a restaurant business is conducted along with a mercantile establishment, such as a drug store, a difficult question would be presented. This, of course, would depend upon the facts in each particular case. But, if the principal purpose of the establishment was operating a drug store, and the serving of sandwiches or light lunches was on such a small scale as to be regarded as incidental, I am inclined to the view that the entire establishment would come within the term of a mercantile establishment.

I believe, however, that, if the General Assembly had intended to exempt business primarily devoted to operating a restaurant, it would have repeated the use of the word in exception (d).

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INDUSTRIAL SCHOOLS—Whether Considered Penal Institutions.

HONORABLE PAUL S. BLANDFORD, Superintendent,
Virginia Industrial School for Boys,
Maidens, Virginia.

DEAR MR. BLANDFORD:

This is in reply to your request for my opinion upon the question whether the four schools—Virginia Industrial School for Boys, Virginia Home and Industrial School for Girls, Virginia Manual Labor School, and Virginia Industrial School for Colored Girls—are penal institutions.

Whether or not these schools are to be considered penal institutions depends upon the definition given to the phrase “penal institutions”, which may possibly vary, depending upon the rights, privileges, and duties called into question.

The four schools were all originally established by corporations chartered by the Legislature of Virginia to establish schools designed for the correction and rehabilitation of wayward children. The schools were authorized to receive children voluntarily surrendered to them by their parents, and also children convicted of crimes by the courts of the Commonwealth and committed to the schools by said courts.

Later, each of these schools was acquired by the Commonwealth pursuant to statutes, which provided that the schools were to be continued to be conducted for the purposes set forth in the charters of the private corporations.

At the present time, the majority of the children sent to these schools are those adjudged delinquent by the Juvenile and Domestic Relations Courts under chapter 78, sections 1905-1922, inclusive, of the Code of Virginia (Michie’s 1936). Section 1905 provides:

“* * * 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.”

Children adjudged delinquent are committed to the State Department of Public Welfare and by this Department sent to the industrial schools. In some instances children who are not adjudged delinquent under the above statutes, but
who are actually tried for and convicted of crimes by courts of record are sent to these schools because it is considered better for them to be held there rather than in jail or the penitentiary where they would be thrown with hardened criminals.

Though some children who have been convicted of crimes are sent to these schools, yet, since the primary objective to be accomplished by sending children to them is not to punish the children for offenses committed by them, but rather to rehabilitate them, it is my opinion that these institutions should be considered as institutions of correction and not penal institutions.

What is more important, even if in some respects these schools may be considered penal institutions, nevertheless, those children who have simply been adjudicated delinquent by the Juvenile and Domestic Relations Courts and committed to the State Department of Public Welfare, and by this Department sent to these industrial schools, are not to be considered as criminals or as having been convicted of any crime. See the provision of section 1905 of the Virginia Code quoted above.

In my opinion, the rights of any individual who has been sent to one of these schools should be governed by the circumstances under which he was sent there rather than by any arbitrary designation given to these schools.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTIC, ETC.—Expense of Lunacy Commission, by Whom Paid.

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

HONORABLE BERNARD MAHON,
Attorney for the Commonwealth,
Bowling Green, Virginia.

MY DEAR MR. MAHON:

I am in receipt of your letter of November 30, in which you refer to section 1021 of the Code of Virginia, providing for the expenses of a lunacy commission, and particularly that part of the section which states that—

"All expenses incurred * * * shall be paid by the county or city of which such person was a legal resident at the time of such commitment * * *

You ask how the expenses should be paid in the case of a commission called to pass on the condition of a resident of an unincorporated town.

In my opinion, the expenses of the commission in such a case should be paid by the county in which the town is located. I do not see how the word "city" used in this section can be construed to include a town. I observe that you state that the statute formerly read that the expenses should be paid by the "county or corporation". I take it that the section must have been deliberately amended so as to eliminate the liability of a town for these expenses.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
JAILS AND PRISONERS—Compensation of Prisoners in City Prison Farms.

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

HON. C. STUART WHEATLEY, Clerk,
Corporation Court City of Danville,
Danville, Virginia.

MY DEAR MR. WHEATLEY:

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

"*** do city prison farms where the prisoners are required to do manual labor during their confinement fall within the purview of section 2095 by implication though not specifically designated therein?"

Section 2095 does not in terms include city prison farms, and I know of no authority for construing the statute so as to allow compensation to prisoners confined to such farms.

If the General Assembly desires that State prisoners be compensated for work on city prison farms, it would seem that such compensation should be provided by an amendment of the existing law or a new statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Fugitives from Other States—Cost of Maintaining—How Paid.

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

MR. JOHN G. SAUNDERS,
City Sergeant,
Richmond, Virginia.

MY DEAR MR. SAUNDERS:

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

"It has been our practice where men were arrested in Richmond as fugitives from other points and committed to the city jail by police court to be held until the authorities could be notified and prisoners turned over to the proper authorities, that the charges for keeping them in jail were charged to the State account. The State auditors have taken exception to this, claiming that as these were not State prisoners they could not be charged to the State."

I assume from what you state that these prisoners are being held by you under valid warrants. It is true, of course, that they are not being held for violation of State law, but they are being held under authority of State law. I am referring, of course, to prisoners being held for offenses committed against the laws of other jurisdictions than Virginia.

After careful consideration I am of opinion that, as a matter of comity between the States, the charges for keeping these out-of-State prisoners in jail may be paid out of the State appropriation for criminal expenses. As a practical matter, it would be extremely difficult for an officer to collect these small charges from other States and, again, if Virginia did not hold such prisoners for other States, it might well be that other States would not be inclined to hold prisoners charged with violation of Virginia law.
As to prisoners held by you for the officers of other cities in Virginia, it is my opinion that, if these prisoners are charged with violation of State law, then your account for their expenses should be certified by the judges of the courts in which the prisoners are to be tried; if such prisoners are being held for violation of city ordinances, then your charges should be paid by the cities in question and not out of the State treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Rearrest of Prisoner Released by Mistake.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., October 23, 1940,

MAJOR RICE M. YOUELL, Superintendent,
The Penitentiary,
Richmond, Virginia.

DEAR MAJOR YOUELL:

I am in receipt of your letter of October 15, in which you ask as to your authority to re-arrest William Barbour, who was convicted in Charlotte county of a misdemeanor and sentenced to confinement in jail for six months and to pay $14.39 costs. In August, 1940, another William Barbour was convicted in Charles City county of a misdemeanor and sentenced to confinement in jail for four months and to pay a fine of $50.00 and $10.25 costs.

On September 20, 1940, the Trial Justice of Charles City county ordered the release of William Barbour from that county and, through error, William Barbour from Charlotte county was released.

You ask what is the proper thing for you to do to have William Barbour from Charlotte county re-arrested and returned to the convict road force to complete his sentence.

I am herewith enclosing a memorandum covering the situation you have described, taken from 6 C. J. S. section 21, page 627. I have not only examined the above authority, but have also examined a number of cases cited therein.

I am of the opinion that, where a prisoner has been released by mistake, his situation is the same as if he had escaped, and that his custodian may re-arrest him without a warrant, or may re-arrest him on the process under which he was being held in his custody prior to his arrest. The release of a prisoner by his custodian without legal authority is void, and necessarily the release of William Barbour from Charlotte county, upon an order received by you for the release of William Barbour from Charles City county, was not authorized by law and was, therefore, void.

Very truly yours,

ABRAM P. STAPLES.
Attorney General.

JAILERS—Compensation for Care of Insane, Epileptic, Etc.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., December 7, 1940.

MR. H. E. MAYHEW, Sergeant,
City of Roanoke,
Roanoke, Virginia.

MY DEAR MR. MAYHEW:

Mr. Fitzpatrick has talked with me concerning your account with the State for the month of October for the maintenance and care of insane, epileptic, feebleminded, etc.
The Comptroller has raised the point that you should not receive an allowance for both the day of admission and the day of release. It seems that it has been the practice of the Comptroller for many years to allow the board of a prisoner on the day of admission, but not for the day of release. This office expressed an opinion on this question under date of June 30, 1940, to Mr. T. Wilson Seay, Sheriff of Henrico County, and I herewith enclose a copy of that opinion, which substantially upholds the position of the Comptroller.

Mr. Fitzpatrick was also concerned as to whether or not in calculating the rate of allowance for the insane the number of prisoners in jail should also be taken into consideration.

It is my view that the two accounts, that is for prisoners on the one hand and for insane on the other, should be treated as separate accounts. The statutes seem to contemplate this and the practice has long been so to do. I observe that from the way your account is made up this also seems to have been your practice.

Calculating your account on the basis of the Comptroller's letter and the rulings to which I have referred, it would appear that for the month of October you are entitled to receive an allowance for the insane for fourteen days at $1 a day and for six days at 75 cents.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGES—Certificate as to Claims Allowed Officers in Criminal Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., January 3, 1941.

Honorable Milton I. Hargrave, Clerk.
Circuit Court of Dinwiddie County,
Dinwiddie, Virginia.

My Dear Mr. Hargrave:

Your letter of December 19 was duly received, but in the press of other matters I have not been able to give it attention until today.

I quote from your letter as follows:

"The judge's certificate of court claims allowed officers for services in criminal cases is as follows, to-wit:

'The undersigned, Judge of the Court, in which the foregoing account is allowed, hereby certifies that he has actually examined the papers upon which it is founded, and is satisfied that warrants were issued, trials had, or examinations made, as shown in said account, and further that in no case, either Felony or Misdemeanor, except it be one in which the defendant was acquitted and no prosecutor was liable for payment of the costs, is a fee allowed an officer until the execution required by Code Section 4964 has been issued and proceeded with and the return made thereon as required by law.'

'Section 4964 referred to in the above certificate refers to the clerk of the circuit court.

'Section 4987j relates to papers being kept in the trial justice's office, and states for a period of two years.

'If an officer makes a claim for costs in criminal cases, which he has to do before the papers are filed in the clerk's office in order to do so before the claim is two years old, I can't see how both of these sections can be complied with.'
It is true that section 4987j of the Code provides for the papers in a case before a trial justice to be retained in the justice's office for two years. However, I call your attention to the provisions of section 4961 of the Code, under which the certificate of a judge is made, to the effect that in cases arising before a justice the expenses "shall be certified by such justice to the circuit or corporation court before which he qualified, which court shall certify the same, if it appears to be correct, to the auditor." It would appear from this provision that the court may accept the certificate of the trial justice if he is satisfied that it is correct, and that the statute does not contemplate that he shall necessarily personally examine the papers. While the language of the certificate which you quote might not precisely fit in with the present procedure, I see no reason why the judge should not make the certificate that he has examined the papers when he has in fact examined all the papers that he is required to examine.

Where the judge certifies that the execution required by section 4964 has been issued, I call your attention to the fact that section 4963 provides that a justice in a criminal case shall certify to the clerk of his county or corporation all the expenses incident to such proceedings which are payable out of the treasury. Upon this certificate the clerk issues the execution provided for in section 4964. Thus it would appear that there is no reason why the judge should not certify that the execution required by section 4964 has been issued by the clerk when in fact the clerk's records show this to be the case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Criminal Cases, Finality of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., December 2, 1940.

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

DEAR MR. LEE:

This is in reply to your letter of November 18, in which you request my opinion upon a question arising out of Virginia Code (Michie 1936) section 5962a. My attention is called to the provision in that section that—

"* * * All judgments or decrees entered during any term of the court shall become final at the end of the term or at the expiration of fifteen days after their rendition, whichever period shall first happen."

You request my opinion as to whether, under this section, a judgment by which a defendant is sentenced for a felony may be set aside or the sentence suspended after the expiration of fifteen days from its entry, but before adjournment of the term.

Prior to the enactment of this statute it was well settled that every judgment remained subject to the control of the court until adjournment of the term at which it was entered, at which time it became absolutely final and the court thereafter had no power to reconsider it for any purposes. Harley v. Commonwealth, 131 Va. 664; Allen v. Commonwealth, 114 Va. 826. Thus it seems clear that in a criminal case a sentence could not be suspended after adjournment of the term at which it was passed. See opinion of Mr. Justice Prentis in Richardson v. Commonwealth, 131 Va. 802.
The statute in question, first enacted as Chapter 458 of the Acts of 1926, provided for the continuation of each term of court until the beginning of the next. The provision quoted above undoubtedly was added in order to prevent the delays and injustices which would result if no judgment were to be deemed "final" in any respect until the end of a term as thus extended. Under this statute it has been expressly held that a judgment which has become "final" by expiration of the prescribed fifteen day period is as completely beyond the control of the courts as one which had become final at common law by adjournment of the term. Carney v. Poindexter, 170 Va. 233.

While the effect of this statute seems never to have been passed upon in a criminal case, I can find nothing in its language or elsewhere in the law which would restrict the operation of its broad provisions to civil cases, and can think of no grounds for reading such a limitation into it. It is my opinion, therefore, that Code section 5962a applies equally to criminal and civil cases, and that a judgment in a criminal case passes from the control of the court fifteen days from the date of its entry; that hence such a judgment cannot thereafter be set aside or a sentence for felony suspended.

It should be noted that in a misdemeanor case the sentence may be suspended at any time under the express provisions of Code section 1922b as amended by Acts 1938, p. 189.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICE OF PEACE—Appointment of Person Who Has Resigned as Registrar.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMFD, VA., August 13, 1940.

HONORABLE W. FRANCIS BINFORD,
Trial Justice,
Prince George County,
Prince George, Virginia.

DEAR JUDGE BINFORD:

This is in reply to your letter of August 9, in which you ask if a registrar may resign a position as such and then be appointed a justice of the peace in the same district in which he was registrar.

I know of no provision of law which forbids the appointment of a person to the office of justice of the peace after he has resigned as registrar and his resignation has been duly accepted.

Section 97 of the Code provides that no person who acts as registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar. While this section does not prohibit the appointment of a person who has served as a registrar to a vacant office to serve an unexpired term, it would make such person ineligible as a candidate for such office when it is to be filled by election at the election to be held next after he has acted as registrar.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
JUSTICES OF THE PEACE—Bonds Required of Those Accepting Cash Bail Bonds, Chap. 335, Acts 1940.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 1, 1940.

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

MY DEAR MR. SIMPKINS:
I am in receipt of your letter of June 22 from which I quote as follows:

“...I am writing you with regard to the interpretation of Chapter 335 of the Acts of the Assembly of 1940. Several justices of the peace of Hanover County have requested me to advise them whether they need give the bond provided in this Chapter of the Acts if they do not take cash bonds as authorized therein, or are they required to take cash bonds and, therefore, required to give the necessary bond. I am of the view that since the law gives a person charged with the offense mentioned therein the right to give a cash bond, that the justices must give the surety bond.”

As you suggest, the first section of Chapter 335 of the Acts of the Assembly of 1940 (Acts of 1940, page 557), gives to a person charged with an offense mentioned therein, who may be admitted to bail by a justice of the peace, the right to deposit cash instead of entering into a recognizance with surety. A justice of the peace, therefore, who admits to bail, as he may do, must be in a position to accord to the person charged with an offense, the right to deposit cash. In view of this situation, I am of opinion that the Act contemplates that justices of the peace shall give the bond required thereby.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF PEACE—Fees for Issuing Search Warrant Naming No Particular Individual.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 28, 1940.

HONORABLE RICHARD T. WILSON, Judge,
Hustings Court City of Petersburg,
Petersburg, Virginia.

MY DEAR JUDGE WILSON:
In your letter of August 24 you ask my thought on the following question:

“I am writing to inquire whether your office has made a ruling as to whether or not a justice of the peace is entitled to $1 for issuing such a ‘John Doe Warrant’ as I have described above. To put it a little differently, is it necessary for a search warrant to designate the name of a particular individual in order for a justice of the peace to be entitled to a fee? This question is continually arising here and, if at your earliest convenience you will let me have your thought on the subject, I shall appreciate it very much.”

I do not recall that this matter has previously received my consideration, but I am glad to now give you my views in the hope that they may be of some help to you.
Section 4675 (37) of the Code (Michie, 1936) provides for the issuance of search warrants in the enforcement of the Alcoholic Beverage Control Act. Such warrants, the section stipulates, shall be issued, directed and executed in accordance with the general law pertaining to search warrants. As I read sections 4822a-4822c of the Code, it is only necessary for the affidavit upon which the warrant is issued to reasonably describe the premises to be searched and the property to be searched for, alleging the material facts constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which the search is to be made. I do not understand that it is essential that the owner or occupant of the premises or the alleged offender be named. The officer then makes the search, seizes the property mentioned in the affidavit, and brings the same, and the person or persons in whose possession the same are found, before the justice or court having jurisdiction of the offense.

My conclusion is, therefore, that it is not necessary for a search warrant to designate the name of a particular individual and that, when a justice of the peace issues a warrant upon a proper affidavit, he is entitled to his fee even though the name of no particular individual be mentioned.

If you know of any statute or authority throwing any further light on the question or which would indicate a conclusion contrary to the one that I have reached, I shall be glad to consider the matter further.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICE OF PEACE—Jurisdiction to Grant Bail—Jurisdiction to Commit to Jail.

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

MR. C. D. WALTON,
Justice of the Peace,
Jonesville, Virginia.

My Dear Mr. Walton:

I am in receipt of your letter of July 29, in which you ask a number of questions, which I will attempt to answer in the order in which they appear in your communication.

"Who must the justice of the peace consult as to how much bond a prisoner must make for his appearance before the trial justice?"

The amount of the bond required by a justice of the peace in admitting to bail in the case of a misdemeanor is in the discretion of that officer, giving due consideration, of course, to all pertinent factors.

"When the bond is made by a defendant in a criminal case, is it the duty of the sheriff at once to release the prisoner or refuse and wait until the trial justice passes on the bond?"

In a case in which a justice of the peace may admit to bail no provision is made by statute for the trial justice to review the action of the justice of the peace.

"Is it lawful and proper for a justice of the peace to make bond on an appeal from the decision of the trial justice?"

In my opinion, the statutes do not contemplate that a justice of the peace may admit to bail in a case after the defendant has been tried by the trial justice,
REPORT OF THE ATTORNEY GENERAL

except possibly upon the authority of the trial justice. See section 4828 of the Code.

"Has a justice of the peace a right to issue a commitment sending a prisoner to jail?"

There are a number of cases in which a justice of the peace may commit a person to jail. If you will advise me the circumstances of the particular case that you have in mind, I shall be glad to give you the benefit of my views.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICE OF PEACE—Power—Granting Bail.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 10, 1940.

Mr. Theodore A. Taylor,
Justice of the Peace,
Suffolk, Virginia.

My Dear Mr. Taylor:
I am in receipt of your letter of October 9, in which you ask in effect if a justice of the peace may admit to bail in misdemeanor cases anywhere in his county.

In my opinion, the authority of justices of the peace to admit to bail "within their respective counties" is continued by subsection 7 of section 4987-f of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUVENILE AND DOMESTIC RELATION COURTS—Disruption of Marital Relationship—Penalty.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 21, 1941.

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

Dear Mr. McNeil:
This will acknowledge receipt of your letter of March 18, in which you refer to paragraph (5) of section 1953e of the Code (Michie 1936) prescribing the jurisdiction and powers of justices of Juvenile and Domestic Relations Courts, which paragraph gives to such justices jurisdiction over "the prosecution and punishment of persons male or female who knowingly contribute in any way to the disruption of marital relations, or of a home."

Like you, I have been unable to find any statute providing any punishment for the offense set out in the quoted language. Therefore, it would appear that, as judge of the Juvenile and Domestic Relations Court of Rockbridge County, you may impose no penalty for this offense.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
LICENSING—Real Estate Brokers Commission's License Not in Lieu of.

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

HONORABLE A. D. LATANE, CLERK,
CIRCUIT COURT OF ESSEX COUNTY,
TAPPAHANNOCK, VIRGINIA.

My Dear Mr. Latane:

I am in receipt of your letter of October 18, in which you ask in effect if the licenses issued by the Virginia Real Estate Commission to real estate brokers and salesmen under chapter 175-C of the Code (Michie, 1936) are in lieu of the real estate agent's license imposed by section 196 of the Tax Code.

Your question must be answered in the negative. The Virginia Real Estate Commission is a regulatory body and the licenses issued by it are not revenue licenses, but in the nature of permits. The annual sum paid by a licensee for the renewal of his license is not a tax but a fee. The State license tax imposed on real estate agents by section 196 of the Tax Code is a tax and is imposed for the purpose of revenue only. This license is assessable by the local commissioner of the revenue. The payment of the fee to the Virginia Real Estate Commission does not in any way relieve the real estate of his liability to the State license tax.

Indeed, the Act establishing the Virginia Real Estate Commission expressly provides that:

"The requirement hereof shall be in addition to the requirements of any existing or future ordinance of any State, city, or county so taxing, licensing or regulating real estate brokers."

See section 4359 (90) of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
ATTORNEY GENERAL.

LOBBING—By Miscellaneous Agencies Receiving State Appropriations—Virginia State Horticultural Society.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 13, 1941.

HONORABLE W. STUART MOFFETT,
STAUNTON, VIRGINIA.

My Dear Senator Moffett:

This will acknowledge your letter of March 1, in which you state that the Virginia State Horticultural Society employs an all-time secretary; that the board of directors of the Society has for years been sending the secretary to Richmond during legislative sessions "to represent this (horticultural) interest, in cooperation with general agriculture". You direct my attention to the following provision in the Appropriation Act of 1940 (Acts 1940, at p. 860):

"No funds appropriated to any miscellaneous agency or agencies under this act shall be paid to any such agency, whether it be an association, society, or federation, until there is filed with the Comptroller an affidavit by its principal officer, that the said agency has not and will not during the period covered by this appropriation act employ, directly or indirectly, any lobbyist, or lobbyists, legislative agent or legislative counsel."
The appropriation to the Virginia State Horticultural Society is made to it as one of the "miscellaneous agencies" referred to in the quoted provision. Your inquiry is whether or not the secretary of the Horticultural Society may continue to be sent to Richmond, with his expenses paid, during legislative sessions to represent horticultural interest.

I am not fully advised as to what have been the activities of this secretary in representing horticultural interest during the legislative sessions. A lobbyist is generally understood as one who attempts to influence the votes of members of the General Assembly for or against a particular measure. The terms "legislative counsel" and "legislative agent" are defined by our General Assembly (Acts 1938, p. 148) as "any person employed to promote or oppose in any manner the passage by the General Assembly of any legislation." I think it reasonable to say that the terms "legislative agent" and "legislative counsel" means the same thing in the quoted language as the General Assembly defined them to mean in the Acts of 1938, to which I have referred.

My conclusion is, therefore, that so long as the secretary of the Virginia Horticultural Society does not attempt to "promote or oppose in any manner the passage by the General Assembly of any legislation" he may be sent to Richmond during legislative sessions to engage in such other activities as the Virginia State Horticultural Society may direct, assuming, of course, that such activities are in the interest of the Society.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LOCAL BOARDS OF HEALTH—Regulation of Septic Tanks.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 28, 1940.

Dr. I. C. RIGGIN, Commissioner,
State Health Department,
Richmond, Virginia.

My Dear Dr. RIGGIN:

I have your letter of November 14, in which you request the opinion of this office as to whether regulations governing the installation and maintenance of septic tanks in a county should emanate from the board of supervisors or from the local board of health.

It should be noted at the outset that Code section 1545-a is not operative as to a county unless "the local board of health shall deem it necessary". Hence, in any county in which it is desired to invoke the provisions of this Act, a resolution should be passed by the local board as to the necessity therefor.

As to the establishment of detailed standards and requirements such as you suggest, under the broad language of Code sections 1493 and 1494 it is my opinion that this should be accomplished through regulations promulgated by the local board of health. While the county board of supervisors undoubtedly has general powers to act in this field under Code section 2743, and might validly adopt such an ordinance where the local board of health had failed to act, in my opinion the statutes in question make such matters primarily the function of the local board of health.

You next inquire as to how the cost of publication may be defrayed in case regulations are adopted by the local board of health.

I think it clear from a reading of Code sections 1492-1498, which provide for the appointment and prescribe the functions of local boards of health, that such boards are intended to be in most respects agencies of the localities which they serve and to operate at the expense of such localities. Certainly I can find nothing in the statutes or in the Appropriation Act expressly providing for the pay-
ment of such cost out of State funds. It is my opinion, therefore, that the cost of making the required publication in connection with regulations adopted by a local board of health must be borne by the locality.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

MADISON COLLEGE—Additional Compensation to Professors.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 19, 1941.

DR. ROWLAND EGGER,
Director of the Budget,
State Capitol Building,
Richmond, Virginia.

My Dear Dr. Egger:

This will acknowledge receipt of your letter of March 15, in which you state that it is the desire of the president of Madison College to pay, with the approval of the Governor, additional compensation to certain professors of the College on account of additional services rendered during the illness of one of the other professors of the Institution who has recently died.

Apparently the purpose of President Duke is to have this additional compensation paid to the professors in order that they may in turn give such additional compensation to the family of the deceased professor. You desire the opinion of this office in the matter.

If President Duke and the Governor are of the opinion that the facts, that is, the additional services rendered, are such as to warrant the payment of extra compensation to those rendering the service, it appears to me plain that such additional compensation may be paid. However, I do not think that the payment of the additional compensation may be conditioned upon the agreement that when received by the living professors it will be turned over to the family of the deceased professor. In other words, the payment of the additional compensation should be justified solely on account of the additional services rendered and not dependent upon the disposition that the professors make of the increase in pay.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MEDICAL COLLEGE OF VIRGINIA—As State Institution.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 7, 1941.

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

Dear Dr. Sanger:

I have your letter of February 6 requesting the opinion of this office as to whether the Medical College of Virginia is, as a matter of law, a "State institution".

The Medical College of Virginia is a public corporation, created by legislative enactment and dependent entirely upon the will of the Legislature for its continued existence. The members of its governing board are appointed by the
Governor, and the College is required to make annual reports to the State Comptroller. Its revenues are paid into the State treasury and disbursed by the State like any other public funds, and for a large portion of its expenses the College is dependent upon appropriations from the general revenues of the State.

I know of no proper sense in which the phrase "State institution" may be used which would not include the Medical College of Virginia.

Very truly yours,

The Attorney General of Virginia,
By:
JOS. L. KELLY, JR.,
Assistant Attorney General.

MARRIAGE AND DIVORCE—Clerks’ Fee for License and Acknowledgment.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General.
RICHMOND, VA., August 30, 1940.

HONORABLE O. B. CHILTON, Clerk,
Circuit Court of Lancaster County,
Lancaster, Virginia.

MY DEAR MR. CHILTON:

I am in receipt of your letter of August 27, from which I quote as follows:

"I would appreciate very much your opinion as to the proper fee for a marriage license. Section 3484 of the Code states that such fee is one dollar, but a good many clerks charge for the acknowledgment on the application for the license, and I would like to know if such a charge is lawful and, if so, the proper acknowledgment fee in such instances."

The fee for issuing a marriage license is one dollar. Section 3484 of the Code. However, section 5074 provides for an affidavit as to certain facts to be made by the parties contemplating marriage. This affidavit may be made before the clerk or some other officer authorized to take acknowledgments. While the affidavit is necessary to secure a license, in my opinion, the issuing of the license and the taking of the affidavit are two separate acts and, if the clerk performs this service, he may charge a fee of fifty cents therefor.

My information is that the majority of the clerks in the State charge the additional fee and that it is a well recognized practice.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Compliance With 1940 Act by One Ordered to Marry by a Court.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., July 29, 1940.

DR. I. C. RIGGIN,
State Health Commissioner,
Richmond, Virginia.

MY DEAR DR. RIGGIN:

I am in receipt of your letter of July 27, in which you enclose a communica-
tion from Mr. R. A. Edwards, Clerk of the Circuit Court of Isle of Wight...
County, in which Mr. Edwards asks the following question relative to the new marriage-license laws:

“There is just one other thing that I overlooked before when writing that I would like to ask you, and that is with reference to issuing a marriage license to a person who has been ordered to marry by the court, or who might elect to be married rather than be sentenced to a term in the penitentiary. We quite frequently have such cases and, while I can see nothing in the law which makes any exceptions, yet I could not but wonder if the same procedure would have to be gone through with as to the medical examination.”

In my opinion, the requirements of the new Act apply to licenses secured in both cases. I can see no inconsistency in requiring the medical examination prescribed by the Act in either case, nor do I think that a decree of a court directing marriage could properly be construed as directing the marriage contrary to the requirements of the license law.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—License—Minors Committed to State Board of Public Welfare as Delinquent.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 1, 1941.

HONORABLE HERBERT G. COCHRAN, Judge,
Juvenile and Domestic Relations Court,
Norfolk, Virginia.

DEAR JUDGE COCHRAN:

This will acknowledge receipt of your letter of January 23.

On behalf of the Clerk of the Corporation Court of the City of Norfolk you request the opinion of this office as to the authority of the Clerk to refuse a marriage license for a minor child under the following circumstances:

It appears that the child in question has heretofore been committed to the State Board of Public Welfare as a delinquent child under Chapter 78 of the Code of Virginia; that consent to such marriage has not been given on behalf of the Board, and that, while an affidavit attesting the father's consent has been furnished, there has subsequently been brought to the Clerk's attention a letter from the father to the Juvenile Judge in which the father repudiates such affidavit and expresses his opposition to the marriage.

Under section 1910 of the Code a child adjudged to be dependent, delinquent, or neglected is declared to be “a ward of the State * * * subject to the guardianship of the court * * *.” It is further provided that such child may be committed to the State Board of Public Welfare and that this Board shall be “the sole agency for the guardianship of delinquent children committed to the State.”

Code section 5078 provides that a marriage license shall not be granted for the marriage of any person under twenty-one years of age unless the consent “of the father or guardian or, if there be none, of the mother of such person” shall be given.

While the statutory language is not unambiguous, it would seem to be the intent of this latter section to require the consent of the father or guardian, whichever shall have legal custody of the child at the time when application for a marriage license is made.

It is the opinion of this office, therefore, that where a child has been taken from the control of its parents and has become a ward of the State, under Chapter
78 of the Code, a Clerk would be justified in refusing to issue a license for the marriage of such child on consent of the father alone.

Furthermore, the consent required by Code section 4078 can undoubtedly be withdrawn at any time before the license is issued. In the case which you describe the Clerk clearly has been given ample reason to question both the genuineness of the father’s affidavit and his present consent to the marriage. Hence he would be clearly justified in withholding the license on this ground alone.

Very truly yours,

The Attorney General of Virginia.

By JOSEPH L. KELLY, JR.,
Assistant Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 18, 1940.

HONORABLE LEWIS CRAWLEY, Clerk,
Circuit Court of Cumberland County,
Cumberland, Virginia.

My dear Mr. Crawley:

I am in receipt of your letter of July 17, in which you ask if under the marriage license law the clerk of the court should have proof that the physician signing the certificate presented to the clerk is a licensed physician.

If the certificate is properly filled out and executed by the physician and there is nothing on its face to indicate that the physician is not a licensed physician, I am of opinion that the clerk may accept it. If, however, there is anything on the certificate that causes the clerk to doubt that the physician is a licensed physician, or if the clerk has any personal knowledge which would cause him to doubt the fact, I am of opinion that the clerk would be justified in making further inquiry.

The answer to your second question is the same as the answer to your first, that is to say, the only paper presented to the clerk is the certificate of the physician and, if that is correct on its face, I am of opinion that the clerk may accept it, as above indicated.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Issuance of License by Clerk—License Issued Prior to Aug. 1, 1940—Physician’s Certificate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 19, 1940.

HON. J. SOL WRENN,
Clerk of Court,
Emporia, Virginia.

My dear Mr. Wrenn:

I have your letter of July 17th, requesting my opinion on certain questions arising out of chapter 102 of the Acts of 1940.

With respect to your first question, I concur in your view that there is nothing in the law to prevent issuance of a license prior to the effective date of the new
act, and performance of a ceremony pursuant thereto after the act has taken effect.

Your next question is as follows:

"I would also like to be advised that if a couple comes here with a certificate from some North Carolina physician, showing that they are not affected with syphilis, (not using a Virginia Form and not reporting it to the Va. Health Dept.) if the license can be issued."

In my opinion it would be clearly a violation of the act to issue a license after August 4, 1940, except upon the filing of a certificate which contains the statements required by the first paragraph of Code section 5073-a, and which does not include any statement indicating whether the applicant is or is not infected with syphilis. While it is not necessary, as a matter of law, to use the printed forms distributed by the State Health Department, the law is unambiguous in specifying that the certificate to be filed with the clerk must contain the statements which you will find printed thereon.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Issuance of License by Clerk to Syphilitic Persons—Physician’s Certificate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 20, 1940.

HONORABLE V. W. NICHOLS, Clerk,
Circuit Court of Bedford County,
Bedford, Virginia.

MY DEAR MR. NICHOLS:

I have your letter of August 10, in which you request my opinion as to your duties with respect to the issuance of marriage licenses in certain cases.

As you point out, Code section 5088a makes it unlawful for any person having a contagious venereal disease to intermarry with any other person, and makes it unlawful for the clerk of any court knowingly to issue a license for such a marriage. Under this section, if a clerk is doubtful as to whether one or both of the applicants for a license are free from such disease, he is authorized to accept an affidavit from the man stating that he is not so infected and believes that the woman is not so infected.

You then call attention to the fact that paragraph (g) of Code section 5073a as enacted at the 1940 session of the General Assembly provides that no clerk shall refuse to issue a marriage license because of any indication of syphilis disclosed by any test, report, or statement made or issued as to such person under that Act.

You request my opinion as to whether this provision partially repeals the earlier statute and whether it would be proper for you to dispense with requiring the affidavit just mentioned in cases where it has come to your attention that one or both of the parties have been found to be syphilitic.

It is a cardinal principle of statutory construction that a statute which does not expressly repeal a former Act should, if possible, be reconciled with it, repeal by implication being inferred only when absolutely necessary. In my opinion, sections 5088a and 5073a of the Code can be reconciled, and the latter section should not be construed as repealing the earlier Act.

You will observe that section 5088a deals only with contagious venereal diseases. I am advised by the State Health Department that in the vast majority of cases persons in whom syphilis is detected pursuant to the provisions of the 1940 Act, at least after commencing the treatments required by that Act, will not be infected with syphilis in a contagious form at the time of applying for their
license. Hence it is possible to give full force and effect to both statutes without accomplishing an unreasonable or absurd result.

It is my opinion, therefore, that Code section 5088a has not been repealed in whole or in part by the 1940 Act, and that a clerk should not knowingly issue a license to any person who is infected with a contagious venereal disease, but that, if in doubt as to this fact, he may grant such a license upon taking the affidavit provided for in section 5088a.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—

1. License Issued Prior to Aug. 1, 1940.
2. Certificate of Non-Resident Physician.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 2, 1940.

HONORABLE LEAMAN LEDMAN,
Clerk of Prince William County,
Manassas, Virginia.

My Dear Mr. Ledman:

I am in receipt of your letter of July 1 and beg to advise that this office has heretofore expressed the opinion that a marriage license issued prior to the first day of August, 1940, is valid for the performance of the marriage ceremony after said date.

Replying to your second question, I beg to advise that on and after August first, the license may be issued by you when the proper certificate is furnished by a physician, as defined in sub-section h of the Act. It is not necessary that the physician be a resident of this State.

I am informed that the State Health Commissioner has issued instructions relating to the serological tests required by the Act, and if you have not already received them, I am sure that officer will be glad to furnish you with these instructions upon request.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Licenses—Sero logical Test—Physician’s Certificate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 27, 1940.

HONORABLE W. L. PRIEUR, JR.,
Clerk of Courts,
Norfolk, Virginia.

My Dear Mr. Prieur:

I have your letter of December 10, requesting my opinion on certain questions arising out of Virginia Code (Michie 1936) section 5073-a, relating to pre-marital examinations for syphilis, which you state have been submitted to me as the result of a conference with the local Health Commissioner, the Judge of the
REPORT OF THE ATTORNEY GENERAL

Corporation Court, the Commonwealth's Attorney, the Clerk, the President, and other members of the Norfolk Medical Association.

Your questions are stated as follows:

"First: Non-resident applicants for marriage licenses frequently apply at this office for license, presenting laboratory tests from another State, and within an hour they return with prescribed blue card properly signed by a local physician. Is this legal and in accordance with pamphlets sent out by State Public Health Department?

"Second: Under this section is it legal for physician A or WPA worker in laboratory to withdraw the blood and physician B to make the certificate which is to be filed with the clerk?"

The only provision of the law limiting the clerk's authority and duty to issue marriage licenses is the following portion of subsection (a):

"It shall, on and after the first day of August nineteen hundred and forty, be unlawful for the clerk of any court to issue a marriage license until there shall have been filed with him, by or on behalf of each of the two persons for whom the license is desired, a statement signed by a physician, stating * * *

(etc.)

It follows that when the applicant presents a certificate which contains the prescribed statements as to each of the parties, and which is signed by a physician, the clerk is not required to inquire into the truth of the statements or into the question of whether it was for any reason improper for the physician to sign it, unless he has personal knowledge of an irregularity.

Subsection (a) of section 5073 of the Code provides that in the event the serological test does not indicate evidence of syphilis, the statement required to be filed with the clerk may be signed by the physician who caused the test to be made; whereas, if such test does indicate evidence of said disease, the statement may be signed either by the physician who made or caused the test and examination to be made, and who obtained, or caused to be obtained, the medical history required by this subsection, or by a physician to whom a report of such test and medical history has been made. The foregoing provision would seem to indicate an intention that the physician filing the statement, or signing the statement to be filed with the clerk in case of a negative test, must be the same physician who caused the test to be made and has knowledge that the blood tested is actually that of the applicant for the marriage license.

Dr. Riggin, State Health Commissioner, advises me that the only laboratory approved in states other than Virginia is the laboratory of the State Health Department of the several states. Subsection (d) of the statute requires that the test shall be made by a laboratory approved for such purpose by the State Health Commissioner.

You have transmitted to this office along with your letter a letter addressed by Doctors Anderson and Kimbrough of Norfolk to Judge R. B. Spindle of the Norfolk Corporation Court, in which they inquire as to whether or not one physician may sign the certificate of transmittal of the report of the laboratory test to the State Department of Health, basing same solely upon the report of an approved laboratory as to a test caused to be made by another physician.

It is my opinion that the statute does not contemplate that this may be done, but it is intended to place upon the physician signing the certificate the sole responsibility of vouching for the fact that the blood which was the subject of the laboratory test is actually the blood of the applicant for the marriage license. Of course, a physician may assume responsibility for the acts of those on his staff, but I do not believe that he is permitted to rely upon acts of others than those employed in his office. It is quite obvious that a Virginia physician should not sign a certificate based upon a laboratory report purporting to have been caused to be made by a physician unknown to him, or in fact without his actual knowledge that the person was a physician.
For the reasons above set out, therefore, I am of opinion that, where the clerk has knowledge that the physician's certificate is based upon the serological test caused to be made by another physician, whether within or without the State, it is the duty of the clerk of the court to decline to issue the marriage license.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

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

DEAR DR. RIGGIN:
This will acknowledge receipt of your letter of October 10, from which I quote as follows:

"The Department would appreciate your opinion on Section 5073-a, sub-section h, of the marriage act which reads as follows:

"'The term "physician" as used in this section means one who holds a certificate or license to practice medicine, such certificate or license having been issued by the Medical Examining Board of this State or a similar board or authority of some other state, territory or county, or of the District of Columbia.'

"The Department is particularly interested in knowing as to whether this section would permit doctors of osteopathy who have been licensed by their state licensing authorities, to execute these certificates."

As I understand section 1613 of the Code, doctors of homeopathy and doctors of osteopathy are required to take substantially the same examination as a prerequisite to practicing their professions as other practitioners of medicine. I am confirmed in this understanding by a letter received from Dr. J. W. Preston, of Roanoke, Secretary of the Virginia State Board of Medical Examiners. Certainly it is true that both doctors of homeopathy and doctors of osteopathy are engaged in the practice of medicine as that phrase is defined by section 1622 of the Code.

My conclusion is, therefore, that the definition of physician, as used in section 5073-a of the Code (Supplement of 1938 to Michie's Code of 1936), is broad enough to include doctors of osteopathy and doctors of homeopathy.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
MARRIAGE AND DIVORCE—Pursuant to License Issued Prior to Aug. 1, 1940—Applicability of New Marriage Law.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., July 30, 1940.

HONORABLE LEWIS CRAWLEY, Clerk,
Circuit Court of Cumberland County,
Cumberland, Virginia.

MY DEAR MR. CRAWLEY:

Replying to your letters of July 29, I know of no provision in the statute which fixes the time for the marriage ceremony to be performed after a license has been issued by the clerk. I, therefore, know of no reason why you may not issue a license now where the ceremony is not to be performed until September. The new marriage license statute does not apply to any license issued prior to August 1, 1940.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MILITARY BOARD—Power to Operate Parking Lot.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., November 8, 1940.

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

DEAR DOCTOR EGGER:

This is in reply to your request for my opinion upon the question whether or not the Military Board, which recently acquired the Rountree tract of land on Broad Street, would have authority to operate a parking lot and charge a nominal fee for the privilege of parking therein.

It is my opinion that the Military Board is without authority to charge for the privilege of parking on the property. However, I am of opinion that the Board may permit public parking on the lots and, if the interests of the State seem to require it, may restrict the parking privilege to employees of the State having their place of work in the vicinity of the property.

I have been unable to find any appropriation which would seem to permit the expenditure therefrom of funds for operating a parking lot by the Military Board. Of course, the lot could be improved for other purposes within the scope of a proper appropriation, but I doubt very much the authority to expend public funds for the operation of a parking lot unless the purpose of same was directly and almost entirely related to the operations and activities of the Military Board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
MOTOR VEHICLE LAWS—License—“For Hire” Truck.

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

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

DEAR SIR:
I am in receipt of your letter of September 11, in which you state, in part:

"Recently State Patrolmen have returned a number of warrants to our office charging certain persons with unlawful operating trucks upon the highways of Scott County, Virginia, for hire on "T" license. The evidence in these cases shows the defendants have gone to coal mines in Scott County, Virginia buying a truck load of coal and taking the same to Kingsport, Tenn., and selling it."

You ask whether the use of these trucks in such manner would constitute a for-hire operation.

Of course, each case would rest on the facts presented, and it is therefore very difficult to apply the law until all the facts are known. However, I call your attention to Section 2154(82)n of Michie’s Code, which is commonly known as Section 35(n) of the Motor Vehicle Code, which reads in part as follows:

"Any owner of a motor vehicle, trailer, or semi-trailer who shall purchase articles, merchandise, commodities or things at one point or points and transport them in said motor vehicle, trailer, or semi-trailer to another point or points for sale at the latter point or points, in the sale price of which is reflected a charge for the transportation of such articles, merchandise, commodities or things, or who shall permit any such vehicle to be so used by another, shall be deemed to be operating such vehicle for hire; provided, however, this provision shall not apply to merchants maintaining a regular place of business and delivering by motor vehicle, trailer, or semi-trailer, articles, merchandise, commodities and things sold by them, for which no transportation charge directly or indirectly is made." (Italics supplied)

It would seem to me that if these persons sold their coal at a price in which was reflected the charge for transportation, then the same would constitute a for-hire operation and the trucks used in such operations should be so licensed.

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

NATIONAL GUARD—Contributing Members—Jury Service Exemption.

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

HONORABLE S. GARDNER WALLER,
The Adjutant General of Virginia,
Richmond, Virginia.

MY DEAR GENERAL WALLER:
I am in receipt of your letter of December 7, in which you refer to the communication received by you from Captain G. W. Johnson. Captain Johnson raises the following question:
"I have been approached by several business men who are contributing members of the Company, desiring to know if they can contribute to our fund before we are inducted into service if their jury exemptions will be extended for a year from the date of their expiration which in most cases will be in May. If not from May, would it be extended for a year from January 1, 1941?"

Sections 2673(79) and 2673(80) of the Code provide for a limited number of annual contributing members to each National Guard Company. Section 5985 of the Code exempts such contributing members from jury duty. The effect of Captain Johnson's question is to ask if, anticipating that a National Guard Company may be inducted into the Federal service, a person may make his contribution for one or more years in advance of the time at which such contributions would otherwise be paid and thus obtain exemption from jury duty for those years.

I am of opinion that this may not be done. The statutes seem to contemplate an annual contribution and, if a contribution were made for one or more years in advance, it might very well be that the contributor would be making his contribution to something that did not exist, the National Guard Company having been inducted into the Federal service, and thus be losing his money without obtaining the exemption for which the money was contributed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES—For Cities—Eligibility of Non-Residents.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 21, 1941.

HON. R. L. JACKSON,
Secretary of the Commonwealth,
Richmond, Virginia.

MY DEAR MR. JACKSON:

This will acknowledge receipt of your letter of May 15, in which you state that the Governor desires the opinion of this office as to whether he can properly appoint a resident of Dinwiddie county as a notary public for Petersburg. I presume, of course, that you mean without first appointing such a person as a notary public for Dinwiddie county.

You enclose a letter received by you from Mr. Robert G. Bass, Clerk of Courts at Petersburg, together with a copy of your reply to Mr. Bass. I do not feel that I can add much to the views expressed by you in your letter to Mr. Bass. I agree with you that it very probably was the intention of the General Assembly, in amending section 2850 of the Code in 1938 (Acts 1938, p. 669), to do away with the residence requirements insofar as the appointment of notaries is concerned. However, the General Assembly only specifically provided in the said amended section that "a notary public may or may not be a resident of any county for which he is appointed." This provision, of course, does not apply in terms to cities, although from other changes in the section it is very probable that the General Assembly did not mean to make any distinction between counties and cities. However, in view of the seriousness of the question as it may affect the titles to real estate and other important instruments, I do not think it would be wise for me to advise you that a notary may be appointed for a city without having first been appointed as such for the county in which he resides, although that is probably the real intent of the section.

It appears from Mr. Bass' letter that it is the object of the notaries to be authorized to take acknowledgments in the City of Petersburg. It does not seem to me that it would be material whether a notary was appointed for the City of
Petersburg or for one of the counties in part of which the City is located. You are no doubt familiar with the following provision contained in section 2850 of the Code:

"Notaries in cities and in counties in which cities or parts thereof are located shall have authority to act as such in each of said localities."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 6, 1941.

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

MY DEAR GOVERNOR PRICE:

This is in reply to your letter of June 5, with further reference to my communication of May 21 to Honorable R. L. Jackson, Secretary of the Commonwealth, relating to the appointment of notaries public.

Specifically answering your questions and in view of the opinion given Mr. Jackson in my letter of May 21, I am of the opinion that, if a resident of Chesterfield county desires a commission as notary public for the city of Petersburg, he should first secure his commission as notary for Chesterfield county, and then secure such a commission for the city of Petersburg. If a resident of Chesterfield county merely desires to act as notary in the city of Petersburg, I am of opinion that he may do so by first securing a commission for Chesterfield county. This is on the assumption, of course, that Petersburg in part lies in Chesterfield county. If a resident of Chesterfield county desires to act as notary in both Petersburg and the county of Dinwiddie, I am of the opinion that he may do so by securing commissions for Chesterfield and Dinwiddie counties, the commission for Petersburg not being necessary, assuming that Petersburg lies in part both in Chesterfield and Dinwiddie.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 11, 1941.

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

MY DEAR GOVERNOR PRICE:

This is in reply to your letter of June 5, with further reference to my communication of May 21 to Honorable R. L. Jackson, Secretary of the Commonwealth, relating to the appointment of notaries public.

It appears that a resident of Chesterfield County desires to act as notary public in the County of Dinwiddie and the City of Petersburg. You inquire
whether he can so act by securing a commission as notary for the County of Dinwiddie.

In view of the opinion given Mr. Jackson in my letter of May 21, I am of opinion that under section 2850 of the Code, as amended in 1938 (Acts of 1938, p. 669), such a person may be appointed a notary public for Dinwiddie County without first being appointed as such a notary for Chesterfield County. Upon the assumption that Petersburg lies in part in Dinwiddie County, a notary public for Dinwiddie County may act as such in Petersburg.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatability of Members of Local Board of Public Welfare—Member of County School Board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 21, 1941.

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

MY DEAR MR. TALIAFERRO:

I am in receipt of your letter of February 20, in which you ask if a member of a local board of public welfare is eligible to be a member of the county school board.

Section 644(1) of the Code provides that:

"No Federal, State, or county officer * * * shall be chosen or allowed to act as member of the county school board * * * ."

The local board of public welfare is provided for in section 6 of the Public Assistance Act of 1938 (Acts 1938, pp. 638, 642). It is quite clear that a member of the local board of public welfare is a county officer. In my opinion, therefore, a member of the local board of public welfare may not be chosen or allowed to act as a member of the county school board.

You next ask if, under section 372 of the Tax Code of Virginia, the treasurer of a county is required to personally visit each taxpayer and call upon him for the payment of his taxes.

I had occasion under date of September 23, 1940, to express an opinion to Honorable O. B. Watson, Treasurer of your County, on this question and herewith enclose a copy of my communication to Mr. Watson.

Referring to your request for copies of the annual reports for this office, which include official opinions of the office, I beg to advise that these reports are sent to the attorneys for the Commonwealth each year. We do not have any copies of prior reports available for distribution, but you will duly receive the current report when it comes from the printer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
OFFICES—Compatibility of—Member of County School Board—Coroners.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 12, 1941.

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

MY DEAR MR. WILLIAMS:

This will acknowledge receipt of your letter of March 10, in which you ask if a person may legally hold the office of coroner and be a member of the county school board at the same time.

In my opinion your question must be answered in the negative. Section 644a of the Code provides:

"No * * * county officer * * * shall be chosen by law to act as a member of the county school board * * * ."

There are certain exceptions contained in this section, but the office of coroner is not included therein.

There can be no question about the fact that a coroner is a county officer. His appointment, definite term of office, and method of removal from office are prescribed by statute. Code section 2815. He is required to qualify according to law and to give bond. Code sections 2815, 2818. The duties of a coroner are prescribed in a number of sections of the Code, notably in chapter 190 thereof.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of Member of County School Board—Member of Local Board of Public Welfare.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 6, 1941.

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

MY DEAR DR. HALL:

This is in reply to your telephoned inquiry as to whether or not a member of a local board of public welfare is eligible to be also a member of a county school board.

The appointment of a local board of public welfare is provided for in section 6 of the Public Assistance Act of 1938 (Acts 1938, pp. 638, 643). The terms of office of the board members are fixed by statute, and the statute further provides that they may be removed from office. Likewise the duties and powers of the local boards of public welfare are prescribed by statute, and these duties and powers involve considerable responsibility. From a consideration of the statutory provisions relating to members of the local board of public welfare, I am convinced that they are unquestionably public officers.

Section 644(1) of the Code provides that—

"No * * * State or county officer * * * shall be chosen or allowed to act as a member of the county school board * * * ."
It is not necessary to determine whether or not a member of the local board of public welfare is a State or county officer, because both such officers are prohibited from acting as members of the county school board. My conclusion is, therefore, that a member of the local board of public welfare is not eligible to be a member of the county school board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Sheriff as Attendance Officer of School.

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

Mr. J. W. McCleary, Division Superintendent,
Craig County Public Schools,
New Castle, Virginia.

My Dear Mr. McCleary:

I am in receipt of your letter of August 19, in which you ask the following question:

"The county school board of Craig county would like to know whether or not the sheriff of Craig county could serve as an attendance officer under chapter 377, section 685, page 662 of the Acts of the Assembly of 1940."

Section 2702 of the Code provides, among other things, that "no * * * sheriff * * * shall hold any other office, elective or appointive, at the same time * * *."

The statute contains certain exceptions, but there is none to cover the case you present. In my opinion, therefore, a sheriff may not hold the office of school attendance officer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICES—Compatibility of—Teachers as Member of Town Council.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 23, 1940.

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

My Dear Mr. Pulley:

I am in receipt of your letter of September 19, with regard to the eligibility of teachers in an agricultural high school to be members of a town council.

As I understand the facts, these teachers are not employed nor paid by the Federal Government. It is my information that the Federal Government makes certain appropriations to the State to be used to partially compensate these agricultural teachers, but the teachers are actually employed and compensated by the State and localities, not being under the jurisdiction of any Federal agency.

If my assumption of the facts is correct, I am inclined to be of the opinion that these teachers do not come within the prohibition of section 290 of the Code. I suggest for your consideration that they may come within the scope of the Hatch Act.

Very sincerely yours,

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

PHYSICIANS—Jails—Compensation—When Paid.

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

HONORABLE M. W. PULLER, Clerk,
Circuit Court of Henrico County,
Richmond, Virginia.

MY DEAR MR. PULLER:
I am in receipt of your letter of July 18, from which I quote as follows:

"The court has heretofore certified the accounts of Dr. A. P. Traynham, Jail Physician of this county, twice a year. However, on the 3rd day of July, 1940, the court certified an account for Dr. Traynham and he has since been informed by the Comptroller's office that under the Acts of Assembly—1940, the jail physician cannot be paid for services rendered until the end of the calendar year."

You then direct my attention to the appropriation act of 1940 (Acts 1940, at page 780), which provides that:

"** compensation for jail physician to be paid at the end of the calendar year; provided, however, that in case of death or resignation his compensation shall be prorated on the basis the time of service bears to the full calendar year."

It seems plain from the quoted language that it is contemplated that the compensation for the jail physician shall be paid by the Comptroller only at the end of the calendar year, and I am, therefore, constrained to advise you that the Comptroller's statement to you with reference to the payment of the compensation of the Henrico jail physician was correct.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Eligibility for Aid for Dependent Children—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 11, 1940.

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

MY DEAR MR. HADEN:
I am in receipt of your letter of July 5, which I quote as follows:

"On January 31, 1938, an unmarried girl sixteen years of age was sent by our Department of Public Welfare to an endowed institution in the District of Columbia to give birth to her baby. The baby was born on May 13, 1938. "It is the policy of this institution to retain both mother and child for a sufficient length of time to enable the mother to adjust herself and be in a position to determine for herself whether or not she wishes to keep the child or permit the Home to arrange for adoption. The mother returned to this county on February 12, 1940, leaving the child at the institution as a further
test of the wisdom of the mother's decision in the matter. On May 5, 1940, the child was returned to its mother.

"The entire family in question was on public relief at the time the prospective mother was sent to the District of Columbia and she was sent there without any idea of establishing a residence, but merely because no available institution was located within this state.

"Under these circumstances, will you please give me your opinion as to whether or not this child is at this time eligible for aid to dependent children as provided by section 27(b) of the Public Assistance Act of 1938 (page 651 of the Acts of Assembly of 1938)?"

You have further advised me that the girl and her child were in the institution and were cared for by the institution during the entire time that they were in the District of Columbia.

Section 27, subsection (b) of the Public Assistance Act of 1938 (Acts 1938, at page 651) provides that a dependent child shall be eligible for aid to dependent children if such child "has resided in this State for one year immediately preceding the application for aid to dependent children * * *.

Giving this language a very technical construction, the child is not eligible for aid to dependent children. However, since the girl was sent to the institution in the District of Columbia by the Department of Public Welfare of Charlottesville and was continuously in the institution at the direction, so to speak, of the Department of Public Welfare, I am of the opinion that this is a case in which it may be said that the child and her mother were constructively in Virginia and thus meets the requirements of the Act. Certain it is that the Federal, State and local governments have been saved money by the action of the Department of Public Welfare, and it seems to me entirely proper to say that this is a case which is intended to be covered by the Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—When Payment Becomes Part of Recipient's Estate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 16, 1940.

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

My Dear Mr. Watts:

I am in receipt of your letter of July 8, enclosing one from M. T. Dickinson, Regional Attorney of the Social Security Board, in which Mr. Dickinson requests the opinion of this office as to whether or not payments under the Virginia Public Assistance Act become a part of the estate of the recipient under the following circumstances:

"1. Where recipient has received the warrant or check while alive, but has not endorsed it.

"2. Where the warrant or check has been deposited in the mails for the recipient before his death, but was not delivered to him."

I presume, of course, that Mr. Dickinson refers to payments made as aid to the blind under Title 5 of the Virginia Act.

Section 40 of the Act prescribes the conditions under which a person becomes eligible for aid to the blind. The local board makes its investigation upon receipt of an application for aid and determines whether or not the applicant is
eligible. It having been determined that an applicant is eligible for aid, section 45 of the Act provides that "aid to the blind shall be paid monthly, or at such other time or times as the rules and regulations of the Commission may provide." My information is that checks are mailed on or about the first of each month.

It is my opinion that, when the purpose and the spirit of the whole Act are considered, once an applicant has been determined to be eligible for aid, and the regulations of the board providing that a check shall be mailed on the first of each month, the right of the grantee accrues on such date, and, where the grantee dies before he can endorse his check or before it actually reaches him, the check becomes a part of his estate. I can find nothing in the Act which limits or earmarks a check mailed on the first of any month for relief during that particular month. It may well be, and doubtless it is true, that in hundreds of cases the applicant has obtained supplies or services in one month on account of the knowledge of the person furnishing the supplies or services that the applicant would receive his check on the first of the following month.

My information is that, if the applicant receives his check and cashes it, say on the 10th of the month and dies on the 11th, no claim is asserted that any part of the proceeds of the check should be returned. I am unable to see any distinction in principle in the case of the applicant who has cashed his check and then dies and another applicant who dies before he is able to cash his check. Even if the Act were to be so technically construed as to justify the holding that the monthly check was limited to relief during the particular month in which it was mailed, certainly the applicant would be entitled to that proportion of the check which the number of days that he lived during the month bears to the whole month. The practical administration of such a construction of the Act obviously would be impossible.

My conclusion is, therefore, that under the Virginia Public Assistance Act, where a check has been mailed to one entitled to aid to the blind, or has been received by such person and not cashed, such check becomes a part of the estate even though the applicant has died before cashing the check or before it has actually been received by him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—Duty of State to Recover From Locality Funds in Good Faith Paid to Recipients of Aid but Not Allowed by Federal Government.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 10, 1940.

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 September 7, from which I quote as follows:

"The Federal Social Security Board, through its regional auditing staff, audits all individual payments made by the counties and cities for Old Age Assistance, Aid to Dependent Children, and Administration, pursuant to provisions of the Virginia Public Assistance Act and the Federal Social Security Act. The procedure has been as follows:

"The Federal Auditors take exception to expenditures made for payments made by the local boards to individuals. The report filed by the Federal Auditors, setting forth these exceptions, and the State is given an opportunity to clear these exceptions by producing additional reports, or other evidence which will clear the exception. By far the majority of all the ex-
ceptions which have been taken by the Federal Auditors to date have been cleared in this way. The remaining exceptions, however, which could not be cleared, are concurred in by the State Department of Public Welfare, and the Federal Government deducts from the regular current payments made to the State the amount of Federal reimbursement involved in the exceptions. This means that the Federal Government has previously reimbursed the State, and the State reimbursed the localities, for Old Age Assistance or Aid to Dependent Children expenditures which, at a later date, have been found to be non-reimbursable according to Federal regulations, and the technical character of Old Age assistance and Aid to Dependent Children.

“All of these payments would be properly allowable as General Relief under State laws. The locality has in all of these instances made payment in good faith, and the client has received the payment similarly in good faith. Wherever there has been any misrepresentation and the client was not entitled to the payment, efforts have been made to recover from the client, and, where this has been accomplished, such exceptions have all been cleared so far as the Federal audit is concerned.

“Insofar as the present status of these exceptions is concerned, the Federal Government has made a charge-back, which simply means that they have deducted from current reimbursements the amount of exceptions which occurred at an earlier date. Therefore, as the matter stands, the charge has already been made against the State appropriation. The question is whether it can stand in that status or whether the State shall now seek to recover from the locality. I feel that in view of the relatively small amount which is involved (which will probably not exceed for any given year more than three or four hundred dollars) the simplest thing to do would be to let the charge stand against the State appropriation, if this can be justified legally.”

The matter of passing upon cases which are eligible for old age assistance and aid to dependent children, in the first place, is handled by the local boards of public welfare. However, the State Board of Public Welfare has the authority to review all decisions of the local boards and may require the records in every case to be sent to its office. Upon a consideration of the whole Act, it is my view that in reality the question of passing on eligible cases is a joint responsibility of the local and State Boards of Public Welfare. Therefore, I am of the opinion that the State Board would be justified in assuming the responsibility for the few payments that may be made in error, certainly to the extent of not charging back to the counties the amount that has been paid from State funds. I observe that you state that the amount involved is only $300 or $400 a year and, if this were distributed among all the counties and cities in the State, the amount in the case of any particular city or county would indeed be de minimis.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACT—General Relief—State’s Claim Against Recipient’s Estate.

Sentence and Punishment—Suspension of Sentence Imposed Under Section 40 of ABC Law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 7, 1941.

HONORABLE A. DUNSTON JOHNSON,
Attorney for the Commonwealth,
WINDSOR, VIRGINIA.

MY DEAR MR. JOHNSON:

This will acknowledge receipt of your letter of January 3, in which you first ask the following question:
"The first relates to the right of the county welfare board of this county to recover from the estate of a recipient of general relief. The welfare board paid an emergency hospital bill for the deceased who died with lock-jaw. The estate of the deceased is composed of a small amount of personal property and a $300 insurance policy. It is my understanding that the payment of this bill is classified as general relief. Section 1904 (18) of the Public Aid and Assistance Act provides for recovery in old age assistance cases against the estate of such recipient. I will, therefore, thank you to advise me whether or not, in your opinion, the board may recover the above mentioned hospital bill from the estate of the recipient."

I have carefully examined the Public Assistance Act of 1938 (Acts 1938, page 638) and can find therein no provision authorizing the recovery from the estate of a recipient of general relief given under the Act. The Act does provide for recovery from the estate of a recipient of aid to the blind and aid to the aged, but there is no provision for recovery of amounts contributed as general relief.

Your second question is as follows:

"The second question relates to the punishment under section 40 of the Alcoholic Beverage Control Act. During the recent round-up of violators of section 40 several persons were tried and convicted in this county and as punishment the trial justice imposed both a fine and jail sentence. However, in lieu of the jail sentence, the trial justice sentenced the violators to serve their time on the road. I contended, and the trial justice concurred in my view, that the jail sentence provided in sub-section (b) of section 40 cannot be suspended. It is my opinion that, if a violator be found guilty, he must be punished by both a fine and jail sentence and that the jail sentence cannot be suspended. I will thank you, therefore, to advise me whether or not, in your opinion, I am correct in this view."

Section 40 of the Alcoholic Beverage Control Act as amended in 1938 (Acts 1938, page 373) does provide, as you state, for both a fine and a jail sentence for a violation of the section. However, I can find nothing in the section or anywhere else in the Alcoholic Beverage Control Act which prohibits a trial court from suspending the jail sentence if such action appears proper to the court. Section 1922-b of the Code (1940 Supplement to Michie's Code of 1936) provides in part as follows:

"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there be circumstances in mitigation of the offense, or if it appear compatible with the public interest, and in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine."

You will observe that the language of section 1922-b, and especially that part which I have quoted, is very broad and, in my opinion, a jail sentence imposed for a violation of section 40 of the Alcoholic Beverage Control Act may be suspended thereunder. I note that you are of opinion that the jail sentence may not be suspended, but, as stated above, I can find nothing in the Alcohol Beverage Control Act which prohibits the trial justice from acting under section 1922-b in appropriate cases.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE MAITLAND H. BUSTARD,
Attorney at Law,
Danville, Virginia.

DEAR MR. BUSTARD:

Your letter of January 23, 1941, requesting the opinion of the Attorney General on the proper method to remove from office the members of the Danville Police Commission, was received in Mr. Staples' absence. Since you requested an early reply, I am writing to give you the benefit of my study upon this question.

The Board of Police Commissioners of the City of Danville is provided for by section 1 of chapter 10 of the city's charter, as amended by chapter 403 of the Acts of Assembly, 1932. It consists of the mayor, who is ex-officio chairman, and four qualified voters of the city who are appointed by the judge of the Corporation Court of the City of Danville for a term of two years.

The Commissioners are required to take an oath of office and perform their duties without compensation. They are charged with the government of the police force of the City of Danville, and have power to appoint the police officers and to remove them for incompetency or misconduct.

Clearly the Commissioners are officers and are subject to removal under the procedure prescribed by the ouster statute—section 2705 of the Code of Virginia—since no other method of removal is exclusively prescribed by the Constitution.

This section provides, in part, as follows:

"The circuit courts of counties and of cities having no corporation court, and the corporation courts of cities, shall have power to remove from office all State, county, city, town and district officers elected or appointed, except such officers as are by the Constitution removable only and exclusively by methods other than those provided by this and the following section, for malfeasance, misfeasance, incompetency, gross neglect of official duty * * * ."

There appears to be some doubt that the bare power to appoint carriers in itself the power to remove when the appointment is for a specific term fixed by law. See McDougall v. Guigon, 27 Gratt. (68 Va.) 133; 22 R. C. L., "Public Officers", section 266. Since the appointing authority of the Police Commissioners is the judge of the Corporation Court of the City of Danville, the court having jurisdiction of their removal under the ouster statute, it would seem better that any action taken by the judge to remove a Commissioner be taken pursuant to the ouster statute whereby jurisdiction is clearly given to him.

It might readily be held that Police Commissioners, though appointed for a particular locality, are, because of the nature of the duties performed by them, State officers and not city officers. See Burch v. Hardwicke, 30 Gratt. (71 Va.) 24; Sherry v. Lumpkin, 127 Va. 116, in which cases it was held that police officers, because of their duties of enforcing State laws and preserving the public peace—matters of State-wide public concern—were State officers and not city officers, and, therefore, they were not subject to removal by the mayor of a city under a power to remove city officers. The first case cited above indicates that the governing board of a city police department comes within the same principle. See also 43 C. J. 744; 1 McQuillin on Municipal Corporations, page 589.

Since whether the mayor of the City of Danville has power to remove the Police Commissioners of that city involves matters of local concern, I suggest that you also advise with the City Attorney of Danville on this point.

Very truly yours,

W. W. MARTIN,
Assistant Attorney General.
PUBLIC ASSISTANCE ACT—Suit Against Recipient's Estate to Recover Funds Paid—Who Brings Suit.

HONORABLE W. EARLE CRANK,
Attorney for the Commonwealth,
Louisa, Virginia.

MY DEAR MR. CRANK:
I am in receipt of your letter of July 25, from which I quote as follows:

"If a person receiving money under the Public Aid and Assistance Act dies and leaves real estate and it becomes necessary to institute a suit to sell such real estate for the purpose of recovering the funds received by such recipient in accordance with the provisions of the statute, in whose name, as complainant, should such suit be instituted?"

Inasmuch as the county appropriates the money to carry out the Virginia Public Assistance Act in the first instance and is simply reimbursed in part by the State and Federal governments, I am of opinion that the suit to which you refer should be brought in the name of the individual members of the local board of public welfare as such board. You will observe that the Act contemplates that the local board shall pay into the treasury of its county or city all amounts received from any recipient of assistance or from his estate, and that the amount so received is then prorated between the county, the State and the United States.

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

PUBLIC ASSISTANCE ACT—Eligibility of Aged Having Children Able to Support Them.

MR. J. H. FALLWELL,
Director of Public Welfare,
Roanoke, Virginia.

MY DEAR MR. FALLWELL:
I am in receipt of your letter of July 29, relative to the applicability of section 1944-a of the Code (Michie, 1936) in the administration of the Virginia Public Assistance Act. This section relates to the duty of children to support their parents under certain circumstances.

I have conferred with Dr. Stauffer, Commissioner of Public Welfare, and he advises me that it is his view and that of the State Board of Public Welfare that in determining the eligibility of an aged person for relief all material factors should be considered, including the ability of the child to assist in the support of such aged person. In other words, the State authorities feel that the ability of a person to support or assist in the support of his or her parent should be considered in determining the assistance that should be granted such parent under the Virginia Public Assistance Act, irrespective of the legal liability of such person to support the parent.

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

PUBLIC OFFICERS—Eligibility—Person Not Qualified to Vote.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 9, 1940.

Mr. R. M. Cobb, Chairman,
Electoral Board of Sussex County,
Wakefield, Virginia.

My dear Mr. Cobb:

I have your letter of August 5, in which you request my opinion on the following question:

"Can a person who is not a qualified voter be elected to any office—state, county or municipal—in Virginia?

The constitutional and statutory provisions bearing on this question are by no means clear or unambiguous. Section 32 of the Constitution affirmatively provides that every qualified voter shall be eligible to hold any office of the State or of the locality in which he is qualified to vote, with certain exceptions, but does not expressly provide that persons not qualified to vote shall be disqualified to hold such office. At the same time the latter portion of this section, which was added by amendment in 1928, is so drawn as to indicate that the revisors of the Constitution construed this section as meaning that only qualified voters, with the specific exceptions noted, should be eligible to hold office.

With equal ambiguity, Code section 154, relating to the duties of candidates and the printing of their names on ballots, contains the following provision:

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

It might well be argued that this provision indicates a legislative construction of the Constitution to the effect that a person not qualified to vote may be an eligible candidate, entitled to have his name printed on the official ballot if nominated in a party primary.

It is apparent that your question is open to a difference of legal opinion, and can be conclusively answered only through adjudication in the courts. I can only advise you, therefore, that in my opinion the Constitution and statutes do not clearly disqualify for office every person who is not eligible to vote, but that the qualifications of such persons are open to question under section 32 of the Constitution.

Cordially yours,

Abram P. Staples,
Attorney General.

PUBLIC RECORDS—Records of Local Officers—Destruction.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 10, 1940.

Honorable Wilmer L. Hall,
State Librarian,
Richmond, Virginia.

My dear Mr. Hall:

I am in receipt of your letter of October 8, in which you refer to section 353 of the Code as amended in 1940 (Acts 1940, page 342) and inquire as to
whether this section includes within its scope the records of the office of a county treasurer, such as capitation, personal property, and real estate tax tickets.

So far as is pertinent to your inquiry the section provides that “no agency of the State government shall sell, destroy, give away or discard any record or records, unless specifically so authorized by law”, without being first examined by the State Comptroller and State Librarian, or their deputies, for the purpose of ascertaining whether such records have any administrative or historical value. In my opinion the section does not apply to records of such an officer as the county treasurer. You will observe the section uses the words “agency of the State government”. In my opinion an agency of the State government as used in this section is a department, bureau, division or branch of the State government itself, as distinguished from the various local officers throughout the State, although some of these officers may also be State officers. I cannot believe that the section intended that the Librarian and the Comptroller should examine every record of every local officer throughout the State before such record could be destroyed. You can well imagine the magnitude of such a task.

I am strengthened in the view I am expressing by the language of section 354 of the Code. This section permits the transfer to the State Library of certain public records of the State. It is obviously intended to include all public records and to do so the Legislature uses the language, “the proper official or custodian of any public record of the State of Virginia.” This, of course, is much broader language than that contained in section 353 and shows that, when the Legislature intended to embrace all public records, it did not consider that the records of an “agency of the State government” were sufficient.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC RECORDS—Destruction of—State Department of Health.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., December 13, 1940.

DR. I. C. RIGGIN,
State Health Commissioner,
Richmond, Virginia.

MY DEAR DR. RIGGIN:
This will acknowledge receipt of your letter of December 10, from which I quote as follows:

“In planning a filing system for the records received from the physicians of the State in connection with the marriage examination act, section 5073a, it has become necessary to request permission to destroy the original records and laboratory reports accompanying these records, after the necessary information has been permanently recorded. The original records will be retained for a period of sixty days, and at the end of that time they will be destroyed.

“We shall appreciate your opinion on this point and, if you see fit, your granting the Department permission to destroy the records.”

Section 353 of the Code as amended in 1940 (Acts 1940, page 342) provides in substance that no agency of the State government shall destroy any records without first having informed the State Librarian and the State Comptroller and obtained the consent of these officers for such destruction. It is not provided that this office pass on the matter. I suggest, therefore, that you advise the
State Librarian and the State Comptroller of your wishes, as provided in section 353, and be governed by the decision of these officers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Use by Local Boards of Funds Appropriated by Board of Supervisors.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 18, 1940.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond, Virginia.

MY DEAR DR. STAUFFER:

In your letter of July 17 you advised me that the board of supervisors of the county of Roanoke in adopting its budget for the fiscal year beginning July 1, 1940, made appropriations considerably less than the amounts shown in the budget prepared by the local board of public welfare and approved by the commissioner of public welfare and the executive secretary of the Virginia commission for the blind, as contemplated in the Virginia public assistance act. It appears that the board of supervisors specifically prescribed the amounts appropriated for general relief, old age assistance, aid for dependent children, and aid for the blind, these amounts in each case being less than those contained in the budget presented by the local board. You further indicate that the amounts appropriated for these items in the light of past experience will not be sufficient to carry out the program for the entire year. You then ask the following questions:

"(1) Should the local board of public welfare proceed to administer the categorical assistances (old age assistance, aid to dependent children and aid to the blind) and general relief until the total appropriation made by the board of supervisors and representing the local share of such costs becomes exhausted, as of which time additional funds must be requested of the board of supervisors for the categorical assistance needs for the remainder of the year and within the approved budget; or

"(2) Should the local board of public welfare proceed to call upon the board of supervisors for additional funds to maintain the categorical assistances within the approved budget at such time as the specific appropriation for these assistances becomes exhausted, even though the amount appropriated for general relief has not yet become exhausted?"

As you suggest, this office has previously expressed the opinion that, where the amount appropriated by the local board of supervisors is insufficient to meet the approved needs for the categorical assistances (old age assistance, aid to dependent children, and aid to the blind), such amount as has been appropriated shall be used until it becomes exhausted, as of which time, if no additional appropriation is made, non-compliance with the requirements of the act will result. I think it follows from my former opinion that the local board of public welfare may go ahead with its program for the categorical assistances until such time as the fund appropriated for each assistance becomes exhausted. In view of the fact that the board of supervisors made specific appropriations for each item, including one for general relief, I do not think that the local board of public welfare could divert any of the amount appropriated for general relief to the cate-
gorical assistances. I assume that the board of supervisors will be notified before the condition actually exists of the impending shortage of funds, so that it will have an opportunity to take the necessary action.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Purchase of Certain Forms.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 8, 1941.

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

Dear Mr. Ketron:

I have your letter of January 6, requesting my opinion on certain questions arising in connection with a requisition from the Alcoholic Beverage Control Board for the acquisition of certain forms.

It appears from your letter that the specifications call for several thousand sets of blank forms, each set consisting of six forms, interleaved with carbon and equipped with perforations designed for use with certain devices which have been installed on typewriters used by the Alcoholic Beverage Control Board.

Each form contains a certain amount of ruling and has printed on it the name of the Board. Your letter states, however, that the printing and ruling is strictly incidental and that from the point of view of the buying agency the principal consideration is to obtain the interleaved sets of stationery perforated in a manner suitable for use with a particular aligning device which the Board has selected and installed on its machines.

You ask my opinion first as to whether the acquisition of such forms should be treated as letting a contract for printing, ruling, etc. or whether, on the other hand, it should be treated as the purchase of material, equipment, or supplies. You indicate that in your opinion the latter view is correct.

Since the statutes require in the letting of contracts for printing, ruling, etc. a procedure different from that prescribed for the purchase of material, it is clear that both cannot be followed, in a case such as this. In such a case it is necessary for the Director of the Division of Purchase and Printing to determine whether the particular requisition is essentially one for printing to which the matter of acquiring paper stock is a mere incident, or vice versa.

In deciding this question, it is my opinion that the Director of the Division of Purchase and Printing is vested with a considerable discretionary power, and on the facts stated in your letter I think you would be amply justified in deciding that the order in question is essentially one for the purchase of supplies; that the printing and ruling involved is a mere incident to the purchase.

Your letter also states that there is only one distributor who can supply the forms in question strictly according to specifications, and you request my opinion as to whether it would be proper to treat the same as technical equipment within the meaning of Code section 401-e so as to permit the using agency to purchase the same directly.

This again in my opinion is a question which the law leaves to the discretion of the Director of the Division of Purchase and Printing, and again it appears from the facts stated in your letter that you would be justified in taking the view that such forms are technical equipment within the meaning of the law. Furthermore, if for the reasons you suggest there is no practical advantage to the Commonwealth in making this purchase through your office, you might
undoubtedly exercise the broad authority vested in you by Code section 401-d to permit such purchases to be made directly, regardless of the technical character of the supplies.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

1. PURCHASE AND PRINTING—Purchases Through by Miscellaneous Agencies Receiving Appropriations from State.

2. STATE PENITENTIARY—Sale of Convict-Made Goods to Miscellaneous Agencies Receiving Appropriations from State.

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

COLONEL LEROY HODGES,
State Comptroller,
Richmond, Virginia.

MY DEAR COLONEL HODGES:

I have your letter of June 29, requesting my opinion as to whether certain "Miscellaneous Agencies" to which appropriations have been made by the General Assembly may make purchases through the Division of Purchase and Printing, and whether they may purchase convict-made goods from the State Prison Board. The agencies to which you refer are the Virginia Crop Improvement Association, Virginia State Dairymen's Association, Virginia State Horticultural Society, Virginia State Poultry Federation and the Home for Needy Confederate Women.

So far as I am advised, the Virginia Crop Improvement Association is a voluntary, unincorporated association of private individuals, its principal function being to establish and maintain fixed and ascertainable standards of purity and quality in agricultural seeds. The Dairymen's Association, Horticultural Society, Poultry Federation and Home for Needy Confederate Women are all private, non-profit corporations chartered for the purposes suggested by their names. None of these "Miscellaneous Agencies" was created by the State or is managed or controlled by the State for any State purpose.

The general provisions of the law governing centralized purchasing deal only with departments, divisions, institutions, officers and agencies of the State, and with counties, cities and towns. Code sections 401-b and 401-f. I am unable to find anything in the law which authorizes private institutions and associations such as you describe to purchase through the Division of Purchase and Printing, even though in recognition of the public services performed by them the Legislature has appropriated public funds for their partial support.

As to the products of the State Penitentiary and prison farms, Code sections 2073 and 2073a require that such products be sold primarily to departments, institutions and agencies of the State, and to counties, districts, cities and towns which desire to purchase the same. Section 2073, however, provides that any surplus of such products, not required by State departments, institutions and agencies may be sold "to Federal, State and local public agencies within or without the State of Virginia, or as the State Prison Board, with the approval of the Governor, may deem to be the best interests of the State."

Under the section just quoted, it is my opinion that any surplus products of the penitentiary or State Prison Farms may be sold to agencies such as those named above if the State Prison Board, with the approval of the Governor, deems such sales to be to the best interests of the State.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PURCHASE AND PRINTING—Purchase for Conservation Commission of Booklet Owned by Printer.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 31, 1940.

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

MY DEAR MR. KETRON:

I have your letter of July 26, in which you quote the request of Mr. J. Stuart White, Director of the Division of Publicity and Advertising for the Virginia Conservation Commission, and ask my opinion as to whether you may grant Mr. White's request.

It appears that several years ago the Conservation Commission prepared and had printed a booklet describing historic shrines in Virginia; that the printer, with the Commission's approval, printed and retained for his own use in advertising the quality of his work several hundred copies of this booklet; that the Commission now wishes to purchase from the printer the surplus copies remaining on hand, at a total cost which will not exceed $1,000.

Inasmuch as Mr. White's proposal clearly does not involve a contract for printing, but only the purchase of publications which are now in existence and are the property of the printing company in question, I know of nothing in the law which would prohibit your making this purchase on behalf of the Conservation Commission.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Bids—Acceptance—Compromise.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 28, 1940.

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

DEAR MR. KETRON:

I have examined the enclosures with your letter of September 4, from which the following facts appear:

On July 25, 1940, your office requested bids for an order of 3,000 yards of bleached sheeting. You received four bids at $.1098, $.1094, $.1083 and $.0887.

Your office concluded that the bid at $.0887, which had been submitted by the Quinn Marshall Company, of Lynchburg, Virginia, was a typographical error and that the bidder intended to bid $.0887. On this basis the goods were ordered and shipped and the Quinn Marshall Company acknowledged that its original bid was intended to be $.0887.

After the goods had been shipped the Quinn Marshall Company advised that a mistake had been made and that its bid should have been $.1087 instead of $.0887 and requested that you pay for the goods at this price or at least compromise at the price of $.0987.

You wish to be advised as to whether the law confers on you any discretionary power to agree upon such a settlement.
As a rule, when a bid is definitely accepted by your office, a binding contract arises between the Commonwealth and the bidder, and I know of nothing in the law which would authorize you or any other public officer to waive the Commonwealth's right to insist on full compliance therewith. If, however, there is anything in the nature of the bid which would put you on notice that there has probably been a mistake, the bidder probably could not be held to his mistake, at least if he gives timely notice thereof.

In the present case you state that in your opinion Quinn Marshall Company's bid of $.0887 was not far enough below the other bids, or below the prevailing wholesale prices, to suggest on its face that an error had been made. Also you state that, after all the bids had been exposed, the goods were ordered, shipped, and had been accepted by the using agency before you were notified of the bidder's error.

Under these circumstances, I must advise that I can find nothing in the law which would authorize you to forego or compromise the rights vested in the Commonwealth by virtue of accepting the Quinn Marshall Company's bid at $.0887.

Yours very truly,

ABRAM P. STAPLES.
Attorney General.

By: JOS. L. KELLY, JR.,
Assistant Attorney General.

PURE FOOD LAWS—Blended Vinegars.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 8, 1940.

HONORABLE S. S. SMITH, Director,
Dairy and Food Division,
Department of Agriculture and Immigration,
Richmond, Virginia.

DEAR MR. SMITH:

This is in reply to your letter of July 6, in which you ask if chapter 321, page 519, of Acts of 1940, which amended the law relating to the manufacture and sale of vinegars, has the legal effect of prohibiting the sale of blended vinegars. This amendment of the Vinegar Law not only omitted section 4 of the old law which permitted the sale of blended vinegars, but changed section 2 thereof to read as follows:

"Vinegar which fails to comply with such definitions or which contains any substance or ingredient not derived exclusively from the fruit, grain, sugar or syrup from which it shall so be made, or which is composed of a compound or mixture of vinegars made from fruit, grain, sugar and syrup, or any two or more of the same, or which contains less than four grams of acetic acid in one hundred cubic centimeters of the vinegar at twenty degrees centigrade, shall be deemed adulterated."

The law, as it now reads, expressly provides that blended vinegars shall be deemed adulterated and, by section 7, prohibits the manufacture and sale of adulterated vinegars.

In regard to the second question you ask, it is my opinion that this Act prohibits the manufacture of blended vinegars in Virginia whether the same is manufactured for sale within or without this State.

Very truly yours,

ABRAM P. STAPLES.
Attorney General.
RADFORD STATE TEACHERS COLLEGE—Contracts for Binding Library Material—How Let.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 20, 1941.

MISS DAISY L. ANDERSON, Librarian,
State Teachers College,
Radford, Virginia.

DEAR MISS ANDERSON:

This will acknowledge your letter of March 12, requesting the opinion of this office as to whether contracts for binding or rebinding books or other papers used in your library must be let through competitive bidding by the Division of Purchase and Printing.

The statutory provisions requiring public printing, binding, etc., generally to be procured through the Division of Purchase and Printing, and the contracts therefor to be let through competitive bidding, are set forth in chapter 25 of the Virginia Code (Michie 1936). Section 401-p of the Code, which is contained in that chapter, was amended by chapter 38 of the Acts of 1940 so as to provide that “The provisions of this chapter shall not apply * * * unless otherwise ordered by the Governor, to the binding and rebinding of the books and other literary material of libraries operated by the State or under its authority * * *.”

Under this provision it seems clear that bookbinding for a library operated by your institution may be procured directly, without recourse to the Division of Purchase and Printing, and the question of whether competitive bids should be obtained is an administrative one to be determined according to the best judgment of the officials in charge of such procurement.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

RECOGNIZANCES—Docketing of.

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

HONORABLE V. W. NICHOLS,
Clerk of the Circuit Court,
Bedford, Virginia.

DEAR MR. NICHOLS:

I am in receipt of your letter of October 15, in which you state that it has been your practice to docket recognizances prior to forfeiture, your reliance being upon section 6479 of the Code. You further say that you understand it is the custom of Lynchburg and other places not to docket such a recognizance until there has been a forfeiture and a rule issued against the surety.

I am inclined to agree with the practice in Lynchburg. You will observe that section 6479 provides that the section “shall be construed as embracing recognizances and bonds having the force of a judgment.” I do not think it can be said that a recognizance has the force of a judgment prior to forfeiture.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
RECORDATION OF INSTRUMENTS—Clerks—Authority to Use Photo-
static Equipment—Fees.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 20, 1941.

HONORABLE M. W. PULLER, CLERK,
Circuit Court of the County of Henrico,
Richmond, Virginia.

DEAR MR. PULLER:

This will acknowledge receipt of your letter of June 18, in which you ask if photostatic equipment may be used in the office of the clerk of court for recording deeds, wills and other instruments.

In my opinion, the statutes expressly authorize the use of such equipment. Section 3392 of the Code provides that every writing authorized by law to be recorded may be so recorded under the direction of the clerk "in typewriting, or by photostating * * * in such books as are prescribed by section thirty-three hundred and ninety-nine * * *." Section 3399 provides that all books used in the clerk's office for recordation of deeds, wills and other instruments "shall either be made of the best quality record paper * * * or if the photostat process is used * * * the deeds, wills or other instruments shall be reproduced on the best quality photostat paper * * * ."

As to the question of the fees of the clerk for recording these instruments, in my opinion, the same fees may be charged as are now provided by law. As you know, the fees charged by the clerk of the court not only are used for compensating the clerk, his deputies and clerical force, but also are used for the payment of the other expenses of his office. I presume that, if photostatic equipment was used in any clerk's office, the State Compensation Board may make an additional allowance out of the clerk's fees for purchasing such equipment as an expense of the office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RELIEF FROM FINES—Time of Filing Petition Under Section 2570—
Waiver.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 28, 1941.

MISS LAURA H. ALLEN,
Secretary to the Governor,
Governor's Office,
Richmond, Virginia.

MY DEAR MISS ALLEN:

This is in reply to your letter of March 26, in which you request my opinion upon the question of the authority of the Commonwealth's Attorney to waive a statutory requirement that a petition filed under section 2570 of the Code be filed fifteen days prior to the term of the court at which the same is to be heard, and also the ten days notice of the filing of same which said section requires to be given to the Commonwealth's Attorney.

You enclosed with your letter a copy of an order entered by the Circuit Court of Wythe County, Virginia, the effect of which is that the Court construed the statute as permitting such waiver by the Commonwealth's Attorney. That being the case, unless some appeal is taken from the order of the Court,
REPORT OF THE ATTORNEY GENERAL

it is, in my opinion, a final adjudication by a court of competent jurisdiction and it is not incumbent upon the Governor to review the regularity of the proceedings in which said order was entered.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SALARIES—Employees of Attorney General—Increase of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 31, 1940.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

DEAR COLONEL HODGES:

I have your letter of October 29, 1940, with reference to the salary increase of $25.00 per month for Mr. Walter E. Rogers, Senior Attorney in this office, whose salary was not fixed by the General Assembly. It has been my policy to employ young attorneys as a part of the office staff, starting them at $100 per month, and as their experience, ability and value increase to raise their compensation from time to time. It is necessary to do this in order to keep them in the organization. In fact, I have lost two of my staff because of better offers from private interests.

You express the opinion that, as a matter of law, the Attorney General is not classified by the Constitution as an officer in the Judiciary Department of the State Government. This is the first time I have heard any such question raised. On the contrary, at the time the Governor vetoed the provision removing salaries of officers and employees in the Judiciary Department from the control of the Chief Executive, he considered the Attorney General’s office in the Judiciary Department and within the terms of the provision. In the Richmond News Leader of April 3, 1940, the following appears:

“* * * The general appropriation act was among the last twelve measures signed. He eliminated several items, including * * * a provision authorizing the Attorney General to make salary adjustments in his department without approval of the Governor.

“Explaining his action upon the last provision, the Governor said today that it appeared bad policy to make the Department of Law an exception in the administration of the State’s normal budget procedure.

“The Governor may have too much power in this regard,” he said. ‘Nevertheless, the present procedure is accepted policy, and I do not think that weakening exceptions should be made.’”

Then the Times-Dispatch of the same date carried the following:

“Before it was signed the Governor * * * vetoed another amendment in it which would authorize the Attorney General to make salary adjustments within the legal department without the consent of the Governor.”

You express the view that the action of the Constitutional Convention in including the Attorney General in Article VI of the Constitution, which creates and provides for the Judiciary Department, was merely “incidental”. The Convention was composed of many of the ablest lawyers of Virginia, and it does
not seem reasonable to impute to them an intention different from that naturally to be inferred from their act in so classifying the Attorney General. It may be argued with equal plausibility that the Secretary of the Commonwealth is not in the Executive Department, and that the placing of section 80 of the Constitution in Article V was merely "incidental". However, the Supreme Court of Appeals does not consider this method of classifying officers as "incidental", but takes exactly the opposite view. In the recent case of Jackson v. Hodges, Comptroller, 10 S. E. (2nd) 566 (Ad. Op.) the Court said (p. 567):

"Article V of the Virginia Constitution (sections 69-86a, both inclusive) provides for and creates the offices of the Executive Department of the State government. Section 80 creates the office of Secretary of the Commonwealth, provides for his appointment by the Governor, subject to confirmation by the General Assembly, for a four-year term, coincident with that of the Governor, and provides that, "The powers and duties of the secretary of the Commonwealth shall be prescribed by law.""

The above may be paraphrased (changes italicized) to read:

"Article VI of the Constitution (sections 87-109) provides for and creates the offices of the Judiciary Department of the State Government. Section 107 creates the office of Attorney General, provides for his election by the qualified voters of the State, for a four-year term coincident with that of the Governor, and provides that he shall perform such duties and receive such compensation as may be prescribed by law, and shall be removable in the manner prescribed for the removal of Judges."

It will be observed that the Court treats all the entire Article V as providing for and creating "the offices of the Executive Department". The same principle must be applicable as to Article VI with respect to the "Judiciary Department", as this is the Title of Article VI. The first section in Article VI (section 87) relates only to the "Judicial Power" of the State. It does not purport to define the entire "Judiciary Department". There is no more reason why an agency in the Judiciary Department should be a Court, or a judge thereof, than that an agency of the Executive Department should be actually in the Governor's office or exercise the powers of the Chief Executive.

Returning again to Article V, it will be noted that section 82 provides that "An Auditor of Public Accounts shall be elected by the joint vote of the two houses of the General Assembly for the term of four years. His powers and duties shall be prescribed by law". Yet, despite the manner of his selection, the mere inclusion of this provision in Article V was accepted by the Supreme Court of Appeals without question as classifying this officer as an "officer of the Executive Department", and bringing an increase of his salary within the provisions of section 83. Moore v. Moore, 147 Va. 460.

And in Bottom v. Moore, Auditor, 119 Va. 372, the Court recognized the legal significance of an office being created by a section of the Constitution being placed in an Article relating to a particular Department, and held that section 83 "applies only to such public officers as are specifically mentioned in Article V of the Constitution as comprising the Executive Department." There is no express provision in Article V that the officers therein mentioned shall comprise the Executive Department any more than in Article VI that the officers therein named shall comprise the Judiciary Department. But the Court held that the mere fact of their inclusion in Article V had the legal effect of making them "comprise the Executive Department"

Furthermore, as stated in 2 R. C. L. 939, "An attorney is, however, more than a mere agent or servant of his client. He is also an officer of the Court." In the first Constitution (1776), the same section (14) provided for the election by the Legislature of the Judges and the Attorney General, thus grouping and associating them together, though there was no classification of the Government
into the three main departments. Naturally, the Attorney General, as an officer of the Court, falls in the Judiciary Department. In every Constitution of Virginia since 1830 the Attorney General has been classified in the Judiciary Department by that instrument.

But even if such classification had not been made by the Constitution the 1940 Appropriation Act classifies the Department of Law and the Attorney General in the Judiciary Department, just as the Department of Finance is classified in the Executive Department. Each is a subordinate department within one of the three main constitutional divisions of the Government, Legislative, Executive and Judicial. Since the Attorney General's office is not classified in either the Legislative or Executive Departments, it must be in the Judicial. There is no other place for it to be. The 1933 Act to which you refer does not undertake to classify the Department of Law in any one of these three main divisions of the Government. The General Assembly evidently did not consider that the salaries in the Attorney General's office should be subject to supervision by the Governor, because section 12 of the 1936 Act (p. 73) provides as follows:

"The Attorney General shall have power to appoint such clerical force as he may deem necessary for the efficient conduct of his office, and to apportion, out of the appropriation for his office, such salaries among the law clerks, secretaries and stenographers as he may think proper, but the aggregate amount paid them shall not exceed the amount provided by law."

The above provision makes it clear that this office was not subject to the provisions of chapter 88 of the Acts of 1926, requiring the Governor's approval of salary increases.

I note your suggestion that Mr. Rogers file a petition for a mandamus to compel the Comptroller to pay the increase granted. I feel that it is very unfortunate that the reluctance of some in the Executive Department to accept the correctness of three opinions of the Attorney General which it was his legal duty to give; i.e., those relating to (1) the capitation tax-license statute; (2) the Governor's power to increase the salary of the Secretary of the Commonwealth, and (3) the Chief Executive's power to veto certain provisions of the appropriation bill has led to regrettable litigation in the courts. These opinions were all given after careful consideration and were free from any influence of bias or prejudice, and, though they were evidently not so regarded by those challenging them, they should be so regarded now since their correctness has been sustained by the Supreme Court of Appeals in every instance.

It has always been, and still is, my purpose and aim to be helpful to and cooperative with every other Department in giving advice and rendering opinions, as I believe nearly all of them will agree. Of course, it is my duty to interpret the law as I conceive it to be and, at times, I am unable to construe it as the Department Heads or officers would like it to be.

As stated, I feel that it is extremely unfortunate that these differences of opinion have had to be aired in Court with consequent undue publicity. Occurrences of this kind are not conducive to public confidence in the State Government nor to the best interests of the State. Therefore, while I entertain no doubt that the mandamus you suggest would be granted if applied for, yet I am reluctant to appeal to the Court to decide matters of this routine nature. May I not, therefore, bespeak your cooperation in endeavoring to satisfactorily solve this and any other problems which may arise. Perhaps a conference might be helpful, and, should you like, I will be glad to have a talk with you at your convenience.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.
SCHOOLS—Division Superintendent—Engaging in Other Business.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 17, 1941.

HONORABLE ROBERT B. ELY,
Attorney for the Commonwealth,
Jonesville, Virginia.

MY DEAR MR. ELY:
I am in receipt of your letter of March 8, in which you ask if a division superintendent of schools, in view of the provisions of section 651 of the Code, may act as "president of the board of directors of his local bank, serving same without pay and at their meetings once a month."

Section 651 of the Code provides, in part, that "the office of division superintendent shall be deemed vacated upon his engaging in any other business or employment during his term of office as such superintendent ***."

It does not appear to me that this provision reasonably construed applies to the case you present. Apparently the only function that the gentleman in question is performing is presiding over a meeting of the board of directors of the bank once a month and he renders this service without pay. It seems to me that the quoted provision refers to some substantial business activity or employment and was not intended to require a person holding the office of division superintendent of schools to give up such a purely nominal activity as the one you describe.

Very truly yours,
ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Local Appropriations and Matching by State.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 23, 1940.

HONORABLE C. W. CARTER,
Attorney for the Commonwealth,
Warrenton, Virginia.

MY DEAR MR. CARTER:
I am in receipt of your letter of September 19, with regard to the amount of the local appropriation to be made for schools in order to receive matching funds from the State.

Without entering into an elaborate discussion of the matter, I may say that I have already expressed the opinion in the case of another county under similar circumstances that the amount of the local appropriation should include the amount raised by a temporary loan for current operating expenses. It seems to me that this is the plain intent of the State Appropriation Bill, wherein (Acts 1940, page 788) it is provided that:

"It is provided further, that no county or city shall receive any State funds for schools beyond the constitutional appropriation for any school year if it shall have reduced its annual expenditures of funds derived from local taxes for instruction or for operation and maintenance of the public schools for the said year below such expenditures made for instruction or for operation and maintenance of the public schools for the preceding school year ***."
The temporary loan obviously has to be repaid out of "local taxes", and so it seems to me that the "annual expenditures of funds derived from local taxes for instruction or for operation and maintenance" includes the cash appropriation for the schools as well as the temporary loan made for the same purpose. In short, it is my view that the letter of Dr. Hall to Mr. Bartenstein reaches the correct conclusion as to the amount of the appropriation which should be made.

I could go into the matter at some length, but, in view of the careful consideration that already has been given by the office, it would not appear necessary at this time.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Salary of Negro Teachers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 29, 1940.

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

DEAR DR. HALL:

This is in reply to your letter of November 14, requesting my opinion upon the question raised by Dr. Joseph H. Saunders, Superintendent of Newport News Public Schools, in his letter to you of November 13. He asks what effect the decisions of the Federal Courts in the case of Alston, et al. v. School Board of City of Norfolk, 112 Fed. (2d) 992 (certiorari denied, 61 S. Ct. 75) will have upon the City of Newport News and other cities and counties in the Commonwealth of Virginia.

In this suit it was alleged by Alston, a Negro school teacher of Norfolk, Virginia, that the School Board and Superintendent of Schools of that city, in fixing the salaries of teachers in the public schools of Norfolk, arbitrarily fix the salaries of Negro teachers at a lower rate than that paid to white teachers of equal qualifications and experience, and performing the same duties and services.

The Circuit Court of Appeals, which was not called upon to decide whether the alleged facts existed, remanded the case to the District Court with instructions that, if the allegations of the complainant should be established, the plaintiffs would be entitled to a judgment to the effect that the discriminatory policy complained of is violative of their rights under the Constitution and to an injunction restraining defendants from making any discrimination on the grounds of race or color in fixing salaries to be paid school teachers.

This opinion speaks for itself and clearly forbids discrimination on the grounds of race or color in fixing salaries to be paid school teachers.

This decision will necessitate any change in the differentials in teachers' salaries fixed by any city or county of the State will depend entirely upon the factual question of whether such differentials are based upon differences in the qualifications and experience of the teachers and the duties and services performed by them, or whether they are based upon race or color. This is, of course, primarily a matter to be determined by the local school boards whose duty it is to fix the salaries of the teachers.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS—Teacher's Certificate—Aliens.

HONORABLE DAVID W. PETERS, President,
State Teachers College,
Radford, Virginia.

DEAR MR. PETERS:

This is in reply to your letter of November 27, in which you ask if a citizen of a foreign country could hold a legal teacher's certificate before he or she has become a naturalized citizen of this country.

I find no provision of law making an alien ineligible to hold a teacher's certificate. All teachers who are employed in this State are required to hold a certificate in full force in accordance with the rules of certification laid down by the State Board of Education, but I am informed by Dr. Hall, Superintendent of Public Instruction, that the Board has no requirement that applicants for a teacher's certificate be citizens of this country.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Anticipation of Literary Fund Loans—How Money Borrowed for.

HONORABLE EUGENE W. CHELF,
Attorney for the Commonwealth,
Salem, Virginia.

MY DEAR MR. CHELF:

I am in receipt of your letter of February 12, in which you refer to chapter 385 of the Acts of 1940, authorizing county school boards to anticipate the payment of literary fund loans and further providing that, if such payments are made from borrowed money, "the procedure for borrowing such money shall be as provided in chapter three hundred and sixty-five of the Acts of nineteen hundred and thirty as amended."

While it is true that chapter 365 of the Acts of 1930 has expired by its own limitation, yet I am of opinion that chapter 385 of the Acts of 1940 adopts the procedure specified in chapter 365 of the Acts of 1930 as the procedure to be followed if money is borrowed for the purpose of anticipating the payment of literary fund loans.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOL BOARDS—Appointment of Members—Time of.

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

Honorable David Nelson Sutton,
Commonwealth's Attorney,
West Point, Virginia.

My dear Mr. Sutton:

This is in reply to your letter of July 1, in which you state that the School Trustee Electoral Board of King William County, after publishing notice in the newspaper, met on April 18, 1940, and appointed three members of the School Board for King William County for a term of four years beginning July 1, 1940. You state that only one of the three persons appointed was a member of the then existing board. You ask if this appointment was valid under section 653 of the Code, which provides in part:

"* * * The members of the county school board shall be appointed within sixty days prior to July first, nineteen hundred and twenty-eight, and within sixty days prior to July first every four years thereafter. They shall take office on July first following their appointment, and shall hold office for a term of four years, and thereafter until their successors have been appointed and have qualified. * * *"

Whether or not appointments of members to county school boards made prior to May 2 are valid depends upon whether the provisions of section 653, as to the time of such appointments, are mandatory or merely directory. In view of the action taken by the Supreme Court of Appeals of Virginia in the case of Simpson v. Wolf, et al., Record No. 1821, November Term, 1936, it is my opinion that such provisions would be held to be merely directory, and that an appointment made prior to May 2 would be valid.

In that case Ruby G. Simpson sought a peremptory writ of mandamus to compel the County School Board of Arlington County to recognize her as a member of that body, and to restrain Walter F. Wolf from acting as such. The admitted facts of the case were as follows:

Ruby Simpson, along with John M. Stewart and Arthur E. Wilson, had been appointed to the School Board of Arlington County in 1932. In 1936, the School Trustee Electoral Board did not appoint a new school board until July 6, at which time Stewart and Wilson were reappointed and Walter F. Wolf was appointed in place of Ruby G. Simpson.

Simpson contended that the provision of the statute was mandatory; that the appointments made on July 6 were invalid, and that she, therefore, continued to hold over as a lawful member of the county school board by virtue of her appointment in 1932. The respondents demurred to the petition, contending that under the facts alleged in the petition the county school board was legally constituted without the petitioner. The court sustained the demurrer and dismissed the petition without a written opinion.

The Supreme Court apparently considered the provisions of section 653, prescribing the time when members of the county school boards should be appointed, directory only and not mandatory.

In Jackson v. Dotson, 110 Va. 46, the court quoted Cooley's work on Constitutional Limitations as follows:

"* * * 'Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory, and if the act is performed but not in the time nor in the pre-
cise mode indicated, it will be sufficient if that which is done accomplishes the substantial purpose of the statute.'"

See, also, the case of Redd v. The Supervisors of Henry County, 31 Gratt. 695.

In the case of Simpson v. Wolf, et als., supra, the court apparently applied the principles of Jackson v. Dotson, supra, and Redd v. The Supervisors of Henry County, supra, to section 653.

It is my opinion, therefore, that the provisions of section 653, prescribing the time for appointment of members of county school boards, should be construed as directory and not mandatory, and that appointments made on April 18, fourteen days earlier than the time specified by the statute, accomplish the substantial purpose of the statute and are, therefore, valid.

However, in view of the fact that the decision of the court in Simpson v. Wolf, et als., supra, may have been based upon the theory that on July 1 there existed vacancies in the membership of the school board which the School Trustee Electoral Board was authorized to fill, and in view of the additional fact that in the case at hand the appointments were made more than sixty days prior to July 1 instead of after July 1, it is my opinion that if the members appointed on April 18 were again appointed in a meeting now, thus bringing the facts in this case more in line with the facts of Simpson v. Wolf, et als., supra, the status of the school board would be cleared of all uncertainty.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Authority to Employ Step Son-in-Law of Member.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 7, 1941.

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

DEAR MR. DOWNING:

This is in reply to your letter of April 4, in which you request my opinion upon the question whether or not a step son-in-law of a member of the school board or superintendent would be within the prohibited degree of relationship for employment by the school board as provided in section 660 of the Code of Virginia.

This section undertakes to specifically set out the relationships embraced within the prohibition and since a step son-in-law is not specifically mentioned, in my opinion, the provision has no application to such a relative.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Employees—Approval of Division Superintendent.

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

HONORABLE HANSEL FLEMING,
Commonwealth’s Attorney,
Clintwood, Virginia.

DEAR MR. FLEMING:

This is in reply to your letter of August 8, in which you ask if a school board has the right to hire clerical help in the school board office unless such workers are approved by the division superintendent.
Section 655 of the Code imposes the duty of transacting the business relating to school matters upon the school board. It is my opinion, therefore, that the school board would have the authority to employ whatever employees are necessary to carry out this work.

Since I find nothing in the law which requires the division superintendent to approve of the general employees of the board, I am of opinion that it may employ such workers without his approval.

You also ask if the person employed as clerk of the board must be recommended by the superintendent.

Section 655 provides that the school board shall “on recommendation of the division superintendent, elect or appoint a competent person as clerk of the school board, and shall fix his compensation.” Under this section then the board is the authority which elects or appoints the clerk. It is my opinion that the board is not bound to accept the person recommended by the superintendent because this would be making his recommendation equivalent to election.

It is my opinion that this statute contemplates that, if the school board finds the one or several persons recommended by the superintendent to be unsatisfactory, it may proceed to elect some other person as clerk of the board.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Employing Relatives of Members—Persons Previously Employed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 11, 1940.

HONORABLE F. C. BEDINGER,
Attorney for the Commonwealth,
Boydton, Virginia.

My dear Mr. Bedinger:

I am in receipt of your letter of September 10, in which you state in effect that an individual has been in the past teaching in the public schools of Mecklenburg county and that this year he married a daughter of one of the members of the School Board, the marriage taking place between the time of his notification that he would be employed and the actual signing of the contract. You desire the opinion of this office on the right of the member of the School Board in question to retain his office.

Section 660 of the Code, as you suggest, prohibits the employment by a School Board of teachers who bear certain relationships to members of the Board. Among those whom the Board is prohibited to employ is the son-in-law of one of the members. The statute, however, contains the exception that the prohibitory 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 assume from what you say that the teacher in question has been employed by the School Board for a number of years and, therefore, was so employed prior to the effective date of the Act. If this assumption is correct, it appears to me that the teacher comes within the exception and that he is eligible to re-employment. I do not think the quoted language means that the teacher, in order to come within the exception, must have been related to the members of the School Board for any particular length of time, but that, if he has been employed in the past, he may continue to be employed, even though he has, in the meantime, become a relative of one of the Board members.

Very sincerely yours,

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

SCHOOL BOARDS—Employing Relatives of Members—Persons Previously Employed.

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

HONORABLE J. LIVINGSTON DILLOW,
Commonwealth's Attorney,
Giles County,
Pearisburg, Virginia.

MY DEAR MR. DILLOW:
This is in reply to your letter of August 14, in which you request my opinion upon the proper interpretation of section 660 of the School Code, as amended by Acts 1938, page 637.

The facts you present are that there is a teacher in the public schools of your county who was employed for the school year beginning September, 1938, and ending in September, 1939, and was also employed for the school year following. It seems that such teacher is within the prohibited degree of relationship to a member of the school board so as to render her ineligible to be employed unless her past employment exempts her from the disqualification due to such relationship.

The 1938 Act contains this proviso:

"* * * 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. * * *.

The Act became effective in June, 1938, and unless the teacher to whom you refer entered into a contract to teach in the public schools prior to the effective date of said Act, it is my opinion that she would not be eligible to be employed. However, if she was employed by any school board in any county or city in the State prior to June, 1938, in my opinion she would be eligible.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Employment of Relatives of Board Members—Persons Previously Employed.

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

HONORABLE F. C. BEDINGER,
Attorney for the Commonwealth,
Boydton, Virginia.

MY DEAR MR. BEDINGER:
I observe from your letter of September 13 that the teacher you have in mind was not employed prior to the effective date of the Act of 1938, amending section 660 of the Code.

I don't know whether you have noted that section 660 of the Code was amended in 1940 (Acts 1940, page 644). Indeed, another proviso was put in relative to the prohibition of employing teachers who are related to members of the School Board, to which I will refer later. In view of this fact, there may be some question as to whether the words "prior to the effective date of this Act" do not now refer to the Act of 1940. However, I do not think that it is necessary to pass on this question at this time.

The new language in the section is as follows:
REPORT OF THE ATTORNEY GENERAL

"* * * provided, further, that this provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board, * * *"

This language, standing by itself, is not at all clear. Certain it is, however, that the spirit of the Act is that a contract shall not be made with a teacher for the first time when such teacher is related to a member of the School Board.

In the case you put, the teacher was employed by the School Board before he became related to a member thereof and, therefore, there was no opportunity for the member of the Board in question to be influenced by his relationship to the teacher.

I have given your question considerable thought and it seems to me that, when the real intent of the Act is considered and especially the amendment of 1940, the employment of the teacher you name, which for all practical purposes took place before he became related to a member of the School Board, is not prohibited by the Act. I cannot say that the question is free from doubt, but, as I have indicated, it certainly seems to me that the construction I am placing upon the Act as applied to the facts you present is in accordance with its real spirit and intent.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Employing Relatives of Members—Division Superintendent as Employee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 19, 1941.

MR. VIRGIL F. SKEEN, Chairman,
Dickenson County School Board,
 Clintwood, Virginia.

MY DEAR MR. SKEEN:
I am in receipt of your letter of February 17, in which you ask the following question:

"Will it be lawful for the school board to appoint as division superintendent of schools a brother of one of the school board members, who meets the qualifications set up by the State Board of Education, and is on the eligible list for superintendents sent out by Dr. Hall on February 1?"

Section 660 of the Code provides in part:

"* * * it shall not be lawful for the school board of any county * * * 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 any member of the school board * * *"

The answer to your question depends on whether or not the division superintendent of schools is a "school board employee". The division superintendent of schools, his appointment by the local school board and his term of office of four years are provided for in section 133 of our Constitution. Furthermore, the duties of the division superintendent of schools are largely prescribed by statute, and his salary is fixed by the State Board of Education in accordance with the
provisions of section 615 of the Code. The individual appointed to the position is required to take the oath of office and he may be removed from office by the State Board of Education for reasons prescribed by statute. From an examination of the constitutional and statutory provisions relating to the position of division superintendent of schools, it is plain that this position is a public office and that one holding this position is a public officer as distinguished from an employee. See 22 Ruling Case Law, pp. 379-382. I also call your attention to the case of Pendleton v. Miller, 82 Va. 390, in which our Court of Appeals held that the position of county superintendent of schools was a constitutional office. While the case dealt with the Constitution of 1870, section 133 of the present Constitution, to which I have already referred, contains substantially similar provisions.

My conclusion is that the position of division superintendent of schools is a public office and that the person appointed to this office is a public officer and not a school board employee within the meaning of the quoted provisions of section 660 of the Code; that, therefore, the school board may appoint as division superintendent of schools a brother of a member of the school board, provided such officer is selected from a list of eligibles certified by the State Board of Education and fulfills the other statutory requirements.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Extent of Expenditures Authorized.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 22, 1941.

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

MY DEAR DR. HALL:

This will acknowledge receipt of your letter of April 10 concerning the school budget of Floyd county.

It appears that after slightly reducing the estimates submitted by the local school authorities for the school year 1941-42 the board of supervisors adopted the school budget as submitted and made a school levy of $2, this being the maximum school levy as such authorized for Floyd county in section 698 of the Code. You state that this $2 levy will not yield the county's part of the school budget and that, therefore, the board of supervisors was requested to make an additional cash appropriation to make up the deficit, which it declined to do. However, the board did adopt the school budget as submitted after the slight reduction above referred to.

You then ask:

"Does the act of the board of supervisors in including the county school budget, which showed proposed expenditures to be the same as estimate submitted, less the amount of items deleted, as a part of the county budget and the publication of same constitute approved and authorize the school board to expend, or contract to expend, for the support of the public schools for the said school year an amount not in excess of such published proposed expenditures for the said school year, * * *?"

I presume that you have in mind the provision of section 675 of the Code that—

"No county school board * * * shall expend or contract to expend in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year, without the consent of the tax levying body."
However, in the case you put, the tax levying body has actually adopted the budget submitted by the school authorities (with slight deletions) and has made the maximum school levy authorized by law, although it is at present estimated that this levy will not yield a sufficient sum. In view of the action of the board of supervisors in adopting the school budget, I think it fair to assume that the board will at the proper time provide the necessary funds to complete the budget which it has approved and adopted. It seems to me that this clearly follows from the action of the board of supervisors.

In my opinion, therefore, the school board will be fully justified in planning its expenditures on the basis of the budget as adopted by the board of supervisors and that in so doing the school board will not be violating the provision of section 675 of the Code to which I have referred. Indeed, I think that the action of the board of supervisors as the tax levying body may be taken as giving its consent to the school board planning or contracting its expenditures in accordance with the budget as adopted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Filling Vacancy on—Notice.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 23, 1941.

HON. WILLIAM GREGORY RENNOLDS,
Division Superintendent of Schools,
Center Cross, Virginia.

MY DEAR MR. RENNOLDS:

I am in receipt of your letter of April 23, from which I quote as follows:

"Please give me your opinion concerning section 653 of the Virginia school laws. We have a vacancy on the school board caused by the death of one of its members. Will it be necessary for the school trustee electoral board to give notice by publication for two successive weeks in a newspaper having general circulation in the county of the time and place of meeting before filling the vacancy? I will greatly appreciate your opinion in this matter."

Section 653 of the Code, as amended, provides that:

"Before any appointment (of a member of the school board) is made by the electoral board it shall give notice, by publication for two successive weeks in a newspaper having general circulation in such county, of the time and place of any meeting for the purpose of appointing the members of the county school board."

Concerning the filling of a vacancy the section simply provides:

"Any vacancy in the county school board shall be filled by appointment by the trustee electoral board."

You will observe that the first quotation from section 653 of the Code refers to the publication of notice of the meeting of the electoral board "for the purpose of appointing the members of the county school board." In my opinion, the use of the word "members" indicates that the Legislature is referring to the meeting at which the whole school board is appointed just prior to the expiration of the terms of office of the members thereof. It was this meeting of which the Legislature apparently considered the public should have notice.
However, in the case of filling a vacancy the statute simply provides that it shall be filled by the trustee electoral board. There does not appear to be the same reason for notice of a meeting for the selection of an member as it does where the meeting is held for the purpose of electing the whole county school board.

In my opinion, therefore, in the case of filling a vacancy in the county school board it is not necessary that notice of the meeting be published for two successive weeks in a newspaper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Interest of Members in School Transactions.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 30, 1940.

HONORABLE PAUL E. BROWN,
Attorney for the Commonwealth,
Fairfax, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of December 27, in which you raise the following question:

"It has been brought to my attention that a bill has been presented to the Fairfax County School Board for gasoline furnished for some of the county owned school buses. The filling station from which this gasoline was sold is owned by one of the School Board members, but is not operated by the School Board member, it being rented by him to the operator, who, as I understand it, pays a regular monthly rent and the rent is in no wise dependent upon the amount of gasoline sold.

"The clerk of the School Board has raised the question as to whether or not this practice violates the law. * * *"

In my opinion, the answer to your question is contained in section 708 of the Code making it unlawful, except by permission of the State Board of Education evidenced by resolution of the said Board, for a member of a County School Board to be interested in certain transactions in connection with the operation of the schools. This section, however, contains the following provision:

"But the prohibitions of this section shall not apply to a merchant who, in the regular course of trade and without employing agents to solicit such business, sells either books selected and adopted by the State Board of Education, or supplies used in the schools and by the pupils."

I think it extremely improbable that the section, without taking into consideration the quoted paragraph, condemns the activity described by you. However, when we consider the quoted provision, if a School Board member may sell school supplies as a merchant, surely such member is not prohibited from renting a piece of property owned by him to another person not a School Board member who is engaged in the business of a merchant and who may sell gasoline for the county school buses.

Very sincerely yours,

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

SCHOOL BOARDS—Legality of Member's Writing Insurance on School Building.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 31, 1941.

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

MY DEAR MR. WILLIAMS:

I am in receipt of your letter of March 27, in which you ask the following question:

"Will you please be good enough to advise me whether or not it would be proper for a member of the school board as an insurance agent to renew a policy of insurance carried by him on certain of the school buildings? This policy was written by him in 1930 or 1931 and he did not become a member of the school board until 1940 and the policy referred to expires in May, 1941."

Section 708 of the Code makes it unlawful for a member of a school board “except by permission of the State Board of Education evidenced by resolution spread on the minutes of said Board * * * to sell, or write, or solicit insurance on any school building * * *.” Even though the individual you mention wrote the original policy back in 1930 or 1931 when he was not a member of the school board, I see no escape from the conclusion that to write a renewal of this policy comes within the scope of the language “to sell, or write, or solicit insurance on any school building.”

In my opinion, therefore, the writing of this insurance comes within the prohibition of the statute except under the conditions laid down therein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Payment of Small Bills—Procedure.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 18, 1941.

HONORABLE EUGENE W. CHELF,
Commonwealth's Attorney,
Salem, Virginia.

DEAR MR. CHELF:

This will acknowledge receipt of your letter of March 17, from which I quote as follows:

"The County School Board of Roanoke County desires to place a revolving fund in the hands of the Clerk of the School Board, and authorize her to pay all bills under $10.00 and all routine bills that come in regularly each month, such as telephone, water, lights, bills for salaries not included in regular payrolls, and bills on which discounts are allowed for prompt payment, all of which bills before being paid to be approved by the Superintendent of Schools, and also to be approved at the next regular meeting of the County School Board. Checks for these bills would be signed only by the Clerk of the Board. The question of the legality of this procedure has
arisen, and the Board would like to have your opinion in the matter. They would also like to know whether it would be necessary to have a specially printed check if the above procedure could be followed."

I direct your attention to section 856 of the Code relating to the duties of the County School Board, and among other things, dealing with the issuance of warrants. That portion of the section which is peculiarly pertinent to your inquiry reads as follows:

"* * * in general, to incur such cost and expenses, but only such costs and expenses as are provided for in its budget without the consent of the tax levying body; to provide for the consolidation of schools and for the transportation of pupils whenever such procedure will contribute to the efficiency of the school system; 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 that are found to be valid. Every warrant issued pursuant to the provisions of this section shall bear the date on which the school board orders it to be issued and shall be made payable on demand, signed by the chairman or acting chairman of the school board, countersigned by the clerk or acting clerk of the school board, and recorded in the form and manner prescribed by the State Board of Education. * * *"

You will observe that the section contemplates that the School Board shall receive and audit all claims and that it shall approve and issue warrants on the county treasurer in settlement of such claims that the Board finds to be valid. Furthermore, the method of issuing warrants is in terms prescribed, namely, that they shall be "signed by the chairman or acting chairman of the school board, countersigned by the clerk or acting clerk * * *.*"

I do not see how the quoted statutory requirements could be complied with by turning over to the clerk what you term "a revolving fund" and allowing the clerk to pay small bills without having the School Board first pass on the claim and without the chairman or acting chairman signing the warrants.

In my opinion, therefore, the procedure suggested by the School Board, as outlined in your letter, may not be adopted in view of the statutory provisions to which I have referred.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Power to Supplement Salary of Division Superintendent.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 17, 1941.

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

MY DEAR DR. HALL:
I am in receipt of your letter of April 10, from which I quote as follows:

"Section 615 of the Code provides for a minimum salary for division superintendents of schools based on the school population of the school division, and the method of payment of same. In addition to such minimum salary, it is likewise provided in this section 'that the local school board may, out
REPORT OF THE ATTORNEY GENERAL

of the local fund, supplement the salary above prescribed and provide for the traveling and office expenses of the superintendent; provided, the specific amounts and the purposes for which such amounts are designated be reported to and approved by the State Board of Education, etc.

"The supplement to the fixed minimum salary, and the traveling and office expenses of the division superintendent, as determined and made by the school board, subject to the approval of the State Board of Education, are items included in the estimate submitted to the board of supervisors as required by section 657 of the Code.

"I am, therefore, asking your opinion on whether or not, in view of the very definite provisions of section 615 of the Code above quoted, a board of supervisors or city council can legally and with effect delete from the estimate submitted, as required by section 657 of the Code, the items of supplement to the minimum salary and traveling and office expenses of the superintendent of schools, which items are included in said estimate on the advice of and approved by the school board."

It is unquestionably true, and this office has heretofore so held, that the board of supervisors is not bound to accept estimates of the school budget in fixing the amount of the school levy. Furthermore, section 656 of the Code provides that the school board may 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. However, section 615 of the Code provides that:

"The local school board may, out of the local fund, supplement the salary above prescribed and provide for the traveling and office expenses of the superintendent, provided the specific amounts and the purpose for which such amounts are designated be reported to and approved by the State Board of Education * * * ."

The language which I have just quoted deals specifically with the authority of the local school board to supplement the salary and provide for the traveling and office expenses of the superintendent, and when this language dealing with this particular subject is read together with the general language to which I have referred in section 656 of the Code, it is my opinion that it must be treated as an exception to the general language in section 656.

It is my view, therefore, that, if the funds are available, the local school board may, as authorized by section 615 of the Code, supplement out of the local school fund the salary of the division superintendent and provide for traveling and office expenses, if such action is reported to and approved by the State Board of Education.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Power of Outgoing Board to Employ Principal of School.

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

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

MY DEAR MR. HICKMAN:

I am in receipt of your letter of August 30, relative to the authority of an outgoing school board to employ the principal of one of the county high schools.

While I personally think that the question is not at all free from doubt, I
am informed that one of the circuit courts of the State has recently held that an outgoing board does have authority to employ teachers for the term 1940-1941, my information being that the decision was based principally upon the fact that this has been the general practice in the State. So far as I know, the decision referred to has been accepted, and I suggest that it may be used as authority in the case you present.

Referring to your second question, I do not think there can be any doubt about the fact that in the case you present the estate of the deceased person who has been receiving old age assistance is liable for the amount of assistance that has been paid to the decedent, especially since you state that there is sufficient money in the estate to pay the claim.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Power to Contract for Five-Year Insurance Policy.

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

MR. K. P. BIRCKHEAD,
Superintendent,
Washington County School Board,
Abingdon, Virginia.

MY DEAR MR. BIRCKHEAD:

This is in reply to your request of August 17, for my opinion upon the question whether or not the school board of your county would have authority to contract for a five-year fire insurance policy with the premiums payable annually, under the plan submitted in a letter from J. G. Penn Agency, Inc.

It appears from said letter that these policies are cancelable at any time and that the failure to make an annual payment would not result in any further liability inasmuch as the policy would be cancelled. It further appears that under this method of purchasing the insurance there will be a net saving to the county over a five-year period of $2,202.68 in premiums.

In view of the cancelable provision above referred to, it is my opinion that the school board may lawfully enter into a contract of this kind for the five-year period.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Temporary Loans.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 27, 1941.

Hon. John W. Gillespie,
Commonwealth's Attorney,
Tazewell, Virginia.

MY DEAR MR. GILLESPIE:

I am in receipt of your letter of June 18, in which you ask the following question:
“The county school board is very desirous of attaining a site for a schoolhouse in the town of Cedar Bluff in this county. As is usually the case, the school board does not have sufficient funds for the purchase of these two sites.

“The board of supervisors has authorized the school board to borrow $10,000 with which to pay for these two sites which is to be repaid out of money to be derived from the sale of bonds to be issued in the future.

“I would appreciate it if you would advise me whether or not the school board has the right to contract this debt.”

Section 675 of the Code provides for the making of temporary loans by the school board with the consent of the board of supervisors. The section further specifies conditions for the loan; among others, that the loan shall be repaid within one year of its date. I know of no reason why the loan you describe cannot be made under this section. However, I do not think it would be proper to condition the repayment of the loan upon a bond issue that may or may not be authorized within a year. If the school authorities and the board of supervisors approve of the loan, I see no reason why it cannot be made under the terms of the section without specifying the manner in which it shall be repaid.

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

SCHOOL BOARDS—Temporary Loans—Amount of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 13, 1941.

HONORABLE PHILIP KOHAN,
Commonwealth's Attorney,
Buchanan, Virginia.

MY DEAR MR. KOHAN:
I am in receipt of your letter of June 11, in which you refer to section 675 of the Code, providing for temporary loans to be made by the county school boards, and ask whether the amount of such a temporary loan is limited by the section to one-half of the amount of money actually raised under the school levy, or one-half of the amount which would be raised if all of the taxes were paid, that is to say, there being no delinquents at all.

The purpose of the statute is obviously to allow the school board, with the consent of the board of supervisors, to make a temporary loan in any year in anticipation of the revenue for that year. Since taxes do not have to be paid until December 5, if the statute were construed to allow the board to borrow an amount equal to one-half of the amount of taxes actually paid, the purpose of the statute would be defeated since it would not be known until considerably after December 5 what amount of taxes would be actually collected during the year.

While the use of the word "produced" in the statute may be a little unfortunate, in my opinion, the plain intent of the borrowing provision is to allow the school board to borrow an amount equal to one-half of the amount which the school levy would raise if all taxes were paid.

Very sincerely yours,
ABRAM P. STAPLES,
Attorney General.
SCHOOL BOARDS—Tuition—Children Placed by Public Welfare Department.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 6, 1941.

HON. PAUL E. BROWN,
Commonwealth’s Attorney for Fairfax County,
Fairfax, Virginia.

MY DEAR MR. BROWN:

My reply to your letter of May 20 has been delayed as I desired to confer with Dr. Sidney B. Hall, Superintendent of Public Instruction, before writing you.

Specifically answering your question, I must say that I know of no statute which authorizes the School Board of Fairfax County to charge tuition for the children described in your letter, nor has the State Board of Education adopted any regulation concerning the charging of tuition in such cases.

I quote below from Dr. Hall’s comment on the situation described by you:

"The State Board of Education has no regulation concerning the charging of tuition to children placed in homes of individuals by the Public Welfare Department. I personally am of the opinion that the position taken by the former Attorney General is a sound one. When taxpayers within a county accept children placed in their homes by the Welfare Department and receive compensation for so doing, they are, in reality, serving in loco parentis, and therefore are serving, in reality, as the parents of these children. I cannot see any reason why the county should not assume the responsibility of admitting these children to their public schools without tuition charges."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Warrants of—Who Must Sign.

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

HONORABLE W. M. McFALL,
Treasurer of Dickerson County,
Clintwood, Virginia.

MY DEAR MR. McFALL:

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

"Mr. Virgil F. Skeen, Chairman of the School Board, and Mr. J. H. T. Sutherland, Superintendent of Schools, are having some trouble in deciding who is the clerk of the School Board. Mrs. Catherine C. Remines or Mrs. Oma Baker. Mrs. Catherine C. Remines was elected by the School Board in July for one month only upon the recommendation of the superintendent, and at the end of the month the School Board elected Mrs. Oma Baker, but the superintendent did not recommend Mrs. Baker, and Mrs. Baker is now holding the position as clerk of the School Board."
"We have a number of claims to be issued by the School Board, and will it be legal for me to accept claims for payment issued by the clerk, elected by the School Board (Mrs. Oma Baker), signed by the superintendent of schools and chairman of the School Board?"

Section 656 of the Code as to the issuance of school board warrants provides in part as follows:

"* * * every warrant issued pursuant to the provisions of this section shall bear the date on which the school board orders it to be issued and shall be made payable on demand, signed by the chairman or acting chairman of the school board, countersigned by the clerk or acting clerk of the school board, and recorded in the form and manner prescribed by the State Board of Education. * * *"

You will observe that the warrants may be signed by the clerk or acting clerk of the school board. If the warrants which have been presented to you have been signed either by the clerk or the acting clerk and comply with the other requirements of the section, I am of the opinion that you may honor them. The question of who is the acting clerk is more one of fact than of law, and I suggest that you be guided in this respect by the advice of the school board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Suspension Pending Medical Treatment.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 3, 1941.

HONORABLE L. H. SHRADER,
Trial Justice,
Amherst, Virginia.

MY DEAR MR. SCHRADER:

I am in receipt of your letter of January 2, in which you ask the following question:

"Please advise me whether or not as Trial Justice of Amherst County, after I have convicted a man and sentenced him to jail for a period of six months, I have authority and power to permit him to leave the jail for the purpose of going to Lynchburg to see his doctor for treatment."

It seems to me that the reply to your question is contained in section 1922-b of the Code as amended in 1938 (Acts 1938, page 189). This section now provides:

"In case the prisoner has been sentenced for a misdemeanor and committed, the court, or the judge of such court in vacation, may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

The section then goes on to provide that the court may subsequently increase or decrease the probation period and may revoke or modify the conditions of the probation.
REPORT OF THE ATTORNEY GENERAL

In my opinion, the language of the section is now broad enough for you to allow the prisoner sentenced by you to jail to leave the jail for the purpose you mention upon such conditions as may appear to you proper to insure his return to jail.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation—For Notifying Jurors to Appear on a Different Date.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 27, 1940.

HONORABLE C. CARTER LEE,
Commonwealth’s Attorney,
Rocky Mount, Virginia.

Dear Mr. Lee:
This is in reply to your letter of November 25, in which you state as follows:

“Frequently we have a criminal case set for trial on a particular date. Sometimes before the date set for the trial, the defendant pleads guilty, or for some reason the case is continued, but the jury has already been told to be back on that date. It is possible to send the sheriff to stop the jury and save considerable expense. I will appreciate it very much if you will advise me whether or not under Section 4960 it is permissible for the court to make a reasonable allowance for the travel of the sheriff in stopping a jury from coming on a particular date when the case is not to be tried on that date. It is possible many times for the sheriff to go and notify the jurors not to appear, but time enough is not available to notify the jurors by mail or telephone, or rather the jurors do not have telephones.”

Section 4960 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 such case is, may allow therefor what it deems reasonable and such allowance shall be paid out of the treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service.”

In my opinion this service of the sheriff in notifying jurors that it is not necessary to appear on a certain date is such a service in a criminal case for which the court may, in its discretion, make a reasonable allowance under section 4960.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation—Service Outside of County in Criminal Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 15, 1940.

Mr. A. S. White,
Sheriff of York County,
Yorktown, Virginia.

My dear Mr. White:
I am in receipt of your letter of July 12, in which you inquire as to your compensation for going out of your county to perform a service in a criminal case.
In my opinion this matter is controlled by section 4960 of the Code of Virginia. This section was amended twice in 1940, one amendment appearing at page 42 of the Acts of 1940 and the other amendment appearing at page 617 of the same Acts. Under this section you may receive such compensation as your court may certify to be reasonable. The section provides, among other things, that not more than eight cents per mile shall be allowed an officer using an automobile for travel.

In connection with the two amendments to the same section, this office has heretofore expressed the opinion that all of the matters contained in one section which were omitted from the other should be given effect except where there is conflict in direct affirmative provisions of the two Acts, in which case the provisions of the last Act, as approved, would prevail over conflicting affirmative provisions in the first Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation for Delivery of Election Lists—Section 109 of Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1940.

HONORABLE PAUL E. BROWN,
Attorney for the Commonwealth,
Fairfax, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of July 19, in which you inquire as to the compensation a sheriff should receive for performing the duties placed upon such officer under section 111 of the Code, namely, delivering a certified copy of the list prescribed by section 109 of the Code to one of the judges of election of each precinct.

I am unable to find any statute which prescribes any compensation to the sheriff for this service. Indeed section 111 does not impose upon the sheriff the duty of delivering this list to one of the judges of election of each precinct, but says this list shall be delivered by the clerk or caused to be delivered by him. It may be the practice for the sheriff to deliver this list at the request of the clerk, but certainly there seems to be no compensation provided for the sheriff for doing this work.

I note that my conclusion agrees with the one you have reached.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation for Executing Warrant Under Section 1021 of Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 27, 1940.

MR. E. J. MARTIN,
City Sergeant,
Charlottesville, Virginia.

MY DEAR MR. MARTIN:

I am in receipt of your letter of July 24, and in reply thereto I will advise that in my opinion under section 1021 of the Code a sheriff executing a warrant under
that section is entitled to a fee of $1.50 and to a fee of 40 cents for summoning each physician and witness. This is in accordance with the previous ruling of this office.

In reply to your second question, I beg to advise that section 1021 expressly provides that all expenses incurred, including fees, are to be paid by the county or city of which the person was a legal resident at the time of commitment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Compensation—Board of Prisoner Violating Federal Law.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 23, 1941.

HONORABLE LEROY HODGES,
State Comptroller,
Richmond, Virginia.

DEAR COLONEL HODGES:
I am in receipt of your letter of January 8, from which I quote as follows:

"I am forwarding to you herewith a letter I have received from the Procurement Officer for Selective Services in Virginia, Lt. Col. W. W. LaPrade, with three attached communications relating to a claim made by the Sheriff of Orange County for one month's board of a prisoner held as a delinquent under the Selective Training and Service Act of 1940 for the Orange County Local Board."

I have been able to find no statute which authorizes the payment of this claim out of the State treasury. No violation of State law is involved and I can find no authority for you to make the payment. I should like to be able to advise you that the sheriff may be compensated for the board of this prisoner, but I am unable to do so. It is possible that, if the matter is taken up with the Federal authorities, they may be able to find some way to compensate this officer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1941.

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

MY DEAR MR. LEE:
Your letter of January 29 has been received in the absence of Senator Staples. Observing that you desire a prompt response, I am taking the liberty of replying.

Your first question is:

"A last sentence of section 3487 of the Code of Virginia provides that 'an officer receiving payment in money or selling goods shall receive a like
commission of ten per centum on the first one hundred dollars of the money paid or proceeding from the sale, and two per centum on the residue, except that when such payment or sale is on an execution on a forthcoming bond his commission shall only be half what it would be if the execution were not on such bond. This act was amended and repassed in 1936. Section 2561 of the Code provides that a sheriff shall be entitled to a commission of five per cent on the amount collected by virtue of a capias pro fine.

"We have quite a few capias pro fines out, and I have advised the officer to collect the commission pursuant to section 3487 of the Code of Virginia. Am I correct in this? I take the position that the 1936 Act supersedes the 1887 Code provision."

This office has uniformly taken the position that section 3487 of the Code deals with fees and commissions in civil cases. However that may be, section 2561 of the Code specifically provides that the sheriff shall be entitled to a commission of five per cent on the amount collected under a capias pro fine. Section 3487 does not in terms deal with the commissions of a sheriff for a collection made under a capias pro fine. Inasmuch as section 2561 deals specifically with the question involved and it is not so covered by section 3487, in my opinion section 2561 prevails. Both sections were originally carried in the Code of 1887 and it is, therefore, my view that section 3487 should not be construed to cover the commissions of a sheriff in a collection made under a capias pro fine unless the section is amended so as to in terms so provide.

You next ask if an officer who arrests a prisoner and carries him to jail under a capias pro fine is entitled to an arrest fee and mileage.

In my opinion, this question must be answered in the affirmative, that is to say, the officer is entitled to the fee and mileage prescribed by section 3508 of the Code, such fee and mileage to be taxed against the defendant as a part of the costs. If after the defendant is put in jail under the capias pro fine he then desires to pay the fine, in my opinion the fine should be paid to the clerk of the court. See section 2562 of the Code.

Very sincerely yours,

W. W. MARTIN,
Assistant Attorney General.

SHERIFFS—Right to Fees for Services Rendered Commonwealth.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 27, 1941.

HONORABLE CHAS. C. CURTIS,
Sheriff of Elizabeth City County,
Hampton, Virginia.

DEAR MR. CURTIS:

This is in reply to your letter of March 21, in which you request my opinion upon the question whether or not a sheriff is entitled to be paid a fee by the Commonwealth of Virginia in cases where he is requested to serve a process or notice of motion for judgment to collect unpaid taxes.

Section 3493 of the Code provides as follows:

"No clerk, sheriff, sergeant or other officer shall receive payment out of the treasury for any services rendered in cases of the Commonwealth, except where it is allowed by this or some other chapter."

The foregoing provision raises the question whether chapter 135 of the Code, of which it is a part, or any other chapter makes an allowance of a fee for a service of the nature to which you refer.
It is my opinion that the said quoted section prohibits the payment of any fee to any of the named officers for any type of service rendered, unless there is a specific statutory provision for the payment of the fee therefor.

Section 3487 of the Code, which is a part of said chapter 135, allows a fee of seventy-five cents to a sheriff for service of a notice, summons, or any other civil process, with certain exceptions not here material.

Section 3489 of the Code, which is also a part of said chapter 135, provides that when a sheriff shall be required to serve a notice or other process in a civil case, and shall, after due effort and without fault, be unable to locate such person or make service of such process in some method provided by law, there shall be paid to such officer the same fee provided by law for serving the same; provided, however, that such officer, when he returns such paper unexecuted, shall make and file therewith an affidavit setting forth the fact that he has made diligent effort to execute such paper and without avail.

It is clear, therefore, that chapter 135 of the Code provides for a sheriff the fee of seventy-five cents, provided he has made diligent effort to serve the notice, and, upon returning the process unexecuted, files therewith the required affidavit as provided in said section 3489.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Minimum Allowance Out of County Treasury.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., April 15, 1941.

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

MY DEAR MR. WHITE:

This will acknowledge receipt of your letter of April 11, in which you refer to section 2726 of the Code, fixing allowances to officers including sheriffs. You state that prior to the 1940 census the county of Augusta had a population of less than forty thousand, but that census fixes the population of the county at more than forty thousand. You further state that the sheriff's contention is "that the increase in population as shown by the last census automatically governs his compensation."

The section in question provides in part that the board of supervisors "shall have power * * * to determine what annual allowances, payable out of the county treasury, shall be made severally to the sheriffs * * *." The section then goes on to provide in effect that the allowance to such officers in counties containing more than forty thousand inhabitants "shall not be less than" a thousand nor more than fifteen hundred dollars.

In view of the language of the section and especially that portion of it providing that the compensation "shall not be less than" a thousand dollars, in my opinion, the language of the section is mandatory and the statute requires the board of supervisors to fix the sheriff's allowance at not less than a thousand dollars. I do not think the new allowance can be paid, however, without the action of the board of supervisors, since the first part of section 2726 provides that the board shall determine what the allowance shall be within the minimum and maximum fixed by the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SHERIFFS, SERGEANTS AND CONSTABLES—Deputy Sheriffs—Eligibility for Office—Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 14, 1941.

HON. ALTON I. CROWELL,
Attorney for the Commonwealth,
Pulaski, Virginia.

MY DEAR MR. CROWELL:
I am in receipt of your letter of May 13, in which you ask if a person is eligible to the office of deputy sheriff of Pulaski county who is not a resident of such county.

I direct your attention to section 2703 of the Code providing that every county officer shall at the time of his election or appointment have resided one year next preceding his election or appointment either in the county for which he is elected or appointed or in the city wherein the courthouse of said county is located. It seems to me that this section prevents the appointment of a non-resident of the county of Pulaski as a deputy sheriff of such county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Fees—When No Arrest Made.

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

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

MY DEAR MR. McNEIL:
I am in receipt of your letter of November 28, in which you state that—

"To a limited extent it has been the practice for the sheriff of this county or his deputy to take a criminal warrant charging a misdemeanor and locate the accused and give him a verbal notice to appear in the trial justice court to answer the charge contained in the said warrant, instead of placing the accused under arrest and bringing him or her to a justice or other officer for admission to bail or committal to jail pending trial. * * *"

You then ask:

"Is the officer entitled to any mileage in the above case, the same as if he made an arrest and carried the prisoner before a justice or to jail?"

I know of no statute allowing mileage in such a case nor do I see how mileage could be allowed for carrying a prisoner to jail if the service was not rendered.

Very sincerely yours,

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

SHERIFFS, SERGEANTS AND CONSTABLES—Fees—Arrest—Execution of Search Warrant.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 17, 1941.

MR. G. M. GILKESON,
Sheriff of Augusta County,
Staunton, Virginia.

MY DEAR MR. GILKESON:
I am in receipt of your letter of June 10, in which you ask a number of questions relative to fees of officers, which questions I will endeavor to answer seriatim.

"If a warrant charging an offense is placed in the hands of a fee officer and that officer instead of bringing the defendant in chooses to summon him, what is the proper fee for the officer to charge, bearing in mind that the officer has arrested the defendant. Would the officer be entitled to mileage?"

An officer to whom a proper warrant of arrest is directed should comply with the terms thereof. I know of no authority that an officer has to vary the terms of the warrant by simply summoning the defendant named in the warrant. In my opinion, such action would not constitute an arrest within the terms of the warrant and the officer, therefore, would be entitled to no arrest fee nor would he be entitled to any mileage.

"If a charge of one dollar is made by a fee officer for executing a search warrant and stolen property is found and the party in whose possession it was, is arrested and brought to jail, and warrant issued charging an offense, is the officer entitled to charge the arrest fee and mileage."

Section 3508 of the Code provides for a fee of $1 "for executing a search warrant." By statute (section 4821 of the Code) it is provided that a search warrant shall command the officer, among other things, to bring the person in whose possession the goods are found before a justice or court having cognizance of the case. In view of the specific provision as to what a search warrant shall command, I am of opinion that the fee fixed by section 3508 for executing a search warrant covers all services that an officer performs thereunder. I do not see how compliance with the direction that the person having possession of the goods shall be brought before the justice can be said to constitute an arrest, since such person is not charged with any crime. I may add that after the person is brought before the justice, if that officer sees fit to swear out a warrant against such person charging him with a crime, then if an arrest is made the officer would be entitled to the fee therefor and to the mileage provided for carrying the prisoner to jail.

"Is a fee officer in Augusta County entitled to a fee for an arrest in case of a violation of the Motor Vehicle Act."

This question is a more or less difficult one and, in my opinion, cannot be categorically answered. For your information, I am enclosing a copy of a letter which I wrote under date of December 31, 1940, to Honorable L. McCarthy Downs, which will give you the views of this office.

"Can a fee officer in Augusta County charge to the State of Virginia an arrest fee and mileage when he has made an arrest on a City of Staunton warrant charging a felony, and the defendant fails to pay the cost, if so should he put the account in to the State through the Augusta County Circuit Court or the Corporation Court of the City of Staunton."

158
It is not clear to me what you mean by a "City of Staunton warrant". Do you mean a warrant issued by the police justice or judge of the Circuit Court of the City of Staunton addressed to the sheriff of Augusta County or such a warrant addressed to a police officer of Staunton? How does the warrant come to the sheriff? Is the arrest made within the city, or within one mile of its corporate limits or in other parts of the county? Please advise me on these questions.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Mileage Fees.

MAYORS—Jurisdiction to Try Offenses Against Town Ordinances.

JAILS AND PRISONERS—Board of Prisoners Convicted of State Offenses.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 23, 1940.

HONORABLE L. BROOKS SMITH,
Trial Justice,
Accomac, Virginia.

My dear Mr. Smith:
I am in receipt of your letter of October 22, in which you inquire as to the amount of mileage allowed a sheriff for carrying a prisoner to jail. You state that your problem is to reconcile section 3487 and section 3508 of the Code. This office has uniformly expressed the opinion over a period of years that this allowance is controlled by section 3508 of the Code, inasmuch as section 3487 deals with civil cases.

Your second question is as follows:

"Section 4987f (12) says that the mayor may try cases if the town council so elects and this authority with section 3011 seems to give them ample authority. Assuming that the town decides to do this, can they then send to the trial justice some cases that they do not wish to try, for reasons best known to them; in other words, if they elect to try criminal cases for the violation of town ordinances in some cases, are they not compelled to try all such cases. If the trial justice does try such criminal cases on state warrants for let us say 'drunk and disorderly' from the incorporated towns, and the defendant is unable to pay his fine and costs and has to go to jail, who is to pay his expense, the State or the town in question?"

You will observe that subsection (12) of section 4987f provides that the town council may continue in the mayor or other trial officer thereof all jurisdiction now vested in such mayor for the trial of cases involving violations of city and town ordinances. However, the section does not provide that the mayor shall have exclusive jurisdiction involving violations of town ordinances where the proper resolution has been adopted by the council. Nor does section 3011 provide that the mayor shall have exclusive jurisdiction in cases of violations of town ordinances. It is my view, therefore, that the trial justice of a county and the mayor of a town have concurrent jurisdiction in cases involving violation of the ordinances of a town located in the county.

It is my further view that, where the warrant charging a violation of a town ordinance is issued by a trial justice, this warrant should be tried by the trial justice and, where the warrant is issued by the mayor of a town, it should be tried by the mayor. The general law is not as clear as it might be, but section 4987-f, subsection 7, does provide that warrants issued by a trial justice shall be
returnable before such officer. It does not provide that, where a mayor has authority to try violations of town ordinances and issues warrants for such violations, such warrants shall be made returnable before the trial justice; as stated above, I am of the opinion that such warrants issued by the mayor should be made returnable before him.

The opinion I am expressing on this question, of course, is based on general law and, if there are any charter provisions to the contrary in any particular town, they must, of course, be taken into consideration.

If a prisoner is tried on a warrant charging a violation of a State law and is sent to jail, then I am of opinion that the expense of keeping him in jail should be borne by the State. Of course, if a town ordinance is involved, no expense should be charged to the State.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

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COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 15, 1940.

Mr. A. S. White,
Sheriff of York County,
Yorktown, Virginia.

My dear Mr. White:

I am in receipt of your letter of July 12, from which I quote as follows:

"Section 4676 of the Code of Virginia provides that in the confiscation of money in slot machines and other like instruments the party making the seizure shall, by an order of this court, receive half of the money in said seizure and the other half shall go to the Commonwealth."

"I made such a seizure in November and collected in one instance $38.18 and in another $19.14 and turned the money over to the trial justice of this county and he in turn paid the money over to the clerk of this court and he paid it to the Commonwealth."

"I have been told that you have construed section 4676 and your construction is that all this money should go to the Commonwealth. Will you please send me a copy of that opinion? If for any reason you haven't construed section 4676, will you please do so and send me your opinion?"

This office has heretofore ruled that, where a sheriff makes a seizure under section 4676 of the Code of Virginia of money seized in a gambling machine, the sheriff is entitled to one-half of said money. However, I observe from your letter that the money that you seized was found in a slot machine. Section 4694-a of the Code (1938 Supplement to Michie's Code of 1936) provides that money seized in a slot machine which is being illegally used shall be forfeited to the Commonwealth. In other words, this section, unlike section 4676, does not provide for one-half of the money to go to the officer making the seizure. Section 4694-a deals exclusively with slot machines and, where it is in conflict with section 4676, I am of opinion that it prevails. My conclusion is, therefore, that all of the money seized by you in a slot machine is forfeited to the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE AGENCIES—Tort Liabilities.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 10, 1940.

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

My dear Dr. Duke:

I have your letter of December 9, enclosing for my comment a letter from Mr. Dale F. Reese, Vice President of the Hartford Steam Boiler Inspection and Insurance Company, addressed to Mr. D. W. Little, Manager, at Baltimore, Maryland.

Mr. Reese seems to take the view that the amendment with respect to the endorsement relating to the waiver of governmental immunity is not in the interest of the assured. The reason he gives is that the College might be thereby prevented from interposing this defense in cases where the damages claimed exceed the amount of the indemnity contracted for.

I cannot agree with this view. The mere fact that the insurance company is not authorized to interpose this defense does not in any way prevent the College itself from making the defense at any time it sees fit. I do not think that the College should have imposed upon it the obligation of affirmatively requesting that the defense of immunity be not interposed. The general purpose of the indemnity is for the protection of the public and it will be a very rare case in which it is desired to have any such defense made. However, in the event the College should, through oversight, fail to notify the insurance company that it did not desire the immunity to be relied on, nevertheless the insurance company would have the right under the policy to claim such immunity.

I do not think there would be any difficulty in restricting the amount of damages claimed by any persons injured to the amount of the indemnity, if the attorneys representing the injured persons have explained to them that if there is such an excess in the amount claimed it may result in the College claiming its governmental immunity. I had an experience of this kind some months ago and there was no difficulty in having the damages claimed held within the indemnity provided for by the insurance.

Sincerely yours.

ABRAM P. STAPLES,
Attorney General.

STATE AGENCIES—Tort Liabilities.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 9, 1940.

DR. ROWLAND EGER,
Director of the Budget,
Governor's Office,
Richmond, Virginia.

Dear Doctor Eger:

This is in reply to your letter of December 9, with which you enclose a copy of certain correspondence with Dr. Samuel Duke, President of Madison College, and also a copy of a letter from the Commissioner of Insurance.

This office recently received a letter from Dr. Duke, dated November 12, inquiring as to the advisability of having inserted in a policy of this kind a clause
waiving the immunity which Madison College would have as a governmental agency. I am enclosing herewith a copy of our reply to Dr. Duke's letter.

In our letter to Dr. Duke, we made certain changes in the clause which the insurance company had suggested, and in my opinion the clause set out in the letter to Dr. Duke is adequate to make effective the policy as a protection to third parties who may be injured by an accident resulting from a boiler explosion. I have always recommended the insertion of a similar clause in automobile liability policies carried by the State Highway Department, the Division of Motor Vehicles, and any other State agency carrying liability insurance.

The insertion of such a clause in a liability policy would not affect the right of the State agency to set up governmental immunity should it so desire, nor does it impose any additional work upon the Attorney General's office to defend such cases unless the damages claimed as a result of the explosion and accident should be in excess of the total liability covered by the policy. In my opinion, it is very important that a clause of the type set out in my letter to Dr. Duke should be included in all liability policies carried by any State agency, the purpose of which is to protect the public against damages from negligence on the part of any State employee.

As to the question of policy, it seems to me that this is a question which each Institution will have to decide for itself, but it has long been the practice of the Department of Highways and the Division of Motor Vehicles to carry liability insurance for the protection of the general public. In the absence of such insurance, the only redress a person injured would have would be through an appropriation for his relief made by the General Assembly. As to the amount of total coverage, I feel that this also is a question which should be determined by each Institution in the light of existing conditions at such Institution.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General

STATE BOARD OF EDUCATION—Powers—To Pay an Acting Superintendent Employed by Local School Board.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General, Richmond, Va., June 13, 1941.

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

My dear Dr. Hall: This will acknowledge receipt of your letter of June 12, in which you quote the following resolution of the State Board of Education asking for the opinion of the Attorney General:

"Salary of Mr. A. C. Turner, Former Acting Superintendent in Patrick County—Attention of the Board was called to the fact that when a vacancy occurred in the superintendency in Patrick County, due to the death of Supt. J. F. Reynolds, on November 12, 1940, the board of said county duly appointed Mr. A. C. Turner, one of its members, as acting superintendent until such time as a superintendent could be elected. He served in this capacity from November 12, 1940, until February 15, 1941, when Mr. C. J. M. Kyle, newly elected superintendent, took office. The basis salary of Mr. Reynolds paid jointly by the State Board of Education and the board of supervisors of said county was $2060 per year, or $1030 annually, or a monthly salary of $85.83, from each source. On recommendation of the State Superintendent, and in view of the emergency which existed at the time of the death of the former Superintendent,
the Board authorized the payment of $85.83 per month for three months to Mr. A. C. Turner, former Acting Superintendent of Schools of Patrick County; on the condition that, in the opinion of the Attorney General of Virginia, the payment of such salary is legal."

I know of no reason why the salary should not be paid Mr. Turner as suggested in the resolution. The vacancy in the office of the superintendent of schools occurred during the school session and it seems to me the school board exercised reasonable discretion in employing an acting division superintendent of schools pending the selection of a permanent officer.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 24, 1941.

-Colonel Leroy Hodges,
State Comptroller,
State Finance Building,
Richmond, Virginia.

MY DEAR COLONEL HODGES:

This will acknowledge receipt of your letter of June 18, in which you ask for the opinion of this office as to the legality of a disbursement from the appropriation to the Virginia Polytechnic Institute at Blacksburg covering membership of the Institute in the Virginia State Chamber of Commerce.

This question was raised some years ago in the case of the Virginia Military Institute and my predecessor, the Honorable John R. Saunders, ruled in 1931 that the appropriation made by the General Assembly to the Virginia Military Institute did not cover membership fee of the Institute in the Virginia State Chamber of Commerce. Colonel Saunders also held that "of course, it is not illegal for an institution to become a member of the Chamber of Commerce," the question being whether or not the appropriation to the institution could be construed to warrant the payment of the membership fee.

I am advised that the Virginia Polytechnic Institute has been a member of the State Chamber for a number of years and that the Institute has annually paid its dues, which would indicate that the fiscal officers have been of the opinion that the payment of the dues was a proper disbursement under the appropriation to the Virginia Polytechnic Institute.

It appears that Colonel Saunders' opinion has been followed for a period of about ten years. In view of this long continued administrative practice, I am of opinion that you would be justified in continuing to be governed by this opinion. This means that the question to be determined in each case is whether or not the appropriation to the institution contemplates, either specifically or by reasonable implication, that such a disbursement may be made. This is more a question of fact than of law and one which I suggest can best be determined by the reviewing officers in the light of all the pertinent circumstances in the case of the appropriation to each institution.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE COMPENSATION BOARD—Salary of City Sergeant of Lynchburg—How Fixed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 7, 1940.

Hon. M. A. Hutchinson, Chairman,
State Compensation Board,
Richmond, Virginia.

My dear Mr. Hutchinson:

I am in receipt of your letter of December 4, from which I quote as follows:

"Reference is made to Chapter 380 of the Acts of Assembly of 1936.
This Act when passed applied to the City of Norfolk, and under section 11 the City Council of the City of Lynchburg took action placing that city under the Act.
According to the census of 1930 the population of the City of Lynchburg was 40,661, and according to the census of 1940 the population is 44,470, or 470 beyond the limitations of 44,000 set out in Chapter 380 aforesaid.
You will note that section 3 of the Act provides that 'for the purposes of this Act the population of each city shall be according to the last preceding United States census,' and that section 2a sets forth maximum and minimum salaries with respect to cities having not less than 40,000 inhabitants nor more than 44,000, and in cities having not less than 120,000 nor more than 150,000. You will note also that with the approval of the City Councils or other governing bodies thereof, the provisions of this Act shall apply to all cities having a population of not less than 40,000 nor more than 44,000 inhabitants according to the United States census of 1930.
"In view of the fact that the population of Lynchburg City according to the census of 1940 is 44,470, the question naturally arises whether the Compensation Board should continue to regard Chapter 380 of the Acts of 1936 as applicable to the City of Lynchburg, or whether Lynchburg will now come within the provisions of the general law with respect to City Sergeants who are on a fee basis?"

In my opinion, the Compensation Board should continue to consider Chapter 380 of the Acts of 1936 as applicable to the City of Lynchburg. Lynchburg by the action of its Council brought itself under the Act as prescribed in section 11 thereof. That section expressly provides that the population factor is controlled by the "United States census of 1930". Lynchburg is still a city having a population of not less than 40,000 nor more than 44,000 under the United States census of 1930. Apparently the provision in the Act to which I have referred was added expressly for the purpose of allowing Lynchburg to come in, the controlling factor being the census of 1930.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE DEPARTMENTS—Printing of Reports—Consolidation for Two Years.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 27, 1940.

Hon. Rowland Egger,
Director of the Budget,
Richmond, Virginia.

Dear Dr. Egger:

I have your letter of August 22nd requesting my opinion as to the proper construction of Code section 394 as amended by chapter 157 of the Acts of 1940,
relating to the printing and distribution of annual departmental reports. You ask whether under the statute reports for the two fiscal years 1939-40 and 1940-41 may be consolidated and printed together or whether on the other hand the act requires consolidation of the reports submitted for the two fiscal years which compose the 1940-42 biennium.

Section 394 first requires that the heads of departments, etc., shall furnish their annual reports on or before October 20th of each year. This unquestionably applies to the report for the fiscal year ending some three months theretofore.

Paragraph (a-1) then requires the Director of the Division of Purchase and Printing to:

"Cause the two annual reports of each State department, division, institution or agency submitted during each biennium immediately following a regular session of the General Assembly * * * to be consolidated into a composite bi-ennial report." (Italics supplied)

The statute thereafter provides that such consolidated reports shall be printed and ready for distribution "on the first Wednesday in January next succeeding the biennium for which such reports shall be made." (Italics supplied)

It is apparent that the two annual reports submitted "during" the biennium following a regular session of the General Assembly cannot be in any case reports covering any fiscal biennium, but will necessarily be the reports covering the second year of one biennium and the first year of another, respectively. Hence the requirement that such "biennial" reports shall be ready for distribution in January "next succeeding the biennium for which" such reports are made cannot be construed to refer to a fiscal biennium, if the statute is to be given effect at all.

It is my opinion, therefore, from a consideration of the entire statute that the reports submitted in October of 1940 and October of 1941 should be consolidated and printed together, and made ready for distribution on or before the first Wednesday in January, 1942.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE HOSPITALS—Committed Patients—Sufficiency of Commitment Papers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 26, 1941.

Dr. G. B. Arnold, Superintendent,
Lynchburg State Colony,
Colony, Virginia.

My dear Dr. Arnold:

This is in response to your two letters of June 20, requesting the opinion of this office on certain questions relating to the commitment of patients to your institution.

You first ask whether a patient should be deemed lawfully committed when it appears from his commitment papers and information subsequently obtained by you that the witnesses at the lunacy commission declined to make oath to their testimony on the ground that none of them "knew the patient sufficiently well to be willing to make statements about him under oath."

Section 1026 of the Virginia Code (Michie 1936) requires that the superintendent of the hospital or colony to which a patient is committed shall examine the commitment papers and send for and receive the patient if such papers "are
found to be in conformity with the law and contain evidence of insanity, epilepsy, feeble-mindedness, or inebriety, as the case may be."

Section 1017 of the Code requires that "the depositions of all witnesses, physicians, etc., shall be taken under oath and transcribed in writing."

Under these statutes it is my opinion that the superintendent of a hospital or colony, in reviewing particular commitment papers, should not consider any unsworn statements of witnesses. If, however, the remaining portion of the commitment papers contains, independently of such unsworn statements, evidence of insanity, epilepsy, feeble-mindedness, or inebriety, it is my opinion that the patient should be considered as duly committed, and such unsworn evidence should be treated as mere surplusage.

You also ask whether it is essential to the validity of commitment proceedings that a warrant be issued and returned executed in cases where the patient's attendance is secured without legal process and there is hence no practical necessity for a warrant.

Code section 1017 provides that a lunacy commission shall be formed by the judge or justice by summoning two physicians before whom, together with the judge or justice, the person suspected of lunacy is to be brought pursuant to a warrant. I note from the specimen enclosed with your letter that the commitment form prescribed by the State Hospital Board pursuant to section 1018 includes in a single writ the summons to the two physicians and the warrant for the subject's arrest.

In my opinion the issuance and execution of this writ as to the two physicians might well be deemed essential to the formation of a legal commission with jurisdiction to act. Likewise the statutes might well be construed to require that such a writ, returned executed, appear as conclusive evidence that the suspected person was in fact present. Accordingly, it is my opinion that the superintendent of a hospital or colony should not send for or receive any patient whose commitment papers do not include this writ returned executed.

Very truly yours,
ABRAM P. STAPLES,
Attorney General.

STATE LIBRARY BOARD—Authority to Sponsor State-Wide W. P. A. Library Project.

STATE BOARD OF EDUCATION—Authority to Sponsor State-Wide W. P. A. Library Project.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 5, 1940.

HONORABLE WILMER L. HALL,
State Librarian.

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

GENTLEMEN:

On October 30, there was addressed to me by Honorable Wilmer L. Hall, State Librarian, a letter requesting my opinion upon the question of the legal authority of the State Library Board of Virginia to act as sponsor for a State-wide library project to be financed by the Works Progress Administration. On November 8, a similar request was addressed to me by Dr. Sidney B. Hall, Superintendent of Public Instruction. For reasons hereinafter stated, I am making this a joint reply to both requests.

As I understand the Federal regulations pertaining to the sponsorship by a State agency of a library project to be financed by funds of the Works Progress
Administration the State agency is not permitted to sponsor any activity in which it itself is not legally authorized to engage. It appears from a project proposal, correspondence, an extract from a report of Miss Agnes D. Crawford, of Washington, D. C., Assistant Director of the Library Section of the Works Progress Administration, and other material, that the proposed activities embrace the following:

1. Cataloging and indexing.
2. Typing and filing index cards.
4. Story telling hours for children.
5. Rearranging books and exhibits when included in a general rearrangement and recataloging.
6. Delivering books to "shut-ins".
7. Opening of reading rooms and circulation of books and magazines to people in isolated communities.
9. Assistants for reference work.
10. Assisting in checking and arranging accumulated materials and duplicates.
11. Checking collections against shelf lists.
12. Preparation of pamphlet, picture, clipping, and photograph collections.
13. Assistance in compilation of bibliographies, concordances, indexes of costumes, portraits, etc.
14. Union or regional lists.
15. Enlargement of library services, such as traveling libraries, package service, etc., where no such services are available.
17. Construction of shelves, tables, desks, etc., in reading rooms.
18. Binding, rebinding and repairing of books and binding and rebinding of magazines, and periodicals, published prior to January 1, 1936.

Another activity which it is proposed to engage in is that of promoting the establishment of new county library systems as authorized by section 365 of the Code of Virginia.

Substantially this same work has been conducted in the past under the joint sponsorship of the State Library Board and the State Board of Education, but it is now desired to separate this sponsorship to the end that each of said agencies may sponsor the particular activities within the fields of their respective authorities. This makes necessary an examination of the statutes to ascertain these respective fields. The entire scope of public library service in Virginia embraces, (a) the State Library at Richmond and its travelling libraries, (b) City Libraries, established pursuant to section 364 of the Code, (c) county and regional library systems authorized by section 365 of the Code, and (d) county and city school libraries established pursuant to section 713 of the Code, as amended by Acts 1938, p. 96.

In order to delineate as clearly as possible the relations and functions of the two State agencies here involved with respect to these several branches of public library service, their authorities and powers will be considered separately.

A. THE STATE LIBRARY BOARD.

1. Relation to the State Library at Richmond.

The State Library Board has plenary powers with respect to the maintenance, operation, government and use of the State Library at Richmond (Code section 351), which the statute provides shall be primarily a library of reference.

All of the above mentioned eighteen sponsorship activities are within the authority of the State Library Board in connection with the State Library at Richmond.
2. Relation to county and city and regional public libraries and county and city school libraries.

These several library activities are grouped together for the reason that the relationship with the Library Board bears to each of them is the same and consists only of what is known as the "travel library" activity. This, I am informed, consists of sending to the above mentioned local libraries collections of books from time to time which are to be returned by the said local libraries in accordance with regulations of the State Library Board.

I can find in the statutes no authority for the State Library Board or the State Librarian to engage in what is termed promotional work; that is, promoting by contacting local authorities and establishment of local county, city or school libraries, which is one of the activities it is desired to have sponsored.

None of the above detailed eighteen sponsorship activities in connection with said local libraries is within the scope of the statutory authority of the State Library Board or the State Librarian.

B. THE STATE BOARD OF EDUCATION.

1. Relation to the State Library at Richmond.

The State Board of Education has no authority whatever with reference to the operation of the State Library at Richmond.

2. Relation to city libraries established pursuant to section 364 of the Code.

The State Board of Education has no authority or jurisdiction whatever with reference to the operation of city libraries.

3. Relation to county and regional library systems authorized by section 365 of the Code.

Where such libraries are established and operated independently of any contract with the local school boards in counties, the State Board of Education has no jurisdiction with respect thereto.

Section 365 of the Code authorizes the trustees of a county or regional library system to enter into contracts with adjacent cities, towns, or State supported institutions of higher learning in the county or region to provide library service on such terms and conditions as shall be mutually acceptable, and authorizes them to contract for library service with a library not owned by a public corporation but maintained for free public use. This section also contains this provision: "The board of trustees of a county free library system or regional free library system may enter into contracts with county or city school boards and boards of school trustees to provide library service for schools".

While the last quoted provision is not entirely satisfactory, in my opinion it contemplates that there may be a joint arrangement under contract between the trustees of a county or regional library system and school boards of counties for the operation of a library to serve jointly the students in the public schools and also the general public. In my opinion, this would authorize a contract for the location of such a joint library in one of the school buildings if space is available, or at such other places as might be agreed upon.

Since under the provisions of section 713 of the Code the school libraries are required to be purchased and cared for under the rules and regulations adopted by the State Board of Education, it would seem that to the extent that the Board might undertake to regulate concerning a jointly operated school library it would have a direct relation thereto. In this connection, it is pertinent to note that, while Acts 1936, page 107 (Michie's Code section 347(11)) declares it to be the public policy of the Commonwealth as a part of its provision for public education to promote the establishment and development of public library service throughout its various political subdivisions, this section would not seem to confer any particular authority upon the State Board of Education.

4. Relation to county and city school libraries established pursuant to section 713 of the Code, as amended by Acts 1938, page 96.

As hereinabove stated, section 713 of the Code provides that the public school libraries shall be purchased and properly cared for under the rules and regulations adopted by the State Board of Education.
REPORT OF THE ATTORNEY GENERAL

In addition to the provisions of said section 713 of the Code, the Appropriation Act for the year 1940, page 792, appropriates the sum of $100,000 for the maintenance of libraries in public schools in accordance with the provisions of said section 713, same to be paid out of the State Treasury, and also an additional $100,000 to be paid only out of the funds received from the localities and from the General Education Board of New York for the maintenance of said libraries. These funds being appropriated to the State Board of Education could be expended by it and under its supervision.

The foregoing constitutes a summary of the general statutory powers of the State Library Board and of the State Board of Education, respectively, with reference to the State Library and local and school libraries of Virginia.

I am advised that it is contemplated that such projects and activities as may be sponsored by either of the two above State-wide agencies in the counties, cities and towns of the State will also have as a joint sponsor the appropriate local authority, such as the councils of cities or towns, in which a city or town library has been established by the trustees of a county or regional library system, or the school boards operating a school library service. Since the State Library Board may provide through its travelling library, books as loans to city and town libraries, and county and regional libraries, it would be legally entitled to act as a joint sponsor with the local authorities in counties and cities in which all such local libraries have already been established.

In my opinion, the State Board of Education being possessed of direct regulatory authority over local school libraries, and to a lesser degree over all libraries operated jointly by the trustees of a county or regional library and the local school boards, said State Board would be the appropriate agency to sponsor activities connected with libraries of these types.

Since the State Board of Education has no legal connection with city or town public libraries, or with county libraries operated independently of school libraries, it is my opinion that the State Library Board would be the appropriate agency to act as joint sponsor with the local library authorities in activities related to libraries of these types, except promotional activities.

I may add that, in cases where county or regional libraries are operated jointly with school libraries under contract with the county school board or boards, such contract would no doubt provide for the extent to which the regulation, management and control of the operation of such joint library service would be vested in the local school boards and the library trustees respectively.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE MILK COMMISSION—Power of Local Board to Expend Funds Collected Without Paying Same into State Treasury.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1940.

Mr. Fred H. Neel, Secretary,
Roanoke Milk Board,
Salem, Virginia.

My dear Mr. Neel:

I am sorry I have been delayed in replying to your letter of September 30, but this is the first opportunity I have had to conclude my review of the opinion given by me to Dr. T. R. Snavely, Chairman of the State Milk Commission, on July 21, 1939, with reference to the handling of the funds of local boards. In the letter of that date to Dr. Snavely, I expressed the opinion that all of the funds collected by the local boards for the payment of their operating expenses should
be paid into the State Treasury and paid out by invoices approved by the State Comptroller, as is the case in all other State agencies.

At the time the statute creating the Milk Commission and Milk Boards was passed in 1934, the method of handling funds by all State agencies was provided for by Acts of 1927, page 107, as amended by Acts of 1928, page 342. This statute is carried forward into Michie's 1936 Code as section 585(69). Subsection (c) of that section 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 * * *."
"All taxes, licenses and other revenue of the State shall be collected by its proper officers, and paid into the State treasury. No money shall be paid out of the State treasury, except in pursuance of appropriations made by law; * * * ."

Unquestionably, the State Milk Commission and the Milk Boards are State agencies, and their revenues derived from the making of assessments constitute revenues of the State. It is clear, therefore, that any statutory provision which would authorize the handling of the funds of the Milk Board without paying same into the State Treasury would be unconstitutional as in violation of the above quoted section.

Furthermore, I call your attention to the fact that the 1940 session of the General Assembly, in recognition of the constitutional and statutory provisions above referred to, appropriated, "For regulating the production and distribution of milk by the local milk boards, in accordance with the provisions of chapter 357 of the acts of assembly of 1934, to be paid only out of the revenues collected and paid into the State treasury, in accordance with the provisions of said act," the sum of $33,780 for each year of the biennium. This appropriation is made to the Milk Commission, which, of course, is the regulatory body in which is vested ultimate authority in regulating the milk business within the scope of the said 1934 Act.

Since the Legislature has seen fit to make the appropriation in this manner, I do not see how it would be possible legally for the funds of the respective Milk Boards to be paid out of the Treasury except upon invoices submitted by the Milk Commission, or its duly authorized agent, to the Comptroller for approval.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE MILK COMMISSION—Power to Regulate Milk Sold on Government Reservation.

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

STATE MILK COMMISSION,
Richmond, Virginia.

GENTLEMEN:

I am in receipt of your letter of November 18, in which you ask for an opinion upon a statement of facts quoted therein and which is quoted by me in full for purposes of reply.

"'Mr. Scott also advised the Commission that there was a construction force operating at Camp Lee, building barracks and other buildings under contract for the United States Government; that a commissary or canteen was being operated by an individual, under a concession from the construction firm, and requested that he be advised as to whether or not he, an operator in the Richmond Market and not licensed in the Petersburg Market, would be violating the rules and regulations should he submit a bid on this milk, in view of the fact that the milk would be sold on a government reservation. The Commission advised Mr. Scott, that it would submit the question to the Attorney General, and would advise him of the ruling of the Attorney General on the question.'"
REPORT OF THE ATTORNEY GENERAL

On account of the fact the United States Government owns acreage in Virginia known as Camp Lee, I do not think that the State Milk Commission has authority to regulate the purchase, sale or delivery of milk from outside the area to parties, official or personal, within the Camp area, and that of consequence the Richmond Dairy, Incorporated, and any and all other persons, firms or corporations may bid on contracts for the sale of milk to the Government, or any commissary or canteen operated by individuals under license from the Government, and that the successful bidder may deliver milk under the terms of a contract award. The Camp Lee property, having been acquired about 1917 for military purposes, by the United States, under the Virginia statutes applicable, the Federal Government has exclusive jurisdiction over such lands in matters of this kind.

Yours very truly,

ABRAM P. STAPLES.
Attorney General.

STATE OFFICERS—What Constitutes—Civil and Police Justice of Suffolk.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., August 15, 1940.

HONORABLE WILLIS E. COHOON,
Member of House of Delegates,
Suffolk, Virginia.

MY DEAR MR. COHOON:

I have your letter of August 5, in which you request my opinion as to whether the Civil and Police Justice of the City of Suffolk, who is also appointed Judge of the Juvenile and Domestic Relations Court for that city under the city charter and under Code section 1953a, is an officer or employee of the State within the terms of Code section 2673 (124).

Section 2673 (124) relates to leaves of absence, compensation, etc., of "all officers and employees of the State" commissioned or enlisted in the military and naval reserves of the United States, and provides that such officers and employees shall be entitled to leaves of absence up to fifteen days in each year for performing active duty in such reserves, "without loss of pay, time, or efficiency rating".

A juvenile and domestic relations judge, appointed to administer and enforce the provisions of chapter 81 of the Code of Virginia, is undoubtedly within the literal meaning of the term "officer of the State". The unmistakable purpose of the statute is to encourage service in the armed forces of the country on the part of public officers and employees, and, in my opinion, it should be liberally construed so as to promote this purpose.

As you point out in your letter, this officer is not compensated directly out of the State treasury, but is paid by the city for which he is appointed. In view of the nature of his duties and powers, however, I do not think that this circumstance alone is sufficient to prevent his being deemed an officer of the State within the meaning of Code section 2673 (124).

It is my opinion, therefore, that the Civil and Police Justice of the City of Suffolk, who is also Juvenile and Domestic Relations Court Judge for that city, is an officer of the State within the meaning of Code section 2673 (124).

Cordially yours,

ABRAM P. STAPLES.
Attorney General.
STATE PORT AUTHORITY—Commissioner Serving as Port Director.

MRS. S. B. SAUNDERS, Secretary,
State Port Authority,
Norfolk, Virginia.

My dear Mrs. Saunders:
The commissioners of the State Port Authority have requested me to write to you upon the question whether or not during the pendency of the vacancy in the office of director of the port it would be lawful for the commissioners of the State Port Authority to elect one of their members to said position.
The statute authorizes the commissioners "to engage the services" of a director of the port. This contemplates a contractual relationship to the authority which is a body corporate. The commissioners, being vested with authority to manage and disburse the funds appropriated to or under the control of the Port Authority, would under the rule uniformly applied by this office in several cases constitute trustees of the fund. Section 4706 of the Code provides as follows:

"If any member of the board of visitors or directors of any State institution, or employee or agent thereof, or any trustee of any public trust or fund, or any salaried officer of any such State institution, or of any such public trust or fund, contract or be interested in any contract with such institution or with the governing authority of such public trust or fund in any manner for furnishing supplies or performing any work for said institution, or for the governing authority of said trust or fund, he shall be fined not exceeding five hundred dollars."

The position of port director is a statutory office, and after an examination of the applicable statutes it does not seem to me that it is compatible with their general provisions or contemplated thereby that the port commissioners are authorized "to engage the services", as the director of the port, of one of the members of the Port Authority or Port Commission.

It is my opinion, however, that, under the general powers of the port commissioners as members of the Port Authority, they might by resolution duly adopted at a properly called meeting authorize and empower the chairman, or some other member of the authority, to perform the necessary duties and acts so that the State Authority may properly function during the period of the vacancy in the office of port director. Should this practice be followed, it would be wise at each meeting of the port commissioners to ratify and approve such acts as might be performed by the designated member pursuant to the authority conferred on him by said resolution during the time since the last preceding meeting of the members of the authority.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATUTES—Construction of—Amendment of by Two Separate Acts at Same Session.

HONORABLE LeROY HODGES,
State Comptroller,
Richmond, Virginia.

Dear Colonel Hodges:
This is in reply to your letter of July 12, in which you call my attention to
chapters 36 and 349 of the Acts of 1940, each of which amends the same sections of the Code.

At the time these Acts were before the Governor for consideration as to whether or not he would approve same, I had a discussion with Mr. Shands, Director of the Division of Statutory Research and Drafting, and we reached the conclusion that the two Acts should be construed together and harmonized except in so far as they were utterly inconsistent.

It was our conclusion, and is now my opinion, that all matter contained in one Act which is omitted from the other should be given effect, and that only in case where there is a conflict in the direct affirmative provisions will there be any necessity for undertaking to give precedence to the one or the other. In such cases, however, the provisions contained in the Act last approved, which is chapter 349, would prevail over conflicting affirmative provisions contained in chapter 36 of said Acts.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Assessment of Real Estate Taxes—Effective Date of Changes Made by Equalization Board.

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

HONORABLE A. O. LYNCH,
Attorney for the Commonwealth,
Norfolk, Virginia.

MY DEAR MR. LYNCH:
I am in receipt of your letter of October 2, from which I quote as follows:

"There was a general re-assessment of real estate in Norfolk county in 1939. Under the law at that time there was no authority for an equalization board, but section 344 of the Tax Code was amended by the 1940 Legislature permitting an equalization board in the year 1940, or any year thereafter, etc. Accordingly, an equalization board was appointed by the circuit court of Norfolk county about two months ago, and the board has just about completed its work.

"The question has arisen whether the changes made by the board are effective for the year 1940 or 1941. I have been in conference with the members of the board today and the chairman of the board, Mr. B. D. Wood, requested that I write you for a ruling in the matter.

"It will be appreciated if you will let me hear from you at your earliest convenience. The land books for 1940 based on the re-assessment made in 1939 have been completed, tax tickets based on the assessment have been made out, and the Treasurer of Norfolk county is ready to mail notices to the landowners."

The general reassessment made in 1939 is, of course, applicable to 1940. The first year to which the equalizations made by the equalization board of 1940 are applicable is not so clear, but I am of opinion that the best view is that your question is answered by section 348 of the Tax Code, which reads in part as follows:

"In every county not having a general reassessment of real estate, taxes for each year on real estate shall be extended on the basis of the last equaliza-
tion made prior to such year, subject to such changes as may have been lawfully made, except that taxes on real estate for the year nineteen hundred and thirty shall be extended on the basis of the general reassessment made in nineteen hundred and twenty-five subject to such changes as may have been lawfully made."

In applying the above quoted provision it would appear that, Norfolk county not having a general reassessment of real estate in 1940, the taxes for 1940 should be extended on the basis of the last equalization made prior to 1940, subject to such changes as have been lawfully made, these changes consisting in large measure of the general reassessment in 1939.

I realize that there is some conflict between section 348 and the last paragraph of section 346 of the Tax Code, but, as above indicated, it is my view that section 348 should be construed to control the situation. I am somewhat strengthened in my view by the fact that, if it should be held that the equalization made in 1940 applies to the 1940 levies, much confusion would result and the practical administration of such a construction would be extremely difficult. On the whole, therefore, I am of opinion that the equalizations made in 1940 are applicable for the first time to the levies made in 1941.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Delinquent Tax Lists—Publication of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 4, 1940.

HONORABLE BERLIN R. LEMON,
Attorney for the Commonwealth,
New Castle, Virginia.

MY DEAR MR. LEMON:

I am in receipt of your letter of October 29, from which I quote as follows:

"The Craig County Board of Supervisors does not deem it advisable to publish the lists mentioned in paragraphs numbered two and three of section 387 of the Tax Code. It seems to me that under the second paragraph of section 389 of the Tax Code, especially the clause 'or such parts thereof as may be deemed advisable,' the Board does have the power to omit the publication of these lists."

I entirely agree with you that the language in the second paragraph of section 389 of the Tax Code referred to by you is plain and that it is within the discretion of the Board of Supervisors as to whether it shall cause to be published the lists mentioned in paragraphs numbered two and three of section 387 of the Tax Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE WALTER G. HOWLETT:
Treasurer of Carroll County, Hillsville, Virginia.

MY DEAR MR. HOWLETT:
This will acknowledge receipt of your letter of October 11, from which I quote as follows:

"Should County Treasurers advertise and sell tracts of land and lots that have heretofore been advertised, sold and bought in by him in the name of the Comptroller, that remain unredeemed?"

"Of course, the procedure of listing such land and lots turned delinquent will be made to the Clerk of Court as usual for record, but why should we go to the expense to advertise and re-sell tracts of land and lots that, under our laws, belong to the Commonwealth of Virginia?"

Many sections of the Code relating to delinquent lands and lots were amended or repealed by the General Assembly of 1940 (Acts 1940, p. 326). Section 2500 was amended and now specifically answers your question. It is therein provided that:

"Real estate, although purchased in the name of the Commonwealth for taxes or levies, and unredeemed, shall nevertheless be advertised by the treasurer and sold for taxes or levies for each year succeeding the year for which the first sale was made, if the taxes and levies extended thereon for any such subsequent year remain unpaid! * * *"

It is further specified that "provided, however, that the treasurer may omit from the advertisement for any year but not from the sale any parcel of real estate theretofore purchased in the name of the Commonwealth and unredeemed."

You will observe from the quoted language of the section that the real estate previously purchased in the name of the Commonwealth for taxes or levies, and unredeemed, shall continue to be sold for further taxes and levies for subsequent years which remain unpaid. However, the treasurer may, in his discretion, omit from the advertisement for any year any parcel of real estate which has been theretofore purchased in the name of the Commonwealth and unredeemed.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Endowment Funds of Cemeteries.

HON. C. H. MORGISSETT,
State Tax Commissioner,
Richmond, Virginia.

MY DEAR MR. MORGISSETT:
I have examined carefully the file concerning the trust fund held for the perpetual care of Forest Lawn Cemetery. You request my opinion upon the taxability of this fund.
It appears that the land now known as Forest Lawn Cemetery was originally owned by the Myrtle Grove Corporation, an ordinary business corporation chartered under the laws of Virginia with outstanding stock and the usual objective of earning money for its stockholders. Legal title to this tract of land was conveyed to the Forest Lawn Cemetery Company, a non-stock, non-profit corporation, in consideration for the execution of an agreement whereby the Myrtle Grove Corporation was appointed exclusive agent for the sale of burial rights in the cemetery. By this agreement the Myrtle Grove Corporation was given full power and authority to fix the prices and terms upon which such rights should be sold and to collect the purchase price therefor, retaining all of the same except a small percentage which was to be paid to the Forest Lawn Cemetery Company and by it paid into a trust fund to provide for the perpetual care of the cemetery.

Under the agreement the Forest Lawn Cemetery Company is required to make such subdivision and layout of the lands embraced within the cemetery, including roads, pathways, walks, park spaces and lots as may be requested by the Myrtle Grove Corporation and cannot, without the consent and approval of the Myrtle Grove Corporation, make any change in its By-laws, Rules and Regulations that would materially alter the general plans of development and operation now in operation. The cost of surveying, plotting and marking of lands or lots is borne by the Myrtle Grove Corporation.

The Forest Lawn Cemetery Company employs all personnel necessary for the usual and ordinary operation and upkeep of the cemetery, and to pay the expense of such operation and upkeep receives all grave fees and other funds arising from services rendered and the income from the perpetual care fund. If the funds of the Forest Lawn Cemetery Company are at any time inadequate to meet its requirements, such funds as may be requisite are advanced by the Myrtle Grove Corporation, which advances are to be repaid by the cemetery company as promptly as practicable after the perpetual care fund reaches the sum of $200,000.

Regardless of whether or not the Forest Lawn Cemetery Company is a subsidiary company of the Myrtle Grove Corporation or is controlled by the latter through inter-locking directors, it is apparent that, under the agreement between the two companies, the burying ground or cemetery is operated under a system designed to result in a profit to the stockholders of the Myrtle Grove Corporation. The gain accruing to the Myrtle Grove Corporation and its stockholders is not that resulting from compensation received for services rendered by the corporation in acting merely as "sales agent" for the cemetery company, but is measured directly by the difference between the cost of the land to the Myrtle Grove Corporation and the total net sum to be received by this corporation for the sale of burial rights in the cemetery. This is so because this corporation has full power to fix the prices to be charged and, under the agreement with the cemetery company, collects and keeps the entire purchase price less a small percentage which is to be paid into the trust fund provided for the perpetual care of the cemetery.

The same result is attained by the system under which the Myrtle Grove Corporation operates under its agreement with the Forest Lawn Cemetery Company as would be attained if the Myrtle Grove Corporation had merely employed an agent to conduct the usual affairs of a cemetery in connection with the interment of the dead. Forest Lawn Cemetery Company is required by the agreement to pay into the perpetual care fund the designated percentage of the sales price of the burial rights. The income of the trust fund is used for the general purpose of beautifying the grounds of the cemetery and is thus a direct benefit to the Myrtle Grove Corporation in its business of earning a profit from the sale of burial rights in the cemetery.

In my opinion, the fact that a non-stock, non-profit corporation has been created to hold the legal title to the tract of land and to perform general duties in connection with the operation of the cemetery does not alter the fact that the cemetery is operated for the purpose of making a profit for the Myrtle Grove Corporation. This system will continue until all burial rights in the cemetery...
have been sold and the profit making activities of the Myrtle Grove Corporation
in connection therewith have ceased.

The fact that Forest Lawn Cemetery Company, which holds legal title to the
tract of land, is a non-profit corporation is stressed by Mr. John T. Wingo, Coun-
sel for the Cemetery Company. However, section 183(c) of the Constitution pro-
vides that the exemption afforded cemeteries shall apply to:

"Private or public burying grounds or cemeteries and endowment funds,
lawfully held, for their care, provided the same are not operated for profit."

The fact that the profit resulting from the operation of a cemetery inures to
the benefit of someone other than the holder of the legal title to the land does not
alter the fact that the cemetery is operated for profit. This being so, endowment
funds held for its care are not, in my opinion, within the exemption provided by
the Constitution or the statute.

The appeal of Ivy Hill Cemetery Co., 183 Atl. 84 (Penn.), involved a simi-
lar situation. In that case the Ivy Hill Cemetery Company, a non-profit cor-
poration, was the registered owner of a parcel of land. The Ivy Hill Mausoleum
Company, an ordinary business corporation, entered into a contract with the
cemetery company whereby the mausoleum company paid the cemetery company
$10,000.00 for the use of the land and also paid the cemetery company the sum
of $15,000.00 to be retained by it as an endowment fund, the income of which
was to be used for maintenance and repair or a community mausoleum to be
erected by the mausoleum company upon the land. The mausoleum company re-
served the right to sell the crypts and retain the entire proceeds therefrom, from
which operation it expected to realize a profit of over $100,000.00. The court
held that the building, though owned and kept in repair by a non-profit corpora-
tion, was operated by the mausoleum company for profit and was therefore not
exempt from taxation. The court said:

"* * * It follows that under the state of this record we are not concerned
with a question as to whether the cemetery grounds were used for profit by
the cemetery company, but are bound to consider whether such land was in
fact used or held by any one for private or corporate profit."

I am of the opinion that the same principle applies to the arrangement under
which Forest Lawn Cemetery is operated and that endowment funds held for its
care are subject to taxation.

Very sincerely yours,

W. W. MARTIN,
Assistant Attorney General.

TAXATION—Local—Exemption of New Business.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 10, 1941.

HONORABLE C. LESTER DRUMMOND,
Attorney for the Commonwealth,
Accomac, Virginia.

MY DEAR MR. DRUMMOND:
I am in receipt of your letter of January 9, from which I quote as follows:

"The Board (of Supervisors) has been requested to exempt from local
taxes the property of a proposed electric cooperative in Accomack County
under section 299-b of the Tax Code of Virginia. The said electric coopera-
tive has been organized in order to furnish electricity to homes and businesses
that cannot secure electricity from the other companies operating in Accomack
County. They have secured a charter from the State of Virginia and are
seeking to borrow money from the Federal Government under the Act of
Congress providing for the loan of money for rural electricity.

"Will you kindly give the Board your opinion as to whether they have
the right to exempt this cooperative under the aforesaid section of the Tax
Code?"

You will observe that section 299-b of the Tax Code authorizes the granting
of the exemption by the localities provided that "no such manufacturing establish-
ment or work of internal improvement shall be so exempted which would compete
with any existing establishment or industry in said city, town, or county." Whether
or not the cooperative which the Board is asked to exempt would compete with
an existing establishment or industry in the county is a question of fact on which
I am unable to pass. If it would so compete, then under the section the exemp-
tion cannot be granted. I suggest, therefore, that you and the Board consider
the matter from this standpoint and, if after such consideration you desire a fur-
ther expression of my views, I shall be glad to give them upon a full presenta-
tion of all of the facts.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemption—Notes Held by Church—Sec. 183 of Constitu-
tion.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 1, 1940.

HONORABLE ERNEST W. GOODRICH,
Commonwealth’s Attorney,
Surry, Virginia.

My dear Mr. Goodrich:
I am in receipt of your letter of June 27 with reference to the liability to
tax of certain notes owned by a church in your county. Without going into
detail, I beg to advise that I am in accord with the conclusions reached by you.
These notes, being treated as endowment funds owned by the church, are spe-
cifically exempt from taxation under the provisions of Section 183 of the Con-
stitution.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

TAXATION—Inspection Tax on Commercial Feeds—Dairy and Food Com-
mission.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., July 16, 1940.

HONORABLE S. S. SMITH, Director,
Dairy and Food Division,
Department of Agriculture and Immigration,
Richmond, Virginia.

Dear Mr. Smith:
I have your letter of July 9, in which you request my opinion on a question
arising out of Code section 1239 (Michie 1936), which imposes an inspection tax
on commercial feeds sold, offered for sale or distributed in this State.
The pertinent provisions of Code section 1239 are as follows:

"Each and every manufacturer, jobber, importer, agent or seller of any concentrated commercial feeding stuff, as defined in section 5 of this act, shall pay the Dairy and Food Commissioner an inspection tax of 15 cents per ton for each ton of such commercial feeding stuff sold, offered or exposed for sale or distributed in this State, and shall affix to or accompany each car shipped in bulk, and to each bag, barrel or other package of such concentrated commercial feeding stuff, a tag or stamp to be furnished by the Dairy and Food Commissioner stating that all charges specified in this section have been paid * * *.

The statutory definition of "concentrated commercial feeding stuffs" includes * * * all feeds intended for feeding to live stock and poultry, except hays, straws and corn stover, when the same are not mixed with other materials * * *." (Virginia Code (Michie 1936) section 1233.)

You request my opinion as to whether the taxes imposed by section 1239 are payable on commercial feeds which are within the statutory definition of concentrated commercial feeding stuff, but which are, actually or allegedly, intended for sale to jobbers who will mix such feeds with other materials before they are sold to the consumer. You state that such feeds are entirely capable of being used by the consumer without being thus mixed with other materials, and that the practice of your office has been to collect the inspection taxes on such feeds without reference to the question whether they were intended to be mixed with other materials before being sold to the consumer; that this practice has been uniformly followed ever since these statutes were enacted in 1910, since which time the Legislature has not made any amendment to the law inconsistent with the construction thus adopted by your office.

From a consideration of the entire Act on this subject (Acts 1910, chapter 151, as amended by Acts 1916, chapter 371), it would seem to be the policy of the statute that an inspection should be made and tax collected with respect to every lot of commercial feeding stuff manufactured in or imported into the State, and that each lot of such feed should be subject to the inspection and the tax as soon as it achieves the character of a "concentrated commercial feeding stuff" or as soon as it is brought into the State, as the case may be.

I find nothing in the law which would exempt from either the inspection or the tax a given quantity of "concentrated commercial feeding stuff" simply because it was actually or allegedly intended to be mixed thereafter with some other material either before or after sale to the consumer. In reaching this conclusion, I am substantiated by the long continued administrative construction referred to in your letter. It is proper to assume that if such construction were not consistent with the legislative intent and the true meaning of the statute, the Legislature would not have repeatedly acquiesced in the same, but would have amended the language of the law. State Board of Education v. Carwile, 169 Va. 663.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Localities—Exemption of New Industries.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 23, 1940.

HONORABLE CHARLES B. GODWIN, JR.,
Attorney for the Commonwealth,
Suffolk, Virginia.

My dear Mr. Godwin:

This will acknowledge receipt of your letter of November 19, in which you refer to section 299-b of the Tax Code, authorizing cities, towns and counties to
exempt manufacturing establishments and works of internal improvement from local taxation under certain conditions. You state that—

"The local board exempted an industry under that provision as there was no such industry in the county at the time of its establishment; now another industry of identical kind comes to the board and asks that they be exempt to establish here because we have exempted the first industry of like kind to be established. They said it is unfair for the board to exempt the first industry and not exempt them as it gives a decided preferential."

The statute provides that "no such manufacturing establishment * * * shall be so exempted which would compete with any existing establishment or industry in said city, town or county."

I realize that it might be argued that the phrase "existing establishment or industry" should be construed to mean an existing taxpaying establishment or industry. However, we are dealing with a statute providing for tax exemption and it is well established that such a statute should be strictly construed against the exemption. Therefore, I am inclined to be of opinion that the better view is that the second industry referred to by you may not be exempted under the statute. I am frank to say, however, that I do not think the question is altogether free from doubt, though the statute may have intended, as an added inducement to a new industry, to hold out to it exclusive tax exemptions as against other future competitors in order to make it feel more secure in undertaking the investment.

Sincerely yours.

ABRAM P. STAPLES,
Attorney General.

TAXATION—Merchant's License, Proration of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 11, 1940.

Honorable L. M. Walker, Jr.,
Commissioner of Agriculture,
State Office Building,
Richmond, Virginia.

My dear Mr. Walker:

I am in receipt of your letter of September 11, in which you ask if a license issued by your Department to a commission merchant under sections 1257 to 1265 of the Code may be issued for less than a year and a prorated reduction made in the license fee of $10 provided by the statute. There has been a change in the membership of the partnership to which a license was originally issued.

I can find nothing in the sections of the Code dealing with the issuance of these licenses authorizing the Commissioner of Agriculture either to transfer a license or to issue a license for any fee less than the prescribed fee of $10. Indeed, it is provided that every license shall expire on December 31 next following its issuance, but there is no provision for issuing a license for any amount less than the prescribed fee of $10.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Merchant’s License—Person Taking Orders.

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

MR. V. I. G. HAMPTON,
Deputy Commissioner of Grayson County,
Galax, Virginia.

MY DEAR MR. HAMPTON:

Replying to your letter of July 23, I beg to advise that in my opinion no merchant’s license need be secured by a person who is taking orders for merchandise to be shipped to the purchaser from a manufacturer in another State. If a person is simply going about from place to place taking these orders, as a traveling salesman frequently does, I do not think that any State license at all is necessary to carry on this business.

If the person you describe has a regular place of business open at all times, in which a stock of goods is carried and from which goods are sold, a merchant’s license should be secured in the county where the place of business is located. Assuming the licensed place of business to be in Carroll county, in my opinion, no further State license is necessary if such person simply goes into Grayson county to take orders for goods to be delivered from the Carroll county store.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Motor Fuel Tax on Gasoline Used by Independent Contractor Employed by Federal Government.

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

COLONEL M. S. BATTLE, Director,
Division of Motor Vehicles,
Richmond, Virginia.

MY DEAR COLONEL BATTLE:

You have advised me that the Virginia Engineering Corporation has a contract with the Federal Government for certain construction work in Virginia, and that the Standard Oil Company of New Jersey is to supply the company with gasoline for necessary use during construction. The Standard Oil Company has asked your Department if such sales of gasoline are subject to the Virginia motor fuel tax of five cents per gallon.

It is clear from the contract between the Virginia Engineering Company and the Federal Government that the company is an independent contractor, although under the particular contract in question the company is to be compensated on a cost-plus-a-fixed-fee-basis. To support the claim for exemption from the Virginia motor fuel tax, it has been suggested that the sales of gasoline, although made to the Virginia Engineering Company, in reality represent a purchase by the United States Government.

It has been well settled by a long line of decisions of the Supreme Court of the United States that an independent private corporation for gain is not exempt from State taxation, either in its corporate person or its property, because it is employed by the United States. In other words, it has been uniformly held that such a corporation is not a Federal instrumentality in the sense that it is exempt from taxation. See Baltimore Shipbuilding and Dry Dock Co. v. Baltimore, 195 U. S. 375; Union P. R. Co. v. Peniston, 18 Wall. 5; James v. Drevo Contracting Co., 302 U. S. 134; Trinity Farm Construction Co. v. Grosjean, 291 U. S. 466.
As I have indicated, the Virginia Engineering Company is an independent private corporation created by the State of Virginia, entering into the contract in question for gain. It does not seem to me that the principles established by the cases I have cited are altered by the fact that the contract is on a cost-plus basis. Indeed, the contract itself seems to contemplate that State taxes, including the tax in question, will be paid by the company.

In setting out the method of determining the actual net cost to the contractor for the purpose of calculating his compensation, it is provided among other things in Article 26, subsection (n) that "the net amount of * * * any State or local taxes, fees, or charges which the contractors may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, or personnel under any applicable valid law or regulations issued by competent authority," shall be included. My conclusion is, therefore, that the Virginia motor fuel tax on the gasoline sold to the Virginia Engineering Company should be paid.

As a practical matter, I understand from you that, inasmuch as the gasoline is being used for non-highway purposes, the Virginia Engineering Company may have refunded to it, under the regular refund procedure provided by our statutes, the motor vehicle tax which is paid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Personal Property in Territory Annexed to City.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 14, 1940.

MR. SHEFFEY L. DEVIER,
Commissioner of the Revenue,
Harrisonburg, Virginia.

MY DEAR MR. DEVIER:

I am in receipt of your letter of November 11.

It is my opinion that as commissioner of the revenue you should assess the tangible personal property in the City of Harrisonburg, including annexed territory, at the rate prescribed by the Council, that is to say, if the Council has acted in the matter, as an administrative officer of the city you should comply with the action of the Council.

I call your attention to the fact that section 2958 of the Code, providing that the tax rate upon the land annexed shall not be increased for a period of five years after the annexation, applies only to the land, no mention being made of tangible personal property.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Publication of Delinquent Tax Lists.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 2, 1940.

HONORABLE DANIEL WEYMOUTH,
Attorney for the Commonwealth,
Heathsville, Virginia.

MY DEAR MR. WEYMOUTH:

I am in receipt of your letter of August 30, relative to my construction of section 389 of the Tax Code, concerning the publication of delinquent tax lists.
In my opinion, a reasonable interpretation of the language you quote is that, if there be a newspaper published in the county or city, then the list must be printed therein, and, in the event there is no newspaper published in the county or city, then the list must be printed either in some newspaper having a general circulation therein or in hand bills to be posted as prescribed. While the punctuation of the quoted language may not be strictly correct, it seems to me that the interpretation I have above outlined plainly represents the intention of the General Assembly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Reassessment of Real Estate—Within What Time to Be Completed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY General,
RICHMOND, VA., March 17, 1941.

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

DEAR MR. JONES:
This will acknowledge receipt of your letter of March 10, from which I quote as follows:

"On May 28th, 1940, Judge Mitchell, upon the recommendation of the Board of Supervisors of Middlesex County appointed one of its citizens to reassess the real estate in this county. Section 247 of the Tax Code provides that the person making the reassessment shall complete the same not later than December 31st of the year of such reassessment. The party appointed by the Judge did not complete his work by December 31st, 1940, and has not nearly completed it up to this time. It is my opinion that he cannot now complete his work as a legal reassessment."

"If it meets with the approval of the Board and the Judge, could he now resign and be re-appointed for 1941 and use the work he has done under his former appointment in 1940?"

Inasmuch as the person appointed to make the reassessment did not complete his work prior to December 31, 1940, I am of opinion that, in view of the provisions of section 247 of the Tax Code to which you refer, no 1940 reassessment can now be made. However, pursuant to the provisions of section 242 of the Tax Code, if the board of supervisors so direct by an appropriate resolution, the judge may now appoint a person or persons to make a reassessment which, if made, will be a reassessment for 1941. I know of no reason why the judge should not appoint the same person if he so desires, and if that person has accumulated data in 1940 which he thinks will be of use in 1941 he may, of course, use it in making the 1941 reassessment.

Very truly yours,

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

TAXATION—Recordation—Deeds From or to Religious Organizations.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 29, 1941.

HONORABLE V. C. RANDALL,
Clerk of the Court,
Portsmouth, Virginia.

MY DEAR MR. RANDALL:

In the absence of the Attorney General from the office, I acknowledge receipt of your letter of January 24, in which you raise the following question:

"We have had presented to this office for recordation a deed of Bargain and Sale, conveying property owned by the First Presbyterian Church, of Cradock, Virginia, to the Presbyterian League of Norfolk Presbytery, Incorporated, which I understand is a holding corporation for the Presbyterian denomination. Also a deed of trust from the Presbyterian League of Norfolk Presbytery, Incorporated, a non-stock corporation, to the Trustees of the Citizens Trust Company of Portsmouth, Virginia.

"Some question has arisen as to whether or not the state tax should be collected on either of these deeds."

Section 122 of the Tax Code provides that the recordation tax imposed by section 121 “shall not apply to any deed conveying land as a site for * * * church * * *.” It does not appear from your letter and I, therefore, assume that the deed of bargain and sale mentioned by you conveys land as a site for a church. It is, therefore, plain that neither section 121 nor section 122 of the Tax Code exempts from the recordation tax either of the instruments mentioned in your letter. Furthermore, I am of the opinion that neither section 183 of the Constitution nor section 435 of the Tax Code exempts these instruments from the recordation tax. Both the Tax Code section and the section of the Constitution provide that “the following property shall be exempt from taxation.”

Our court has held in Pocahontas Collieries Company v. Commonwealth, 113 Va. 108, that the recordation tax is not a tax upon property but a tax upon a civil privilege, that is, for the privilege of availing, upon the terms prescribed by the statute, of the benefits and advantages of the registration laws of the State.

It follows from the above, that neither of the instruments is exempt from the recordation tax. I may also say that the views I am expressing herein are in accord with the uniform ruling and practice of the State Department of Taxation.

Very truly yours,

W. W. MARTIN,
Assistant Attorney General.

TAXATION—County Treasurer—Power to Apply Proceeds of County School Board Warrant to County Levies Owing by Taxpayer

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 12, 1941.

HONORABLE F. C. DRUMMOND,
Treasurer of Amherst County,
Amherst, Virginia.

MY DEAR MR. DRUMMOND:

This will acknowledge receipt of your letter of March 8, from which I quote as follows:

"Will you kindly advise me whether or not, under section 358 of the Tax Code, or any other authority, the Treasurer of Amherst County would
have the legal right to deduct from a warrant issued to a person by the School Board of Amherst County, payable out of the county school fund, who owes county taxes to the county and fails to pay the same?"

This office has heretofore expressed the opinion that section 356 of the Tax Code authorizes the treasurer to apply the proceeds of any county warrant against county levies owing by the taxpayer in whose favor the warrant is drawn. In my opinion, this would also include warrants of the county school board on the county treasurer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

TAXATION—Recordation—Deeds of Trust Filed for Docketing.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 8, 1941

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

My dear Mr. Thoma:
I am in receipt of your letter of May 3, in which you ask the following questions:

"Kindly advise (1) whether a tax is collectible on a deed of trust filed for docketing under section 5202a of the Code and (2) whether after docketing the instrument must be retained on file in the office of the clerk."

In reply to your first question, I beg to advise that there should be no recordation tax imposed unless the person offering the deed of trust for docketing requests that such instrument be recorded in the deed book. The recordation tax, as you know, is imposed for recording an instrument, as distinguished from docketing it, for example, under section 5202a of the Code.

As to your second question, I beg to advise that this office has construed similar language to that contained in section 5202a of the Code to mean that the instrument shall be retained in the office of the clerk. This construction was placed on section 5189 of the Code as such section existed in 1938, which section was amended in 1940, to provide that the clerk after docketing the conditional sales contract should return the same to the party filing the same for docketing. There is no such provision in section 5202a of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation—Deed of Conveyance by Trustee Under Second Deed of Trust.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 10, 1941.

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

My dear Mr. Friend:
I am in receipt of your letter of January 7, in which you state that there has been presented for recordation in your office a deed of conveyance by a trustee
under a second lien deed of trust. You state that the attorney who presented this deed for recordation claimed that the trustee only sold the equity and that the purchaser bought the property subject to the first lien deed of trust without assuming payment of the same. The attorney seems to think that the tax should be based on the amount of the equity which the trustee sold.

In my opinion, the tax should be based on the actual value of the property or the consideration of the deed, whichever is greater. Section 121 of the Tax Code provides that the tax on every deed admitted to record shall be based on the "consideration of the deed or the actual value of the property conveyed, whichever is greater."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation—Computing Base—Consideration.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1940.

HONORABLE C. W. DOBYNS, Clerk,
Circuit Court of Wythe County,
Wytheville, Virginia.

MY DEAR MR. DOBYNS:

I am in receipt of your letter of July 17, from which I quote as follows:

"I have just been advised by one of the attorneys here in Wytheville that State tax should not be collected on that part of the consideration in a deed of trust which has previously been executed against the property conveyed."

Section 121 of the Tax Code provides that on every deed which is admitted to record the tax shall be based upon "the consideration of the deed or the actual value of the property conveyed, whichever is greater."

From the statement made by you, the assumption of debt secured by the deed of trust is a part of the consideration of the deed which is offered you for recordation, and I am of the opinion that the amount of the debt which is assumed should be included in the consideration upon which the tax is based. This is in accord with the uniform ruling of this office and of the State Tax Department.

In any event, the question is more or less academic because, even if the assumption of the debt is not to be treated as a part of the consideration, it may be considered in determining the actual value of the property conveyed. You will observe that the tax is to be based upon the consideration or the actual value of the property conveyed, whichever is greater.

I am enclosing a circular gotten out by the State Tax Department some years ago which covers the situation you describe.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Recordation—Deed Conveying Life Estate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 14, 1940.

Hon. J. W. Baker,
Clerk, Fredrick County,
Winchester, Virginia.

Dear Mr. Baker:

I have your letter of August 7th requesting my opinion as to the proper base for determining the recordation tax to be collected upon the recordation of a deed conveying a mere life estate where the deed recites only a nominal consideration.

Section 121 of the Tax Code requires that such tax shall be based on the consideration of the deed, "or the actual value of the property conveyed", whichever is greater. Accordingly in the case of a life estate it would seem proper to compute the value of the estate conveyed by reference to the provisions of Code sections 5131-5133.

In the case to which you refer, since the grantor and life tenant is eighty-six years of age, the present value of an annuity of $1.00 is computed at $2.739. To determine the present value of the estate here conveyed, this figure should be multiplied by a figure representing 6% of the total value of a fee simple title to the land.

Very truly yours,

Abram P. Staples.
Attorney General.

TAXATION—Recordation Tax—Miscellaneous Liens Under Section 5202-a of Code.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 2, 1940.

Honorable E. O. Russell,
Clerk, Circuit Court of Loudoun County,
Leesburg, Virginia.

My dear Mr. Russell:

I am in receipt of your letter of June 27 in which you refer to the new Section (5202-a) added to the Code of Virginia by the Acts of 1940 (Acts of 1940, page 248), providing for the filing and docketing of mortgages, chattel mortgages, etc., embracing live stock or poultry, in miscellaneous lien books in the Clerk's Office.

You ask three questions, which I will endeavor to answer seriatim:

(1) "A" gives "B" a trust or chattel mortgage on 30 cattle—would this be filed and docketed and a clerk's fee of $1.00 be taxed and no recordation tax?

In my opinion, this is just the case that the Act is intended to cover, and such an instrument may be filed and docketed upon the payment of the Clerk's fee of $1.00, without any recordation tax.

(2) "A" gives "B" a trust or chattel mortgage on 30 cattle and many articles of farm equipment, in the same trust, would this be filed and docketed and a clerk's fee of $1.00 be taxed and no recordation tax?
In my opinion, if such an instrument as the above is offered to the Clerk for filing and docketing, he should accept it. It might be well for the Clerk at the same time to advise the individual offering the instrument for docketing that it is probable that it would be held that the docketing under the Section would only be construed as notice in so far as the cattle are concerned.

(3) "A" gives "B" a trust or chattel mortgage on many articles of farm equipment only. Would this be recorded under §194 and a clerk's fee of $1.50 be taxed (which is the minimum fee here), and a recordation tax of $1 on each $100.00 on the amount secured under the trust be also taxed?

This instrument clearly does not come within the scope of the new Section and if it is desired to record same, it may be done only upon the payment of the regular recordation fee and the Clerk's fee.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Retail Merchant's License—Employee of Merchant.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 29, 1940.

MR. J. W. TOWNES,
Commissioner of the Revenue,
Martinsville, Virginia.

MY DEAR MR. TOWNES:

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

"Will you please advise me in regard to the following sales made in the State of Virginia and the license tax that should be imposed, if any?

"If a party can represent a retail store from other cities, such as Roanoke or Danville, carrying with him samples and merchandise, and go into the homes and make demonstrations and take orders for vacuum cleaners and come back several days later and deliver cleaners from car without having same shipped from out of State to customers?"

In my opinion, an employee of a retail store may travel and take orders for merchandise sold by such store without being subject to any additional State license. Such employee may also carry with him samples of the merchandise for which he is taking orders and subsequently deliver the merchandise under the circumstances stated by you without an additional State license. Of course, the retail merchant includes the sales of such merchandise in the base of his State merchant's license.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Sale of Delinquent Lands Previously Sold.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 12, 1941.

HONORABLE W. L. PAINTER,
Treasurer of Tazewell County,
Tazewell, Virginia.

MY DEAR MR. PAINTER:

I am in receipt of your letter of February 10, in which you ask the following question:
"Referring to page 303, section 2460, Tax Code of Virginia, regarding sale of delinquent lands, I respectfully request your opinion as to whether the treasurer shall sell each piece of real estate returned delinquent, or shall sell only each piece or parcel that has not been previously sold by him, either to an individual, or bid in in the name of the State Comptroller."

Section 2500 of the Code was amended in 1940 (Acts 1940, p. 338) and now specifically answers your question. It is therein provided that:

"Real estate, although purchased in the name of the Commonwealth for taxes or levies, and unredeemed, shall nevertheless be advertised by the treasurer and sold for taxes or levies for each year succeeding the year for which the first sale was made, if the taxes and levies extended thereon for any such subsequent year remain unpaid; * * *"

It is further specified that "provided, however, that the treasurer may omit from the advertisement for any year but not from the sale any parcel of real estate theretofore purchased in the name of the Commonwealth and unredeemed."

You will observe from the quoted language of the section that the real estate previously purchased in the name of the Commonwealth for taxes or levies, and unredeemed, shall continue to be sold for further taxes and levies for subsequent years which remain unpaid. However, the treasurer may, in his discretion, omit from the advertisement for any year any parcel of real estate which has been theretofore purchased in the name of the Commonwealth and unredeemed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Slot Machine Operators.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 12, 1941.

HONORABLE WILLIAM H. LOGAN,
Attorney for the Commonwealth,
Woodstock, Virginia.

MY DEAR MR. LOGAN:

I am in receipt of your letter of May 10, inquiring if a person who operates penny vending machines is subject to the slot machine operator's license imposed by section 198 of the Tax Code of Virginia.

In my opinion, the language which you quote clearly exempts operators of purely vending machines operated by the insertion of one cent.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Local License on Slot Machines.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., December 30, 1940.

HONORABLE BERNARD MAHON,
Attorney for the Commonwealth,
Bowling Green, Virginia.

MY DEAR MR. MAHON:

This will acknowledge receipt of your letter of December 27 reading as follows:
"Section 198 of the Tax Code as amended provides that the board of supervisors of each county may impose and collect a license tax upon slot machines. Will you kindly advise me whether this license tax can exceed the various amounts for different types of machines as set forth in the above mentioned section? Does the board of supervisors have the authority to include all types of slot machines other than those described in the above mentioned section or should the ordinance parallel the State law as set forth in said section?"

In my opinion, the authority given by section 198 of the Tax Code to counties and towns to impose a license tax upon slot machines does not limit such counties and towns to the rate of the State tax on such machines. There is nothing in the section to indicate any such restriction.

If there are any slot machines that may be lawfully operated other than those described in section 198 of the Tax Code, I am of opinion that the counties and towns may license such machines. However, I do not think that a political subdivision may impose a license on a slot machine which is made unlawful by section 4694-a of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Licenses—Slot Machines.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 30, 1940.

HONORABLE ROBY C. THOMPSON,
Attorney for the Commonwealth,
Abingdon, Virginia.

MY DEAR MR. THOMPSON: I am in receipt of your letter of December 27, in which you state that the provisions of section 198 of the Tax Code imposing a license upon slot machine operators is in conflict with section 4694-a of the Code prohibiting the sale of certain slot machines as defined by that section.

I do not know wherein you think the sections are in conflict, but in my opinion when they are properly construed no real conflict exists. Section 198 of the Tax Code deals with slot machines that may be lawfully sold or operated, while section 4694-a of the Code deals with slot machines that may not be lawfully sold or operated. You will observe that section 4694-a specifically refers to slot machines "as hereinafter defined". Such machines are defined in numbered paragraph (b) of the section. In other words, no slot machine is included in section 198 of the Tax Code which comes within the scope of the definition of an unlawful slot machine contained in section 4694-a of the Code.

The $1,000 license granted to a slot machine operator under the provisions of section 198 of the Tax Code does not permit him to sell or lease or operate such slot machines as described in section 4694-a of the Code, and, if he does deal in unlawful slot machines, he may be prosecuted therefor and the machines may be confiscated as provided in section 4694-a.

Very sincerely yours,

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

TAXATION—Tangible Personality—Oysters on Leased Bottoms.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 18, 1941.

Honorable George C. Reedy,
Attorney for the Commonwealth,
Warsaw, Virginia.

My dear Mr. Reedy:
I am in receipt of your letter of February 17, from which I quote as follows:

“I have been asked by the Commissioner of the Revenue of Richmond County whether oysters growing on bottom leased from the State should be assessed and taxed as personal property.

“A number of people in this county lease oyster bottom and purchase either seed oysters or mature oysters which they place on the leased bottom and allow them to remain until they are taken up and marketed.”

A case in which oysters on leased oyster bottom have been taxed as tangible personal property has never been brought to my attention and I am advised by Honorable C. H. Morrissett, State Tax Commissioner, that he does not know of a case where such tax has been assessed. It seems to me that it would be reasonable to say that this situation is analogous to that of growing crops, which are not assessable as tangible property.

Furthermore, even if it should be held that these oysters are taxable, I know of no way by which the law could be administered as a practical matter. It would be practically impossible to determine a reasonably accurate value.

In view of the considerations I have mentioned, it is my opinion that the statutes should not be so construed as to impose a local tax on these oysters as tangible personal property.

Very sincerely yours,

Abram P. Staples,
Attorney General.

TRADEMARKS—Trade Union—How Registered.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 22, 1941.

Honorable Raymond L. Jackson,
Secretary of the Commonwealth,
Richmond, Virginia.

Dear Mr. Jackson:
I have your letter of March 20, enclosing certain applications for registration of trademarks or symbols used by the Amalgamated Clothing Workers of America. You request the opinion of this office as to whether these devices should be registered under the trademark law (Virginia Code Chapter 61) or under the provisions of sections 4302-b and 4302-c of the Virginia Code (Michie 1936).

Each of the two statutes to which you refer includes provisions for the registration of any mark, symbol, etc., adopted and used by a trade union, and under either statute certain remedies are afforded to protect the registrant against certain unauthorized uses of such marks by others. I can find nothing in the law which would prevent a union from registering its mark, upon the payment of the required fees, under either one or both of these statutes, if it desires to do so.
Accordingly, if you are in doubt as to the registration which is desired by the Amalgamated Clothing Workers, it will be proper to call the applicant's attention to the two statutes, and the marks in question may be registered under either or both, according to the wishes of the applicant.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TRADE NAMES—Use of Name "Health Center" by Private Interests for a Bowling Alley.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 24, 1941.

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

MY DEAR MR. GOLDSMITH:
This will acknowledge receipt of your letter of February 22, from which for purposes of reply I quote as follows:

"The Montgomery County Radford Health Department, so named and officially designated on its stationery, is raising objection to the opening of bowling alleys in the City of Radford under the name of Radford Health Center."

"On July 1, 1938, the Radford Health Department and the Montgomery County Health Department combined as one unit under the supervision of the same doctors and State health officers. Each unit, however, of this department maintains a separate office. For instance, Radford maintains a full-time public health nurse with an office and clinical headquarters in the county. Since the establishment of this department, the Radford office has become known as the 'Health Center'. The words 'health center' have no official status as a part of the name of the Radford Public Health Department. However, considerable mail, filing cards and information go out and come into this office under the title 'Health Center' or 'Radford Health Center'."

"Now that private interests are constructing a building for the purpose of housing the above-mentioned bowling alleys under the trade name of Radford Health Center, without any additional or descriptive terminology, it has caused considerable confusion in the handling of the mail, particularly in the receipt thereof by the Department of Public Health, and has already caused the Health officials considerable inconvenience."

You then ask:

"Whether or not I can legally enjoin the use of the name 'Radford Health Center' by the proprietors of the bowling alley."

There seems to be no suggestion that the public will be misled by the name under which the bowling alleys will be operated nor that the bowling alleys will be in any way injurious to the health or damaging to the morale of the public. Indeed you say that the words "Health Center" have no official status as a part of the name of the Radford Public Health Department. The sole ground advanced for injunctive relief is that there is "considerable confusion in the handling of the mail".

While, of course, I cannot attempt to say how a court would hold, my personal opinion is that the grounds advanced for an injunction are not sufficient. There may be other pertinent facts which you have not stated in your letter,
but upon the facts stated by you I cannot believe that a court would grant an injunction.

You next ask:

"To what extent may private interests use the wording 'health center' in connection with a private business venture, such as bowling alleys or any other private recreational or sports business?"

I have already given you the benefit of my views in the case that you now have before you. Your second question is quite broad and to answer it would necessitate a wide range of investigation. Obviously the facts in any particular case would be largely controlling, and I do not feel, and am sure you will agree with me, that it would be proper for me to discuss other hypothetical cases with which you do not now appear to be confronted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—Acting as Attorney to Collect Delinquent Taxes—Compensation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 28, 1941.

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

MY DEAR MR. WEEMS:

This will acknowledge receipt of your letter of February 26, in which you ask if you as a practicing attorney may collect delinquent taxes by means of bringing chancery suits for the sale of land and in such suits receive "special commissioner's fees and other taxed attorney's fees usually allowed, together with any attorney's fees allowed by court". Such suits would be brought by you under section 403 of the Tax Code, which authorizes boards of supervisors to designate attorneys for collecting delinquent taxes and providing that such collections may be made by various methods including chancery suits.

You refer to my letter to you of September 13, in which I expressed the opinion that your designation by the board of supervisors as an attorney for the county in court, in view of the provisions of section 2702 of the Code prohibiting certain county officers from holding more than one office. There was no question involved of additional compensation to you in acting as such attorney, as will be seen from your letter of September 5, 1939, requesting the opinion, wherein you said: "To be more explicit, I do not expect or intend to receive any compensation other than that which I already receive for handling such matters." I assumed, of course, that you were referring to your regular compensation as treasurer and that you did not expect to receive any other than such regular compensation.

My opinion of September 13, 1939, related primarily to the question of whether or not you, being treasurer of your county, might under designation of the board of supervisors appear as an attorney for the county in court, in view of the provisions of section 2702 of the Code prohibiting certain county officers from holding more than one office. There was no question involved of additional compensation to you in acting as such attorney, as will be seen from your letter of September 5, 1939, requesting the opinion, wherein you said: "To be more explicit, I do not expect or intend to receive any compensation other than that which I already receive for handling such matters." I assumed, of course, that you were referring to your regular compensation as treasurer and that you did not expect to receive any other than such regular compensation.

However, your letter of February 26 just received raises an entirely different question, for you now ask if you may bring these suits for the collection of taxes and receive fees as special commissioner and other attorney's fees, although such fees would not be paid by the county. I cannot advise you that there is any statute expressly prohibiting a treasurer from acting in the capacity to which you refer. However, I must say that, in my opinion, for a county treasurer, who
at the same time happens to be an attorney at law, to act in such capacity would be incompatible with the duties of the office of county treasurer. You, of course, know that the statutes in effect make it the duty of the county treasurer as such officer to collect all the county taxes which he can, and the statutes give to the treasurer unusual power in making such collection. Such taxes as the treasurer cannot collect he returns delinquent. If a treasurer knew that taxes which were returned delinquent by him would be subsequently referred to him as an attorney for collection, there might very well be a temptation and a tendency for such treasurer to fail to exert every possible effort to collect the taxes and, instead of collecting them, to return them delinquent and thus be enabled to receive such additional compensation for collecting such taxes in another capacity. Such a possibility would, in my opinion, and I am sure you will agree with me, be detrimental to the public interests and would be in conflict with the general principles of common law.

I am sure you will understand that in expressing the above opinion I do not mean in any way to be reflecting on you personally, my opinion being solely concerned with the incompatibility of having you or any other treasurer acting in the dual capacity which is presented in your letter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—Collection of Taxes—Personal Solicitation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 23, 1940.

HONORABLE O. B. WATSON,
Treasurer of Orange County,
Orange, Virginia.

MY DEAR MR. WATSON:

I am in receipt of your letter of September 21, in which you inquire as to the construction to be placed upon the words "call upon" as used in the last paragraph of section 372 of the Tax Code in connection with the treasurer's duties pertaining to the collection of taxes.

In my opinion, it is entirely clear that these words mean that the treasurer is to request or demand the payment of the past due taxes, as distinguished from paying a personal visit to each taxpayer. Of course, the treasurer may visit the taxpayers in person, but I do not think that this is required by the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TREASURERS—Depositaries—Banks Outside State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 21, 1941.

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

MY DEAR MR. DOWNS:

This is in reply to your letter of January 16, in which you request my opinion upon the question whether or not a county treasurer may deposit in a bank or banks in the District of Columbia public funds in his hands as treasurer.
Upon a consideration of section 350 of the Tax Code and the general public policy of the State, it is my opinion that it is not contemplated that public funds may be deposited in banks located outside of Virginia. Such funds while so on deposit would be beyond the jurisdiction of the Virginia courts to require payment, and, in the event of insolvency or other litigation, the rights of the county or State would probably be controlled by the laws of the District of Columbia, or such other State as the treasurer might use for his deposits. Furthermore, the Auditor of Public Accounts, in auditing the books of the county treasurer, might be denied the cooperation necessary for a proper audit.

I believe our laws contemplate that public moneys shall be held and retained in Virginia banks, so that same will be subject to the jurisdiction of our courts. I realize that this may cause some inconvenience in Arlington County, but I believe if the practice is to be permitted it should be expressly authorized by an act of the General Assembly.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

TREASURERS—Duty to Disclose Information Regarding Payment of Taxes by Citizen.

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

Mr. WILLIAM E. LAINE, Deputy Treasurer,  
Isle of Wight County,  
Isle of Wight, Virginia.

MY DEAR MR. LAINE:  
I am in receipt of your letter of July 18, from which I quote as follows:

"I would appreciate an opinion in regard to inquiries by persons not known by the treasurer to have any interest in the matter as to whether or not a certain taxpayer has paid his taxes for a certain year. For a concrete example, let us say:

"Mr. Smith comes into the office and asks the treasurer has Mr. Brown paid his 1939 taxes, or has Mr. White paid all of his taxes for the years 1938 and 1939. Let us say further that Mr. Smith is not a resident of the county, but for some reason not disclosed to the treasurer wants to know whether or not a certain resident has paid his taxes for any or all years now in the hands of the treasurer for collection."

I know of no legal obligation upon the treasurer to advise one individual whether or not another individual has paid his taxes. Such records in the treasurer's office as are public records are, of course, open to inspection at reasonable times to those who have a legitimate interest in such records, but, as stated above, I know of no rule of law or statute by which the treasurer is compelled to furnish to one person information concerning the payment of another person's taxes.

Very sincerely yours,

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

TRIAL JUSTICE—Authority to Suspend Payment of Fine and Costs.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 5, 1941.

Honorable R. P. Bruce,
Trial Justice for Wise County,
Wise, Virginia.

My dear Mr. Bruce:
This will acknowledge receipt of your letter of April 29, from which I quote as follows:

"A has been fined in the Trial Justice Court for Wise County for a violation of the law; he is not in position to pay the fine so assessed together with the costs, and is given, say, thirty days in which to pay. He does not pay the fine at the end of thirty days, and a capias is issued and he is arrested and placed in jail.

"There sometimes arise such circumstances that the Trial Justice would, if he has the authority to do so, suspend the payment of the fine and costs, or a part thereof, and release him from confinement. Has the Trial Justice the right to do so?"

In my opinion, under the very broad powers given to a justice by section 1922-b of the Code as amended in 1938 (1940 Supplement to Michie's Code of 1936) a trial justice may suspend the payment of the fine in the case you present. The statutes certainly do not contemplate that it is compulsory upon the justice to commit the defendant to jail. See Code section 2559.

As to the costs, I am of opinion that, while the trial justice may give the defendant additional time to pay the costs, he may not enter any order the effect of which would be to relieve the defendant of the costs which have been assessed against him.

Very sincerely yours,

Abram P. Staples,
Attorney General.

TRIAL JUSTICE—Compensation of Substitute.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 23, 1941.

Honorable T. Freeman Epes,
Attorney for the Commonwealth,
Blackstone, Virginia.

My dear Mr. Epes:
I am in receipt of your letter of January 21, from which I quote as follows:

"The substitute trial justice of Nottoway has presented a bill to the board of supervisors for two weeks services in 1940, the vacation period of the trial justice, when the trial justice did not take any vacation. The substitute trial justice claims that he is entitled to such compensation for two weeks whether the trial justice took any vacation or not. I would be glad if you would give me your opinion on this. The law about the substituted trial justice is in section 4987-b, 1940 Supplement."
Section 4987-b of the Code (1940 Supplement to Michie's Code of 1936) provides that "in the event of the inability of the trial justice to perform the duties of his office, by reason of sickness, absence, vacation, interest, proceedings or parties before his court, or otherwise, such substitute trial justice shall perform the duties of his office during such inability and shall receive for his services a per diem compensation equivalent to * * *.*"

In my opinion, the section plainly contemplates that before the substitute trial justice shall receive any compensation he shall have actually rendered some service. Indeed the section provides that the substitute "shall receive for his services". I know of nothing in the law that requires the trial justice to take a vacation and, if the substitute trial justice does not, therefore, act for the trial justice, I am of opinion that he is entitled to no compensation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICES—Costs—Attorney's Fees.

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

HONORABLE W. FRANCIS BINFORD, Sec'y.-Treas.,
Association of Trial Justices,
Prince George, Virginia.

MY DEAR MR. BINFORD:

This will acknowledge receipt of your letter of October 29, from which I quote as follows:

"I would like for you to give me a ruling on section 3533, subsection (1), of the Code of Virginia. This paragraph reads as follows: 'The clerk of the court wherein any party recovers costs shall tax the same. He shall include therein for the fee of such party's attorney, if he has one: (1) in a circuit, corporation, or other court, unless it be a judgment by default on a forthcoming bond, or a case otherwise provided for * * * $2.50.'

"I would like for you to determine whether this applies to trial justice courts, as I have had some communications from trial justices concerning this matter and I would appreciate your opinion."

Section 3533 of the Code was taken from the Code of 1887 and was last amended at the special session of 1902-3-4 (Acts 1902-3-4, p. 783). There was at that time no clerk of a trial justice court or even a trial justice court. It is my view that the words "or other court" as used in the section refer to courts of record. If the Legislature had intended for an attorney's fee to be taxed in cases arising in a trial justice's court, I am confident that it would have so provided in the Trial Justice Act itself. I am advised that since the taking effect of the Trial Justice Act it has not been the practice of trial justices to tax an attorney's fee, and it is my view that this practice should be followed until legislative action in the matter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TRIAL JUSTICE—Disposition of Papers in Criminal Cases.

HONORABLE L. BROOKS SMITH,
Trial Justice,
Accomack, Virginia.

MY DEAR MR. SMITH:
I am in receipt of your letter of January 22, in which you ask "how long criminal warrants should be held in the office of the Trial Justice before turning same over to the Clerk of the Circuit Court to be filed there".

This office has previously expressed the view that after the final disposition of criminal cases by the Trial Justice all the papers therein should be promptly returned to the Clerk's office. We have also held, however, that in cases where the fine is being paid by the defendant on the instalment plan the papers may be retained in the Trial Justice's office until after the fine is paid or until the suspension of the sentence is revoked. After the case is thus finally disposed of the papers should then be transmitted to the office of the Clerk of the Circuit Court.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICE—Duty to Collect Bail Fee at Time of Admitting to Bail.

HONORABLE H. D. DILLARD,
Trial Justice for Franklin County,
Rocky Mount, Virginia.

MY DEAR MR. DILLARD:
I am in receipt of your letter of August 19, which for purposes of reply I quote as follows:

"Section 4987m, subsection (a), of Michie's Code provides as follows:

"(a) The trial justice shall tax in the costs for services rendered by him and his clerk in criminal actions and proceedings and as judge of the juvenile and domestic relations court, the following fees only:

"Subsection (4) provides as follows:

"(4) 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.

"Please advise if, as trial justice, I shall bond a person, and he does not have the money at the time to pay a fee of $1; and I still accept the bond and release the man, if the $1 is a proper charge against me as trial justice and, if the defendant fails to pay same, am I responsible to the State for the $1."

As you know, the fees received by a trial justice are not retained by that officer, but are paid into the treasury of his county, as provided by section 4987m
of the Code. You point out that subsection (4) of section 4987m provides that the fee for admitting a person to bail shall "be collected at the time of admitting the person to bail". In view of the fact that the fee does not go to the trial justice and of the mandatory provision of the section, I am of opinion that it is incumbent upon the trial justice to collect the bail fee at the time of admitting to bail, and that, if he does not so do, the amount of the fee is a proper charge against the trial justice. I can see no escape from this conclusion.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

TRIAL JUSTICES—Eligibility of Minors to Hold Such Office.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., JUNE 18, 1941.

HONORABLE GREY ANDERSON,  
Trial Justice,  
Galax, Virginia.

DEAR MR. ANDERSON:

This is in reply to your letter of June 13, in which you ask if it is necessary for the clerk of a Trial Justice court to be twenty-one years of age.

It is my opinion that a person under twenty-one years of age is not eligible to hold the office of clerk of a Trial Justice court. While there is no Virginia statute specifically dealing with this question, at common law it is generally held that infants, while eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only, are not eligible to public offices involving the performance of judicial functions and the exercise of judgment and discretion. See 46 C. J., "Officers", section 38, page 939; 31 C. J., "Infants", section 31, page 1004; 27 Am. Jur., "Infants", section 6, page 750, and cases cited.

Since the clerk of a Trial Justice court exercises certain judicial functions, such as the granting of bail in misdemeanor cases, it is my opinion that only persons over twenty-one years of age are eligible to hold this office.

Very truly yours,

ABRAM P. STAPLES,  
Attorney General.

TRIAL JUSTICES—Eligibility to Office—Military Service.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., DECEMBER 10, 1940.

JUDGE JAMES ASHBY, JR.,  
Trial Justice,  
Stafford, Virginia.

MY DEAR JUDGE ASHBY:

I have your letter of December 9, in which you state that you expect to be called into active duty with the Twenty-ninth Division, National Guard, on January 3, 1941, and that you desire my opinion upon the question whether or not your office as trial justice of Stafford County will be thereby vacated or whether you may obtain a leave of absence for the period of one year, which is your period of service, and whether or not the Circuit Court may designate an acting trial justice during this period of one year.

Chapter 19 of the Code, sections 289-293, inclusive, relate to the subject of the disabilities to hold office. Section 290, in broad terms, disqualifies any per-
REPORT OF THE ATTORNEY GENERAL

son from holding any office or post of profit, trust or emolument under the Constitution of Virginia who holds any office or part of profit, trust or emolument, civil or military, under the Government of the United States. Section 291, however, qualifies the foregoing by a provision that same shall not be construed "to exclude from such office or post officers or soldiers on account of the recompense they may receive from the United States when called out in actual duty."

Furthermore, section 291(b) would undoubtedly cover your situation if the United States were actually at war.

It is my opinion that, construing the above quoted provision from section 291 along with section 291(b), it was the intention of the General Assembly to permit persons called into army or navy service in any condition of emergency (as distinguished from being regular soldiers or officers in the army or regular members of the naval militia) to retain any State, county or municipal office during such period of emergency service, whether war has actually been declared or not, and that the provisions of section 291(b) are applicable to reserve officers or members of the Virginia National Guard now being called into active duty.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICE—Proceedings for Removal.

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

R. E. BOOKER, Esq., Sec'y.-Treas.,
Virginia State Bar,
408 Law Building,
Richmond, Virginia.

MY DEAR MR. BOOKER:

I have your letter of November 8 requesting my opinion as to the proper forum in which to commence proceedings for the removal of a trial justice elected under Virginia Code (Michie 1936) section 5904-a.

As you point out, the general statutory provisions for the removal of public officers by order of the local circuit or corporation court (Code section 2705) are plainly applicable unless section 104 of the Virginia Constitution be held to require action by the General Assembly.

Section 104 of the Constitution provides in terms that—

"Judges may be removed from office for cause, by a concurrent vote of both houses of the General Assembly; * * *"

The question is, therefore, whether a trial justice elected under Code section 5904-a is a "judge" within the meaning of section 104 of the Constitution.

Undoubtedly the term "judge" in its broadest sense may properly be applied to a trial justice or to any justice of the peace having trial jurisdiction. It is clear, however, that the term is not so used in Article VI of the Constitution. This is apparent from the fact that section 102 provides (as to "judges") that "Their term of office shall commence on the first day of February next following their election," and that "Whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term," whereas section 108 expressly authorizes the General Assembly to provide for the "appointment or election of justices of the peace and prescribe their jurisdiction." (Italics supplied)

Obviously the terms "judge" and "justice of the peace" as they appear in
Article VI of the Constitution are mutually exclusive, and the provisions as to “judges” do not apply to any justice of the peace, regardless of his jurisdiction. This being true, the term “judges” can hardly mean anything other than the judges of courts of record whose election is provided for in the Constitution, and a trial justice elected under Code section 5904-a must be deemed a “justice of the peace” within the meaning of section 108 rather than a “judge” within the meaning of section 104.

This view is supported by repeated legislative interpretations of the Constitution, which are undoubtedly entitled to great weight in considering such a question. For instance, a Civil and Police Justice elected under Chapter 124 of the Code, whose jurisdiction is substantially like that of a trial justice elected under section 5904-a, is expressly referred to as a “special justice of the peace” (Code sec. 3097), and it is expressly provided that such justices shall be removed from office only by the local circuit or corporation court. Code section 3101-a. Likewise it is provided that a trial justice appointed under the Trial Justice Act of 1934 may be removed by proceedings in the circuit court. Code section 4987-a. The legislative construction of the Constitution in this important respect would hardly be upset without some very compelling reason, and no such reason occurs to me.

It is my opinion, therefore, that proceedings for the removal of a justice appointed under Code section 5904-a should follow the provisions of Code section 2705.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Salary of Clerks of.

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

HONORABLE PAUL E. BROWN,
Commonwealth’s Attorney,
Fairfax, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of July 2 in which you refer to Section 4987-g of the Code relating to the salary of the Clerk of the Trial Justice Court, and especially that part of the Section reading as follows:

“Provided, however, that in any county adjoining a city having a population of 170,000 or more, as shown by the United States Census of 1930, the salary of the Clerk shall not be less than $1,800.00 per annum, nor more than $2,400.00 per annum.”

In my opinion, and this office has heretofore so ruled, unless the intent to the contrary is plainly expressed, the General Assembly, in using such language, is referring to a city located in Virginia and not to a city without Virginia. As you know, the description of a city as having a population of 170,000 or more is generally used to refer to the city of Richmond.

My conclusion is, therefore, that the provision to which you refer does not include Fairfax County.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE ANTHONY BARCLAY TALIAFERRO,
   Attorney for the Commonwealth,
   Orange, Virginia.

MY DEAR MR. TALIAFERRO:

I have your letter of August 5, requesting my opinion on two questions relating to the powers and duties of the board of supervisors of your county.

You first ask whether in my opinion a town within your county should contribute part of the salary of the trial justice appointed for the county.

Code section 4987a provides that a trial justice shall be appointed "for every county, including all incorporated towns therein, except as hereinafter provided." Section 4987c provides that a single justice may be appointed for two or more counties or for one or more counties and a city. Section 4987e provides that the salary of the trial justice shall be paid out of the treasury of the county for which he is appointed or, if he is appointed for more than one county, or for one or more counties and a city, the payment of such salary shall be shared ratably by the counties or by the county or counties and city for which he has been appointed.

Section 4987i, to which you refer in your letter, complicates this question somewhat by providing that towns, as well as cities and counties, shall provide the necessary books, stationery and supplies, and that the cost thereof shall be apportioned on the same basis as the apportionment of the trial justice's salary. You will note, however, that under this section such apportionment is to be "between the counties and city within his jurisdiction," and I can find nothing in this section or elsewhere in the Trial Justice Act which provides for a contribution by any town to the salary of the trial justice appointed for the county within which such town is located.

You next state that your board of supervisors has adopted, under authority of Tax Code section 153a, an ordinance in the terms of Tax Code section 153. My opinion is requested as to whether the board of supervisors may permit the operation of a carnival, under the auspices of the American Legion, without payment of the license imposed by such an ordinance upon proof that half of the proceeds would be paid to the American Legion.

I regret to advise that this office has consistently held to the view that it is not within the scope of its general jurisdiction to interpret local ordinances which involve no interests of the State itself. I do not feel, therefore, that I should express an opinion on this question.

Sincerely yours,

ABRAM P. STAPLES,
   Attorney General.
Compensation Act, as amended at the 1940 session of the General Assembly. I understand the particular problem confronting you is as follows:

An individual was the sole owner of a business operating in your county for a number of years prior to January 5, 1938. I assume that owner of the business had been an employer of eight or more individuals since January 1, 1936. On January 5, 1938, or soon thereafter, the owner of said business transferred his interest therein to a corporation for which he received $15,000 par value stock out of $25,000 issued. $9,900 of the stock was issued to his son and $100 to the son's wife. The former owner of the business was elected president and general manager of the corporation, and the son was elected secretary-treasurer and assistant manager.

The specific ruling desired by you is whether or not the employment records of the former owner and the corporation, as they appear on the records of the Virginia Unemployment Compensation Commission, should, under the law, be combined and treated as a single record so as to cause the corporation to be eligible for a reduced rate of payroll tax for the year 1941, provided the employment experience would justify a reduced rate for said year.

The law, as enacted by the General Assembly, contains no provision applicable to a situation such as you present. It merely states in part that—

"For each calendar year commencing after December 31, 1940, the contribution rate of each employer * * * with respect to whom during the most recent three consecutive calendar years throughout which any individual in his employ could have received benefits, if eligible, shall be computed as hereinafter provided."

Before an employer may receive full credit on excise tax assessed under the Federal Unemployment Compensation Act, where less than 2.7% has been paid to the State, it is necessary that the Commission furnish the proper Federal authorities with a certificate to the effect that such employer has been subject to charges for actual or potential benefits for three complete consecutive calendar years. I am advised that the Virginia Commission has ruled in a large number of cases similar to the one under discussion here that where an individual sells his business to a corporation, or other legal entity, that the experienced record may not attach to the new entity, although the seller or transferor may own a majority interest in the new entity. It is stated by the Commission that even though such individual may thereafter have no actual employment record, yet he, under the terms of Section 8(c) of the Act, continued to be an "employer" as that term is used in the Act for at least one calendar year during which he has less than eight individuals in employment for the statutory time. In the case presented by you the former owner of the business could not possibly have ceased to be a liable employer prior to January 1, 1939. Both the former owner and the corporation were employers at the same time, each being a separate employing unit as that term is used in the Act. Under such a state of facts I am of the opinion that the Commission is justified in taking the position that it cannot certify to the Federal authorities that the corporation was the employer subject to charges for "benefit wages" during the time the business was owned by the individual. Such a certificate would be necessary in order for the corporation to qualify for a reduced rate of tax for the year 1941.

Cordially yours,

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

UNEMPLOYMENT COMPENSATION COMMISSION—Personnel Classification—Attorney.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 7, 1941.

HONORABLE EDWIN S. REID, CHAIRMAN,
UNEMPLOYMENT COMPENSATION COMMISSION,
RICHMOND, VIRGINIA.

MY DEAR COLONEL REID:
I am in receipt of your letter of May 7, 1941, in which you state:

"The Unemployment Compensation Commission of Virginia has under consideration the adoption of a Classification Plan pertaining to personnel. It has been suggested by our personnel division that the Assistant Attorney General assigned to the Commission by you under authority of Section Seventeen (17) of the Unemployment Compensation Act be classified as "Principal Attorney" with a salary grade allocation of $4,200-$5,400.

"I shall be glad if you will furnish me with your written official opinion as to the authority of the Commission with respect to making such classification and salary grade allocation."

Under Chapter 24 of Michie's Virginia Code, 1936, it is provided that:

"All legal service in civil matters for the Commonwealth, the Governor, the State Corporation Commission and every State department, institution, division, board, bureau or official, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General * * * ."

Said Chapter provides for the appointment of a certain number of Assistant Attorneys General.
Section 17 of the Unemployment Compensation Act is in part as follows:

"For the purpose of enabling the Attorney General to perform the duties required of him under this act, or other duties required by law to be performed by him for the Commission, he is hereby authorized to appoint one or more assistants, and to require of them the performance of such duties as he may assign to them. The compensation of the said assistants shall be fixed by the Attorney General, with the approval of the Governor, and, together with their proper expenses incurred in the performance of their duties, shall be chargeable as administrative expense of the Commission and paid in the manner in which the compensation and expenses of the employees of the Commission are paid."

Under the law quoted herein the Attorney General is charged with the duty of rendering such legal services as the Commission may require, and is authorized to appoint one or more assistants to perform such duties under the direction of the Attorney General. I have heretofore appointed an assistant at a salary of $5,000 per year. It is my opinion that the Commission has no authority to classify any assistants appointed by me by departing from the statutory designation of Assistant Attorney General.

The view above expressed is also in conformity with the legislative interpretation of section 17 of the Unemployment Compensation Act as appears from an amendment made in the appropriation act at the 1940 session of the General Assembly.

In the appropriation bill as originally introduced, and also in the budget submitted by the Governor to the General Assembly on page 323 of said budget,
the Governor sought to classify the Assistant Attorney General attached to your department as an "Associate Attorney". The General Assembly, as appears from page 844 of the Acts of 1940, amended the bill by changing the words "Associate Attorney" to "Assistant Attorney General". An amendment similar to this was made in the appropriation bill as originally introduced, wherein the Assistant Attorneys General provided for by law were sought to be classified as "Head Attorney" and "Principal Attorney". (See page 22 of the 1940-1942 Budget.) These recommended classifications were rejected by the General Assembly and the appropriation bill was amended so as to provide for six Assistant Attorneys General to be compensated out of the appropriation to the Attorney General.

I am, therefore, of the opinion that, inasmuch as the General Assembly has itself classified a member of my staff attached to the Commission as an Assistant Attorney General and has specifically fixed in the appropriation act a salary for said officer of $5,000, the Commission is without power to alter this classification or to prescribe a salary grade allocation for said Assistant Attorney General. Section 17 of the Unemployment Compensation Act provides that his compensation shall be fixed by the Attorney General, with the approval of the Governor, and does not empower or authorize the Commission itself to fix said compensation.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

UCC—Ownership of Property Bought with Federal Funds Granted to State.

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

Dr. Rowland Egger,
Director of the Budget,
Richmond, Virginia.

Dear Doctor Egger:
This is in reply to your letter of June 27, which is as follows:

"In connection with the inventory of State property a question has been raised as to the ownership of the office equipment and furniture in the custody of the Unemployment Compensation Commission. This is, as you know, a development of the Social Security Board and the Commonwealth of Virginia and apparently some of the equipment was furnished by the Federal Security agency, but this was transferred and assigned to the State of Virginia in a letter addressed to the Governor by the Administrator, Mr. Wayne Coy, under date of April 22, 1940. Therefore, this portion is unquestionably the property of the State.

"Other items of property in service were purchased out of the combined appropriation; for instance, during the period between June 30, 1937, and June 30, 1938, these operations expended $320,772.59 from appropriations as follows:

"Commonwealth of Virginia $59,695.00
"Federal Wagner-Peyser 62,340.49
"Social Security Board Grant 198,737.10

"Within these expenditures, equipment purchases totaled $18,026.42. It is on this property and that subsequently purchased that we would like to have ownership clarified. As Federal contributions apparently were in the form of grants, it would appear that the State of Virginia has title to the property. Your opinion is requested."
REPORT OF THE ATTORNEY GENERAL

This office has always taken the position that, when money has been granted to the Commonwealth of Virginia, it is thereafter the property of the State, and also that any property in which such money is invested also belongs to the State.

This question arose several years ago in connection with properties purchased from grants made by the Federal Emergency Relief Administration, and the office of the National Relief Administration and the National Office of the Federal Emergency Relief Administration concurred in the view that all properties purchased with monies granted passed within the ownership of the State of Virginia.

It is my opinion, therefore, that the property to which you refer is State property.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General

UNITED STATES RESERVATIONS—State’s Jurisdiction Over—Criminal Offenses.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., December 20, 1940.

HON. J. MELVIN LOVELACE,
Attorney for the Commonwealth,
Suffolk, Virginia.

MY DEAR MR. LOVELACE:
I am in receipt of your letter of December 19, in which you ask if the trial justice court of Nansemond county has jurisdiction of a criminal offense alleged to have been committed on “Federal property now known as Big Point Ordnance Depot in Nansemond County.” I further observe that this property was acquired by the United States in or about 1930, and I assume that it was acquired for and is being used by the United States for military or naval purposes.

If my assumption is correct, I am of the opinion that the trial justice court does not have jurisdiction over this offense. While the State has reserved in such cases concurrent jurisdiction for some purposes, in my opinion, the statutes in effect at the time this property was acquired do not confer upon the State jurisdiction over criminal offenses of the character you describe committed on this property.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA CONSERVATION COMMISSION—Authority to Acquire Real Estate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., December 3, 1940.

HON. N. CLARENCE SMITH, Chairman,
Virginia Conservation Commission,
Richmond, Virginia.

DEAR MR. SMITH:
I have your letter of November 29, enclosing a deed between J. J. Dirzulaitis and others and your Commission. You request my opinion as to the power and authority of your Commission to accept a conveyance of the property described in this deed, for nominal consideration, for use in connection with the Division of
REPORT OF THE ATTORNEY GENERAL

Water Resources and Power. You state that the land in question can be used by your Commission for this purpose only. Your question would seem to be controlled by the provisions of Virginia Code (Michie 1936) sections 585 (34) and 585 (47).

Section 585 (34), in defining the status of your Commission as a corporate entity, provides that the Commission may—

"* * * in such corporate capacity, sue and be sued, contract and be contracted with, purchase, lease, or otherwise acquire, enter, and convey property, real and personal."

As this office has previously held, these general provisions can hardly be construed as anything more than definitive of the naked corporate powers of the Conservation Commission as a legal entity. For the acquisition, lease, or sale of any particular real property specific authorization must be found elsewhere in the law.

The only statutory authority for acquiring real property is provided by Code section 585 (47). This section authorizes the acquisition of—

"* * * areas, properties, lands or any estate or interest therein of scenic beauty, recreational utility, historical interest, remarkable phenomena or any other unusual features which in the judgment of the commission should be acquired, preserved and maintained for the use, observation, education, health and pleasure of the people of Virginia; * * *.”

Under the provisions of these statutes, it is my opinion that the Virginia Conservation Commission has no authority to accept or to hold real property for the use of the Division of Water Resources and Power.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA INDUSTRIAL SCHOOL FOR BOYS—Time Off for Employees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 12, 1940.

Mr. Paul S. Blandford, Superintendent,
Virginia Industrial School for Boys,
Beaumont, Virginia.

My dear Mr. Blandford:
I am in receipt of your letter of July 11, from which I quote as follows:

"There has recently arisen the question of days off allowed for men and women employed at this institution. They at present have two days in the month off, meaning that they work twenty-eight to twenty-nine days a month, because Sunday is one of their hardest days from the standpoint of supervision of both boys and visitors. They work thirteen or fourteen hours a day. "Is there any law prohibiting the board from allowing the employees of this institution four days a month off duty? The State Farm is now giving four days off and has given the guards there a raise in salary. Our having two days off and $70 a month seems an inequality to both the superintendent and the employees here."

The Virginia Industrial School for Boys is "governed, managed and controlled by a board of directors composed of five members, appointed by the Governor." I am of the opinion that this board at its discretion has the power to allow the
employees of the institution four days a month off duty. This would appear to be
an entirely reasonable regulation in view of the fact that these employees work on
Sundays also. Indeed the average State employee has considerably more than
four days off duty each month.

Replying to your second question, I know of nothing to prohibit a member
of the Legislature from serving on the Virginia Industrial School Board if he is
appointed by the Governor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

V. P. I.—Power to Acquire and Hold Real Estate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 18, 1940.

DR. JULIAN A. BURRUS, President,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

MY DEAR DR. BURRUS:
This is in response to your request for my opinion on certain questions relat-
ing to the acquisition of land by your institution.

You first inquire as to the effect of a deed naming the grantee as "The Vir-
ginia Agricultural and Mechanical College and Polytechnic Institute." While the
complete corporate name of your Institution is "The Board of Visitors of the
Virginia Agricultural and Mechanical College and Polytechnic Institute," a deed
such as you describe could not conceivably be held defective because of this tech-
nical misnomer of the grantee, there being no possibility of confusion as to the
identity of the grantee.

You next ask my opinion as to the power of your institution to acquire and
hold real property. Under section 860 of the Virginia Code (Michie 1936) your
institution is a corporation, and since its establishment as such has acquired and
held hundreds of thousands of dollars worth of real estate much of which was
purchased under specific authorization and direction of the General Assembly. I
can conceive of no grounds upon which to question the power of V. P. I., like
any other corporation, to acquire and hold the title to land.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA STATE BAR—Active Members—Payment of State License.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 18, 1941.

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

MY DEAR MR. BOOKER:
I am in receipt of your letter of March 17, in which you advise me that you
have on your rolls a person who has registered as an active member of the Vir-
ginia State Bar and who has been paying his dues as an active member of the
Bar, as defined by Section IV, Rule 3 of the Rules for the Integration of the Virginia State Bar. You state that you have ascertained that this person has not paid his State license as an attorney at law since June, 1922. You desire the opinion of this office on the question whether or not such a person is qualified to practice law in this State and as to whether or not you should accept or collect dues from such a person as an active member of the Virginia State Bar.

Independent of the Rules for the Integration of the Virginia State Bar, this person is not qualified to practice law in this State, if he has not paid his State license as an attorney at law for the current year. See section 3408 of the Code.

As to whether or not you should accept or collect dues from such a person as a member of the Virginia State Bar, I should say that you should not allow such a person to pay dues for the reason that he is not eligible for active membership in the Virginia State Bar, as defined by Section IV, Rule 3. Paragraph (a) of this rule prescribes as one of the prerequisites to active membership that an attorney shall have paid his State and local licenses if he is liable for such taxes, and I assume that the person in question is so liable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA STATE BAR—Salary of Secretary-Treasurer—Increase.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., January 13, 1941.

HONORABLE JOHN S. BATTLE, President,
Virginia State Bar,
Court Square Building,
Charlottesville, Virginia.

MY DEAR MR. BATTLE:

I have your letter of January 10, with reference to the salary of Mr. R. E. Booker, Secretary-Treasurer of the Virginia State Bar.

You state that the Comptroller has taken the position that he will require either an approval of an increase in Mr. Booker's salary by the Governor or by the Supreme Court of Appeals. The question as to which approval he would require would seem to depend upon whether or not the Virginia State Bar is an agency within the Judiciary Department of the State Government. You are no doubt familiar with the opinion of the Court in the recent veto case (Commonwealth v. Dodson, Clerk, etc.), in which the Court held that any statutory provision which would require the Governor to approve the salaries of persons employed in the Judiciary Department would be unconstitutional.

As to this question, it is my opinion that the Virginia State Bar is a part of the Judiciary Department, Chapter 314, page 508, of the Acts of 1941, authorizes the Court to promulgate rules and regulations "Organizing and governing an association to be known as the Virginia State Bar composed of the attorneys at law of this State, to act as an administrative agency of the Supreme Court of Appeals of Virginia for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Supreme Court of Appeals under this act to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing." Furthermore, the General Assembly, in the Appropriation Act, page 770, has placed the Virginia State Bar in the Judicial Branch of the Government.

As to this question, it is my opinion that the Virginia State Bar is a part of the Judiciary Department, Chapter 314, page 508, of the Acts of 1941, authorizes the Court to promulgate rules and regulations "Organizing and governing an association to be known as the Virginia State Bar composed of the attorneys at law of this State, to act as an administrative agency of the Supreme Court of Appeals of Virginia for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Supreme Court of Appeals under this act to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing." Furthermore, the General Assembly, in the Appropriation Act, page 770, has placed the Virginia State Bar in the Judicial Branch of the Government.

As to this question, it is my opinion that the Virginia State Bar is a part of the Judiciary Department, Chapter 314, page 508, of the Acts of 1941, authorizes the Court to promulgate rules and regulations "Organizing and governing an association to be known as the Virginia State Bar composed of the attorneys at law of this State, to act as an administrative agency of the Supreme Court of Appeals of Virginia for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Supreme Court of Appeals under this act to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing." Furthermore, the General Assembly, in the Appropriation Act, page 770, has placed the Virginia State Bar in the Judicial Branch of the Government.

Some question might arise, also, as to whether or not the Council of the Bar would have authority to increase the salary of Mr. Booker, in view of the fact that the Appropriation Act contains this provision: "Out of this appropriation the following salary shall be paid: Associate executive, not exceeding... $3,600. In my opinion, it would be well to have the approval of the Court of this increase in Mr. Booker's salary.
It has always been the administrative practice of the State to regard these salary appropriations as not preventing the department heads or commissions from increasing salaries in the Executive Department with the approval of the Governor, the view having been taken that the provisions of section 3 of the Appropriation Act, which is the same as has been contained in recent Acts, carried this implied authority.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WARRANTS—Service of by State Police Officers.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., February 15, 1941.

COLONEL M. S. BATTLE, Director,
Division of Motor Vehicles,
Richmond, Virginia.

MY DEAR COLONEL BATTLE:

Replying to your letter of February 10, I am of opinion that State police officers have the authority to execute properly issued capiases pro fine and other warrants which may be executed by a sheriff. See section 2154(53) of the Code.

In connection with your second question, I know of no authority which any officer has to alter the directions of the common-law writ of a capias pro fine. If a trial justice has suspended the payment of a fine and the defendant fails to comply with the conditions of the suspension, for example, by failure to pay the fine at the time designated by the trial justice, then under section 1922-b of the Code the trial justice may "cause the defendant to be arrested and brought before" him. Upon the defendant's appearance before the trial justice, that officer may direct that he be sent to jail for the non-payment of the fine, or the trial justice may permit the defendant to give a bond for his appearance at some future date. Of course, what the trial justice shall do in case a defendant fails to comply with the conditions imposed by that officer upon the suspension of the payment of the fine is a matter to be determined by the trial justice within the scope of his authority. I may say in addition that in cases where the trial justice does not suspend the payment of the fine and makes his report to the clerk of the court under section 2550 of the Code of the fines imposed during the next preceding month, then after such report has been made process looking toward the payment of the fine is then issuable by the clerk of the court to whom the report is made.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

WEIGHTS AND MEASURES—Use of Gasoline Pump Calculated to Falsify Measure.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, VA., January 16, 1941.

MR. J. H. MEEK, Director,
Division of Markets,
Department of Agriculture and Immigration,
1030 State Office Building,
Richmond, Virginia.

MY DEAR MR. MEEK:

I am in receipt of your letter of January 15, which I quote in full:
"We wish to obtain from your office an opinion regarding a certain gasoline pump installation which has been condemned by a representative of this office serving as an inspector of weights and measures.

The pump in question is what is commonly known as an electric meter pump which, subsequent to its original installation, has been equipped with two separate and distinct discharge hose lines, making it possible to deliver gasoline to two customers simultaneously or to divert a portion of the gasoline measured and registered by the pump to some receptacle other than the customer's automobile.

"It is our opinion that such an arrangement definition facilitates the perpetration of fraud, and while we do not contend that the operator of this particular pump has misused same, we feel that the general use of such devices throughout the State would be decidedly prejudicial to the interests of motor vehicle operators who, generally speaking, have little or no knowledge of the mechanics of gasoline measuring devices.

"We have made every effort to get this installation corrected without resorting to legal action. The wholesale gasoline distributor who owns the pump has made several attempts to make the desired correction, but on each occasion the operator, as we understand it, has refused to permit any alterations. It is apparently the opinion of the operator that the specifications applicable to weighing and measuring devices are not enforceable.

"We would appreciate your advising us as to whether or not under the present law the State has a right to require that all weighing or measuring devices be constructed in such a way that they do not facilitate the perpetration of fraud."

You will understand, of course, that the question of whether or not the use of electric meter pump that you describe facilitates the perpetration of fraud is one of fact about which this office has no knowledge and can express no opinion.

For the purpose of my reply to your letter, therefore, I will assume that you are correct in your statement that the use of the said pump facilitates the perpetration of fraud, by which I presume you mean that it may be readily used to falsify the quantity of gasoline sold to a customer.

Section 1485(23) of the Code provides in part that anyone "who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using any device or instrument to be used to or calculated to falsify any weight or measure shall be guilty of a misdemeanor * * *

The word "calculated" is defined by Webster's New International Dictionary, Second Edition, as follows:

"Calculated—adapted by calculation, forethought, or contrivance to accomplish a purpose; hence, loosely, likely to produce a certain effect; fitted; adapted; suited."

From a consideration of the spirit and purpose of the weights and measures statutes, I am of opinion that the word calculated as it appears in the portion of the statute which I have quoted should be construed to mean a device which is likely to produce a false measure or adapted or suited to produce such a false measure. Giving this construction to the word and assuming that you are correct in your facts, I am of opinion that such a pump as you describe violates the statute which I have quoted. I understand from you that it has been the practice of your department to disapprove such pumps and that this is the practice generally under the weights and measures laws of other States and of the Federal Government.

Very sincerely yours,

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

WESTERN STATE HOSPITAL—Power to Sell Medicine, Coal, Etc., to Employees at Cost.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 24, 1941.

Dr. J. S. DeJarnette, Superintendent,
Western State Hospital,
Staunton, Virginia.

Dear Dr. DeJarnette:

I have your letter of April 21, in which you request the opinion of this office as to whether the Western State Hospital may sell to its employees medicine, coal, etc., at cost.

Virginia Code (Michie 1936) section 401-i provides that surplus materials, equipment and supplies purchased for any State institution or agency shall be transferred or sold by the Director of the Division of Purchase and Printing. I find nothing else in the law which would authorize a sale of materials, equipment or supplies purchased for a State agency, and nothing which would authorize the purchase of materials, etc., for the purpose of resale.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

WITNESSES—Legality of Verbal Summons in Criminal Cases.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 18, 1941.

HONORABLE WILLIAM D. PRINCE,
Trial Justice of Sussex County,
Stony Creek, Virginia.

My dear Mr. Prince:

This will acknowledge receipt of your letter of April 11, in which you inquire concerning “the legality of a verbal summons of a witness to attend court as a witness in a criminal case.”

The manner of serving process is a matter which is controlled by statute. I have made a rather careful examination of our Code and I am thoroughly satisfied that there is no authority in Virginia for a sheriff or other officer to orally summon a witness in a criminal case. Our statutes clearly contemplate and provide, I think, that a copy of the process shall be delivered to the witness who is summoned, and it should be so stated on the return of the sheriff. Of course, if a witness attends in obedience to an oral summons, he is perfectly competent to testify. The only effect that I can think of in the case of a witness who is not properly served with process is that, if the witness does not attend, he cannot be fined or compelled to attend on such improper service of process.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
## INDEX

### ADMINISTRATORS

Authority of Deputy Clerk to Administer Oath to ........................................... 31

### AGRICULTURE AND IMMIGRATION

Power of Department to make Five-Year Contract to Purchase Electric Power .......................... 1

### ALCOHOLIC BEVERAGE CONTROL

Local Options—Participation of City in County Election ........................................ 2
Ordinances—Cities and Towns Paralleling—Section 50 ........................................... 29
Profits—Distribution to Localities ............................................................................. 1
Regulatory Power in Shenandoah Park ......................................................................... 3
Taxes on Alcoholic Beverages—Sale of Entire Business by Retail Licensee ................. 4

### ALIMONY

Enforcement of Virginia Decree in Another State ....................................................... 55

### APPROPRIATIONS

Criminal Charges—Cost of Printing Uniform Warrants, Committal Cards and Release Cards ........................................................................................................ 4
Funds for schools in excess of School Levy .................................................................. 15
Library Purposes—How Funds Disbursed ..................................................................... 7
Public Welfare—Reallocation of Funds by Board of Supervisors .................................. 14
Regional Defense Councils .......................................................................................... 24
Schools:
  Constitutional—Disbursement of—Matching of by State ........................................ 134
Special Board Receiving Revenues Under Act Recreating Same ................................. 8
Transfer for Payment of a Deficit to Some Other Object ............................................. 7
Unexpended Balances—Use to Satisfy Contracts ......................................................... 9
Virginia School for Deaf and Blind—Transfer of Item to Another Purpose ................. 5
William and Mary College—Operation of Richmond and Norfolk Divisions .............. 37

### ATTORNEY GENERAL

Assistant Assigned to UCC—Classification .................................................................. 205
Salaries of Employees:
  Approval of by Governor ......................................................................................... 10
  Increase of .................................................................................................................. 131

### BAIL

Authority of Bail Commissioner or Clerk of Circuit Court to Grant ......................... 11
Duty of Trial Justice to Collect at Time of Admitting to ........................................... 199
Form of Recognizance ............................................................................................... 12
Power of Justice of Peace to Grant in Felony Cases ................................................... 14

### BATHING BEACHES

Assignment—Rental ..................................................................................................... 40

Destruction of Records of State Department of Health .............................................. 123
Power of Board of Supervisors to Pay Compensation to Members of Local Board .... 22
Regulation of Septic Tanks by Local Board ............................................................... 99
## BOARDS OF SUPERVISORS

### Appropriations:
- County Funds for Paving Street in Funds for Schools in Excess of School Levy ........................................ 15
- Public Welfare—Reallocation of Funds ................................. 14

### Authority:
- To Furnish Uniforms to Virginia Protective Force .................. 16
- To Transfer Funds to County School Board—Budget System of Shenandoah County ..................................... 17

### Chairman of—Term and Removal ........................................ 17

### Duty:
- To Furnish Sheriff an Office ........................................ 19
- To Provide Office Quarters for County Board of Public Welfare 19

### Powers:
- To Adopt Ordinance Paralleling Milk and Cream Act .............. 48
- To Adopt School Budget .............................................. 21
- To Appoint Special Police Officers .................................. 23
- To Cancel Bonds Held in Sinking Fund ............................... 24
- To Enact Ordinance Concerning Bear Hunting ....................... 23
- To Make Appropriations to Regional Defense Councils .......... 24
- To Make General Levy to Repay Literary Fund Loan .............. 26
- To Pay Compensation to Members of Local Board of Health .... 22
- To Provide Bookcases for Office of Commonwealth's Attorneys 26
- To Provide Bounty for Skunks and Ground Hogs ............... 20
- To Provide Fee for Obtaining a Building Permit .............. 21
- To Provide Fuel to Cook Food of Prisoners .................... 20
- To Provide Heat to Home of Jailor .................................. 20
- To Raise School Levy—Limit ........................................ 25
- Special Meeting—Notice Required .................................. 27

### BONDS
- Deputy Clerks ....................................................... 30
- District Bond Issue—Validity—Rate of Levy for ............. 46
- Justices of the Peace Accepting Cash Bail Bond ............... 95
- Sinking Fund—Power of Board of Supervisors to Cancel ...... 24
- Town Treasurer ....................................................... 29

### BOUNTIES
- Power of Board of Supervisors to Provide for Payment of—Skunks and Ground Hogs .................................................. 20

### BUDGETS
- Schools:
  - Authority of Board of Supervisors to Transfer Funds—Shenandoah County ............................................. 17
  - Power of Board of Supervisors Over ........................................ 21

### BUILDING PERMITS
- Authority of Board of Supervisors to Provide Fee for .......... 21

### CITIES AND TOWNS
- Authority of Board of Supervisors to Appropriate County Funds for Paving Street in Town ............................. 27
- Power to Pass Ordinance Paralleling ABC Act .................... 28
- Mayor—Eligibility—Residence ........................................ 28
- Town Treasurer—Bond of ............................................. 29

### CIVIL AND POLICE JUSTICES
- State Officers ....................................................... 172
# REPORT OF THE ATTORNEY GENERAL

## CLERKS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to Grant Bail</td>
<td>11</td>
</tr>
<tr>
<td>Commission on Taxes Collected by Delinquent Tax Collector</td>
<td>30</td>
</tr>
<tr>
<td><strong>Deputies:</strong></td>
<td></td>
</tr>
<tr>
<td>Authority to Carry Concealed Weapons</td>
<td>31</td>
</tr>
<tr>
<td>Bonds of</td>
<td>30</td>
</tr>
<tr>
<td>Power to Administer Oath to Administrator</td>
<td>31</td>
</tr>
<tr>
<td>Docketing of Recognizances</td>
<td>129</td>
</tr>
<tr>
<td><strong>Fees:</strong></td>
<td></td>
</tr>
<tr>
<td>Criminal Cases When Jury Waived</td>
<td>34</td>
</tr>
<tr>
<td>Felony Cases—Nolle Prosse</td>
<td>32</td>
</tr>
<tr>
<td>Indexing Papers Returned by Trial Justice Prematurely</td>
<td>33</td>
</tr>
<tr>
<td>Recording Installment Payment on Fines</td>
<td>33</td>
</tr>
<tr>
<td>Recording Justices' Certificates of Fines</td>
<td>32</td>
</tr>
<tr>
<td>Recordation of Photostatic Copy of Instruments</td>
<td>130</td>
</tr>
<tr>
<td><strong>Recordations:</strong></td>
<td></td>
</tr>
<tr>
<td>Instruments—Authority to Use Photostatic Equipment</td>
<td>130</td>
</tr>
<tr>
<td>Orders, Judgments, Decrees, Etc.</td>
<td>73</td>
</tr>
<tr>
<td>Powers of Attorney of Corporations</td>
<td>36</td>
</tr>
<tr>
<td>Renunciation of Will</td>
<td>35</td>
</tr>
<tr>
<td>Retention of Instruments Filed for Docketing</td>
<td>36</td>
</tr>
<tr>
<td>Salary—Minimum Allowance out of County Treasury</td>
<td>35</td>
</tr>
</tbody>
</table>

## COMMISSION OF FISHERIES

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to Assign Areas for Bathing Beaches</td>
<td>40</td>
</tr>
<tr>
<td>Jurisdiction—Over What Waters</td>
<td>38</td>
</tr>
</tbody>
</table>

## COMMONWEALTH'S ATTORNEYS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority—Relief from Fines</td>
<td>130</td>
</tr>
<tr>
<td>Authority of Board of Supervisors to Provide Bookcases for Office</td>
<td>26</td>
</tr>
<tr>
<td>Duties—Bond Issue of Magisterial District</td>
<td>39</td>
</tr>
</tbody>
</table>

## COMPENSATION BOARD

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary of City Sergeant of Lynchburg—How Fixed</td>
<td>164</td>
</tr>
</tbody>
</table>

## COMPTROLLER

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paying Part of Criminal Expense Account While Holding Contested Items in Abeyance</td>
<td>39</td>
</tr>
</tbody>
</table>

## CONCEALED WEAPONS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carrying of by Deputy Clerk</td>
<td>31</td>
</tr>
</tbody>
</table>

## CONDEMNATION PROCEEDINGS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer Lists—What Acreage to be Included in</td>
<td>73</td>
</tr>
</tbody>
</table>

## CONSERVATION COMMISSION

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority:</td>
<td></td>
</tr>
<tr>
<td>To Acquire Real Estate</td>
<td>207</td>
</tr>
<tr>
<td>To Pay Dues of Director of Division of Publicity and Advertising in National Association of Accredited Publicity Directors</td>
<td>40</td>
</tr>
<tr>
<td>Bathing Beaches—Payment of Rent</td>
<td>40</td>
</tr>
<tr>
<td>Disposal of Flags in State Museum</td>
<td>41</td>
</tr>
<tr>
<td>Purchase of Booklet Owned by Printer</td>
<td>127</td>
</tr>
</tbody>
</table>

## CONTRACTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding Library Material of State College—How Let</td>
<td>129</td>
</tr>
<tr>
<td>Power of Department of State to Make Five-Year Contract to Purchase Electric Power</td>
<td>1</td>
</tr>
</tbody>
</table>
### CONTRACTORS
- Regulation of—Independent Contractor with Federal Government. 42
- State Agency Requiring Independent Contractor to Carry Insurance 41

### CORONERS
- Duty to Make Preliminary Inquiry 42

### CORPORATIONS
- Preferred Stock of Holding Companies as Legal Investment for Fiduciaries 43

### COSTS
- Civil Cases—Expense of Jury 44
- Proceedings against Sheep-Killing Dogs 44
- Printing Uniform Warrants, Committal Cards and Release Cards 4
- Taxation of Against State Board of Embalmers 45

### COUNSEL
- Appointment of by Court—Fees 51
- Appointment of by Court in Felony Cases 51

### COUNTIES
- Applicability of Code Section 2904—Pertaining to Costs and Expenses Borne by County not Having City of Second Class 45
- District Bond Issue—Validity—Rate of Levy for 46
- Expense of Auditing Accounts of Local Boards of Public Welfare 47
- Taxation on Carnivals and Shows 49

### CRIMINAL LAW
- Counsel:
  - Appointment of by Court—Fees 50
  - Appointment of by Court—Felony Cases 51
  - Carrying of Unconcealed Weapons 52
  - Forfeiture of Weapons used in Committing Crime 52
  - Violation of Act Relating to Payment of Wages—Punishment For 53

### DAIRY AND FOOD DIVISION
- Blended Vinegars—Manufacture and Sale of 128
- Inspection Fee for Mills 54
- Inspection Tax on Commercial Feeds 179
- Labels—Use of 53

### DEEDS
- Recordation Tax 185, 186, 188

### DEPOSITS
- Public Funds—Banks Outside State 195

### DIVISION OF MOTOR VEHICLES
- Authority:
  - To Compel Witnesses to Attend and Give Testimony at Hearings 56
  - To Employ Additional Police In Cases of Emergency 57
  - To Pay Expenses of Contest Designed to Stimulate Interest in Traffic Control 55

### DOG LAWS
- Poultry Killing Dog—Destruction of 59, 60
DUES
Membership Fee:
  Authority of Conservation Commission to Pay—National Association of Accredited Publicity Directors ........................................ 40
  Authority of State College to Pay—Virginia State Chamber of Commerce ................................................................. 163

ELECTIONS
Absent Voters—Necessity of Application to State Reasons for Absence .......................................................... 60
  Alcoholic Beverage Control—Local Option—Participation of City in County Election .............................................. 2
Ballots:
  Form of—Hampton Roads Sanitation District ....................................... 86
  Printing of ................................................. 62
  Printing of—Election of Supervisors for Soil Conservation District ................................................................. 63
Capitation Tax:
  Payment by Agent ................................................. 61
  Payment of Without Being Assessed ........................................... 70
  New Residents ........................................ 65, 69
Clerk—Who May Serve ........................................... 63
  Commissioner of—Eligibility of—Party Affiliations ........................................ 61
  Delivery of Election Lists—Compensation of Sheriffs ........ 153
  Hampton Roads Sanitation District—Necessity for Writ of Election 87
  Judge—Who May Serve ........................................ 63
  Necessity for Separate Ballot Boxes—Hampton Roads Sanitation District ................................................................. 62
  Polling Booth—Location of by Electoral Board ........................................ 63
  Primary for Purpose of Nominating Party Candidate for Congress 88
  Registrars—Compensation of ........................................ 64
  Registration—After Sundown ........................................ 65
  Residence ........................................ 66, 69
  Residence—Married Woman ........................................ 66
  Special:
    Qualification of voters ........................................ 67, 68
    To Fill Vacancy in Congress ........................................ 68
Voters:
  Eligibility:
    Persons Paying Capitation Tax Without Being Assessed... 70
    Residence ........................................ 69
    To Vote in Special Elections ........................................ 67, 68

EMBALMERS
Licenses:
  Apprentices ........................................ 71
  Persons Licensed in Another State ........................................ 70
  Requirements for ........................................ 72

EMINENT DOMAIN
Orders, Judgments, Decrees—Where Recorded ........................................ 73
  Transfer Lists—What Acreage to be Included in ........................................ 73

EXTRADITION
Requirements Before Demand for Recognized ........................................ 73
FEDERAL RESERVATIONS
Power of State Milk Commission to Regulate Sale of Milk on .......... 171
State's Jurisdiction Over:
Criminal Offenses ...................................................... 207
Highway in Elizabeth City County ....................................... 74
License Requirement as to Insurance Agent Doing Business On 75

FEDERAL SOLDIERS AND SAILORS RELIEF ACT
Applicability to Confessions of Judgments ............................ 75

FEES
Arrest—On Warrant Charging a Felony ................................ 76
Clerks:
Collection of Delinquent Taxes ......................................... 30
Criminal Cases When Jury Waived ....................................... 34
Felony Cases—Nolle Prosse .............................................. 32
Indexing Papers Returned by Trial Justice Prematurely ............. 33
Recording Installment Payment on Fines ............................... 33
Recording Justices' Certificates of Fines .............................. 32
Justices of Peace—Issuing Warrant Naming No Particular Individual 95
Police Officers—Criminal Matters ...................................... 49
Sheriffs, Sergeants, Constables:
Arrest and Trial of Offenders Violating Motor Vehicle Laws .... 76
Sheriffs:
Arrest Under Capias Pro Fine .......................................... 154
Services Rendered Commonwealth ....................................... 155

FIDUCIARIES
Investments—Preferred Stock of Holding Companies ................. 43

FINES
Authority of Trial Justice to Suspend Payment of .................. 197
Relief From—Time of Filing Petition Under Statutory Requirement Waiver .................................................. 130
Right of Arresting Officer to Part of Violating Motor Vehicle Laws 77
Violation of Municipal Ordinance—Power of Governor to Remit 83
Violations State Laws or Town Ordinances ............................. 78

FIRE ESCAPES
Powers of Department of Labor Relating to Construction and Main-
tenance of ................................................................. 58

FLAGS
Held in State Museum—Disposal of .................................... 41

FOREST CONSERVATION
Duty to Leave Trees for Seed Purposes ................................ 79

FUGITIVES
Cost of Maintaining—How Paid .......................................... 90

FUNDS
Disbursement of—Library Purposes .................................... 7
Milk—Power of Local Milk Board to Expend Without Paying Same Into State Treasury ................................. 169

GAMBLING
Slot Machines:
Confiscation—Disposition of ........................................... 79
Seized Without Warrant—Destruction of ............................... 80
GAME AND INLAND FISH
Duty of Commission to Prevent Pollution of Streams ............. 80
Jurisdiction—Over What Waters ................................ 38
Minnow Seining in Certain Creeks—When Lawful ............... 82
Right of Commission to Dispose of Water on Land Acquired by Deed 81

GASOLINE TAX
Gasoline Used by Independent Contractor Employed by Federal
Government .................................................. 182

GENERAL ASSEMBLY
Eligibility of Members to Appointment as Judge of a Court ...... 83

GOVERNOR
Authority to Transfer Appropriation for Payment of a Deficit to
Some Other Object ........................................ 7
Powers:
To Appoint as Member of Military Board One Not Meeting
Legal Qualifications ....................................... 84
To Remit Fines Imposed For Violation of Municipal Ordinances 83
Salaries—Approval of—Department of Law ................... 10

HAMPTON ROADS SANITATION DISTRICT
Election—Form of Ballot ................................... 86
Referendum—Necessity for Writ of Election .................... 87
Withdrawal of Political Subdivision from—Notice ............. 85

HIGHWAYS
Federal Reservation—State's Jurisdiction Over ................... 74

HUNTING
Authority of Board of Supervisors to Enact Ordinance re—Bear
Hunting ..................................................... 23

INDUSTRIAL SCHOOLS
Employees of—Time Off .................................... 208
Whether Considered Penal Institutions ......................... 88

INSANE, EPILEPTIC, ETC.
Compensation of Jailers for Care of .......................... 91
Lunacy Commission—By Whom Expense of Paid .......... 89

INSURANCE
License Requirement—Agent Doing Business on Federal Property 75
School Buildings:
Authority of School Board to Contract for Five-Year Policy .. 148
Legality of Member of School Board Issuing Policy .......... 145

JAILS AND PRISONERS
Board of Prisoners Convicted of State Offenses .............. 159
Compensation of Prisoners on City Prison Farms .......... 90
Fugitives—Cost of Maintaining—How Paid .................. 90
Physicians of Jail—Compensation .......................... 115
Power of Board of Supervisors to Provide Fuel to Cook Food
for Prisoners ............................................. 20
Power of Board of Supervisors to Provide Heat for Home of Jailer 20
Rearrest of Prisoner Released by Mistake .................. 91
Sentence—See Sentence and Punishment.
<table>
<thead>
<tr>
<th>JAILERS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation for Care of Insane, Epileptic, Etc.</td>
<td>91</td>
</tr>
<tr>
<td>Power of Board of Supervisors to Provide Heat for Home of</td>
<td>20</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>JUDGES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certificate as to Claims Allowed Officers in Criminal Cases</td>
<td>92</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>JUDGMENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confessions of—Applicability of Federal Soldiers and Sailors Relief Act</td>
<td>75</td>
</tr>
<tr>
<td>Criminal Cases—Finality of</td>
<td>93</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>JURY</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exemption—Contributing Members National Guard</td>
<td>109</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>JUSTICES OF PEACE</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment of Person Who Has Resigned as Registrar</td>
<td>94</td>
</tr>
<tr>
<td>Bonds Required of—Accepting Cash Bail Bonds</td>
<td>95</td>
</tr>
<tr>
<td>Fees—Issuing Warrant Naming No Particular Individual</td>
<td>95</td>
</tr>
<tr>
<td>Powers:</td>
<td></td>
</tr>
<tr>
<td>To Grant Bail</td>
<td>14, 96, 97</td>
</tr>
<tr>
<td>To Commit to Jail</td>
<td>96</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>JUVENILE AND DOMESTIC RELATION</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disruption of Marital Relationship—Penalty</td>
<td>97</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LABOR LAWS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority of Department of Labor in Regard to Fire Escapes</td>
<td>58</td>
</tr>
<tr>
<td>Hours of Women—Drug Store Serving Light Lunches</td>
<td>87</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LICENSES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Members of State Bar</td>
<td>209</td>
</tr>
<tr>
<td>Automobile—&quot;For Hire&quot; Trucks</td>
<td>109</td>
</tr>
<tr>
<td>Embalmers:</td>
<td></td>
</tr>
<tr>
<td>Apprentices</td>
<td>71</td>
</tr>
<tr>
<td>Persons Licensed in Another State</td>
<td>70</td>
</tr>
<tr>
<td>Requirements for</td>
<td>72</td>
</tr>
<tr>
<td>Insurance Agents doing Business on Federal Reservation—State's Jurisdiction Over</td>
<td>75</td>
</tr>
<tr>
<td>Marriage:</td>
<td></td>
</tr>
<tr>
<td>Issuance of to syphilitic persons</td>
<td>104</td>
</tr>
<tr>
<td>Issuance of Upon Certificate of Nonresident Physician</td>
<td>105</td>
</tr>
<tr>
<td>Minors Committed to State Board of Public Welfare as Delinquent</td>
<td>102</td>
</tr>
<tr>
<td>Persons Ordered by Court to Marry</td>
<td>101</td>
</tr>
<tr>
<td>Serological Test—Physician's Certificate</td>
<td>105</td>
</tr>
<tr>
<td>Validity of When Issued Prior to Premarital Test Legislation</td>
<td>103, 105, 108</td>
</tr>
<tr>
<td>Merchants:</td>
<td></td>
</tr>
<tr>
<td>Person Taking Orders</td>
<td>182</td>
</tr>
<tr>
<td>Proration of</td>
<td>181</td>
</tr>
<tr>
<td>Retail—Employee of Merchant</td>
<td>189</td>
</tr>
<tr>
<td>Peddlers—Validity of</td>
<td>50</td>
</tr>
<tr>
<td>Real Estate Agents—Real Estate Brokers Commission's License Not in Lieu of</td>
<td>98</td>
</tr>
<tr>
<td>Slot Machines</td>
<td>190, 191</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LIENS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recordation Tax</td>
<td>188</td>
</tr>
</tbody>
</table>
LITERARY FUND
Anticipation of Loans From—How Money Borrowed .................. 136
Levies by Board of Supervisors to Meet Loan from .................. 26

LOBBYING
By Miscellaneous Agencies Receiving State Appropriations—Virginia State Horticultural Society ........................................ 98

MARRIAGE AND DIVORCE
Alimony—Enforcement of Virginia Decree in Another State ...... 55
Disruption of Marital Relationship—Penalty .......................... 97
Licenses:
  Issuance of:
   Physician’s Certificate Proof that Physician is Duly Licensed 103
   To Minors Committed to State Board of Public Welfare as Delinquent ........................................ 102
   To Syphilitic Persons ........................................ 104
   Upon Certificate of Nonresident Physician ....................... 105
   Persons Ordered to Marry By Court ............................ 100
   Serological Test—Physician’s Certificate ........................ 105
   Validity of When Issued Prior to Premarital Test Legislation . 103, 105, 108
   Physician’s Certificate—Doctors of Osteopathy .................. 107

MAYORS
Eligibility—Residence ........................................ 28
Jurisdiction to Try Offenses Against Town Ordinances ............ 159

MEDICAL COLLEGE OF VIRGINIA
State Institution .................................................. 100

MILEAGE
Police Officers—Criminal Matters .................................... 49
Sheriffs:
  Arrests Under Capias Pro Fine .................................. 154
  Carrying Prisoner to Jail ........................................ 159

MILITARY BOARD
Power of Governor to Appoint Member of—Not Legally Qualified 84
Power to Operate Parking Lot ...................................... 108

MILK COMMISSION
Powers:
  Local Boards—To Expend Funds Collected Without Paying Same Into State Treasury .................................... 169
  To Regulate Milk Sold on Government Reservation ................ 171

MOTOR VEHICLE CODE
Licenses—”For Hire” Truck ........................................ 109

NATIONAL GUARD
Contributing Members—Jury Service Exemption ...................... 109

NOTARIES
Cities—Eligibility of Nonresidents ................................. 110, 111
Geographical Extent of Authority .................................... 111
OFFICES
Compatability of:
Commissioner of Port Authority Serving as Director .......... 173
Member of County Board of Public Welfare as Mayor of Town 50
Member of County School Board as Coroner ...................... 113
Member of General Assembly as Judge of Court .............. 83
Member Local Board of Public Welfare Member County School
Board .................................................................. 112, 113
Sheriff as Attendance Officer of School ......................... 114
Teachers as Member of Town Council ......................... 114

ORDINANCES
Cities and Towns—Paralleling ABC Act .......................... 28
Paralleling Milk and Cream Act—Authority of Board of Supervisors
to Adopt .......................................................... 48
Power of Board of Supervisors to Enact—Concerning Bear Hunting
Towns:
Jurisdiction of Mayors to Try Offenses Against .......... 159
Who Receives Fines for Violation of ......................... 78

OYSTER LAWS
Oyster on Leased Bottoms—Taxation ...................... 192

PARKING LOTS
Power of Military Board to Operate .................. 108

PENAL INSTITUTIONS
Industrial Schools .............................................. 88

PHYSICIANS
Jails—Compensation—When Paid ............................ 115

POLICE COMMISSIONERS
Removal of .......................................................... 120

POLICE OFFICERS
Fees—Services in Criminal Matters ....................... 49
Mileage ................................................................ 49
Special:
Authority of Board of Supervisors to Appoint .......... 23
Authority of Division of Motor Vehicles to Employ in Cases
of Emergency .................................................... 57
Service of Warrants by ........................................ 211

POWERS OF ATTORNEY
Corporations—Recordation of ................................. 36

PRINTING
Uniform Warrants, Committal Cards and Release Cards—Cost of .. 4

PUBLIC ASSISTANCE
Dependent Children—Eligibility for Aid—Residence .......... 115
Duty of State to Recover from Locality Funds in Good Faith Paid
to Recipients of Aid but not Allowed by Federal Government .. 117
Eligibility of Aged Having Children Able to Support Them .... 121
General Relief—State's Claim Against Recipient's Estate .... 118
Suit Against Recipient's Estate to Recover Funds Paid—Who Brings 121
When Payment Becomes Part of Recipient's Estate .......... 116
### PUBLIC OFFICERS
- Civil and Police Justice—State Officers .................................. 172
- Eligibility—Person Not Qualified to Vote .................................. 122
- Fees: Making Arrest on Warrant Charging a Felony ...................... 76
- Removal of—Police Commissioners ........................................... 120

### PUBLIC RECORDS
- Local Officers—Destruction .................................................. 122
- State Department of Health—Destruction ................................. 123

### PUBLIC WELFARE
- Duty of Board of Supervisors to Provide Office Quarters for County Board .......................................................... 19
- Expense of Auditing Accounts of Local Boards—By Whom Paid .......... 47
- Member of Local Board Serving as Mayor of Town ........................ 50
- Use By Local Boards of Funds Appropriated By ............................ 124

### PURCHASE AND PRINTING
- Bids—Acceptance—Compromise .............................................. 127
- Purchase of Certain Forms .................................................. 125
- Purchase for Conservation Commission of Booklet Owned by Printer 127
- Purchase Through By Miscellaneous Agencies Receiving Appropriations From State ......................................................... 126

### PURE FOOD LAWS
- Blended Vinegars—Sale of ................................................... 128

### REAL ESTATE COMMISSION
- License Issued By Not in Lieu of State License Tax ..................... 98

### RECOGNIZANCES
- Docketing of ........................................................................ 129
- Form of ................................................................................ 12

### RECORDATION OF INSTRUMENTS
- Clerks, Authority to Use Photostatic Equipment—Fees .................... 130

### REGIONAL DEFENSE COUNCILS
- Authority of Board of Supervisors to Make Appropriations to ........ 24

### REGISTRARS
- See Elections.

### REPORTS
- State Departments—Consolidation for Two Years ....................... 164

### RESIDENCE
- Deputy Sheriffs—Eligibility for Office ..................................... 157
- Mayors—Eligibility for Office ................................................ 28
- Voting:
  - Establishment of ................................................................ 69
  - Legal .............................................................................. 66
  - Married Woman .................................................................. 66

### SALARIES
- Acting Division Superintendent Employed By Local School Board—
  Payment by State Board of Education ........................................ 162
- City Sergeant—How Fixed ...................................................... 164
- Clerks—Minimum Allowance Out of County Treasury .................. 35
- Clerks of Trial Justices ......................................................... 202
Division Superintendent of Schools—Power of School Board to Supplement .............................................. 146
Employees of Attorney General:
  Approval of by Governor ........................................... 10
  Increase of ........................................... 131
Negro Teachers ........................................... 135
Secretary-Treasurer—State Bar—Increase of ........................................... 210
Trial Justices—Contribution by Towns ........................................... 203

SCHOOLS
  Appropriations:
    Constitutional—Disbursement of ........................................... 6
    Funds for by Board of Supervisors in Excess of School Levy 15
    Local—Matching by State ........................................... 134
  County Levy—Power of Board of Supervisors to Raise 25
  Division Superintendent—Engaging in Other Business 134
Teachers:
  Aliens—Certificate ........................................... 136
  Negroes—Salary ........................................... 135
  Tuition—Children Placed by Public Welfare Department 150

SCHOOL BOARDS
Anticipation of Literary Fund Loans—How Money Borrowed For.. 136
Appointment to—When Made ........................................... 137
Authority:
  To Charge Tuition—Children Placed by Public Welfare Department ........................................... 150
  To Employ Relative of Members—Persons Previously Employed ........................................... 139, 140
  To Employ Step Son-In-Law of Member ........................................... 138
  To Employ Relative of Member as Division Superintendent ........................................... 141
Employees of—Approval of Division Superintendent ........................................... 138
Extent of Expenditures Authorized ........................................... 142
Filling Vacancy on—Notice ........................................... 143
Insurance on School Buildings—Legality of Member of Issuing Policy ........................................... 145
Interest of Members in Transactions in Connection with Operation of Schools ........................................... 144
Member of as Coroner ........................................... 113
Member of as Member of Board of Public Welfare ........................................... 112, 113
Payment of Small Bills—Procedure ........................................... 145
Powers:
  Outgoing Board to Employ Principal of School ........................................... 147
  To Contract for Five-Year Insurance Policy ........................................... 148
  To Supplement Salary of Division Superintendent ........................................... 146
Temporary Loans ........................................... 148, 149
Warrants of—Who Must Sign ........................................... 150

SENTENCE AND PUNISHMENT
Suspension of Sentence:
  Imposed under ABC Law ........................................... 118
  Pending Medical Treatment ........................................... 151

SEPTIC TANKS
Regulations Governing Installation and Maintenance ........................................... 99

SHENANDOAH NATIONAL PARK
Regulatory Power of ABC Board Over Sale of Intoxicating Beverages ........................................... 3
## SHERIFFS, SERGEANTS AND CONSTABLES

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>City Sergeant—How Salary Fixed</td>
<td>164</td>
</tr>
<tr>
<td>Commission of Sheriffs on Amounts Collected Under Capias Pro Fine</td>
<td>154</td>
</tr>
<tr>
<td>Deputy Sheriffs—Eligibility for Office—Residence</td>
<td>157</td>
</tr>
<tr>
<td>Duty of Board of Supervisors to Furnish Office for Sheriff</td>
<td>19</td>
</tr>
<tr>
<td>Fees:</td>
<td></td>
</tr>
<tr>
<td>Arrest—Execution of Search Warrant</td>
<td>158</td>
</tr>
<tr>
<td>Arrest and Trial of Offenders Violating Motor Vehicle Laws</td>
<td>76</td>
</tr>
<tr>
<td>Sheriffs:</td>
<td></td>
</tr>
<tr>
<td>As Attendance Officer of School</td>
<td>114</td>
</tr>
<tr>
<td>Compensation:</td>
<td></td>
</tr>
<tr>
<td>Arrests—Mileage Allowance</td>
<td>154</td>
</tr>
<tr>
<td>Board of Prisoner Violating Federal Law</td>
<td>154</td>
</tr>
<tr>
<td>Delivery of Election Lists</td>
<td>153</td>
</tr>
<tr>
<td>Executing Warrant—Summoning Physician and Witness</td>
<td>154</td>
</tr>
<tr>
<td>Notifying Jurors to Appear on a Different Date</td>
<td>152</td>
</tr>
<tr>
<td>Service Outside of County in Criminal Cases</td>
<td>152</td>
</tr>
<tr>
<td>Fees:</td>
<td></td>
</tr>
<tr>
<td>Arrests Under Capias Pro Fine</td>
<td>154</td>
</tr>
<tr>
<td>Services Rendered Commonwealth</td>
<td>155</td>
</tr>
<tr>
<td>When No Arrest Made</td>
<td>157</td>
</tr>
<tr>
<td>Mileage:</td>
<td></td>
</tr>
<tr>
<td>Arrests Under Capias Pro Fine</td>
<td>154</td>
</tr>
<tr>
<td>Carrying Prisoner to Jail</td>
<td>159</td>
</tr>
<tr>
<td>Minimum Allowance Out of County Treasury</td>
<td>156</td>
</tr>
</tbody>
</table>

## SLOT MACHINES

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confiscated—Disposition of</td>
<td>79</td>
</tr>
<tr>
<td>Disposition of Money in Seized Machine—Sheriff Making Seizure</td>
<td>160</td>
</tr>
<tr>
<td>Licenses</td>
<td>190, 191</td>
</tr>
<tr>
<td>Seized Without Warrant—Destruction of</td>
<td>80</td>
</tr>
</tbody>
</table>

## SOIL CONSERVATION

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Election of District Supervisors—Printing of Ballots</td>
<td>62</td>
</tr>
</tbody>
</table>

## STATE AGENCIES

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to Require Independent Contractor to Carry Workmen’s</td>
<td>41</td>
</tr>
<tr>
<td>Compensation Insurance</td>
<td></td>
</tr>
<tr>
<td>Tort Liabilities</td>
<td>161</td>
</tr>
</tbody>
</table>

## STATE BAR

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Members—Payment of State Licenses</td>
<td>209</td>
</tr>
<tr>
<td>Salary—Secretary-Treasurer—Increase</td>
<td>210</td>
</tr>
</tbody>
</table>

## STATE BOARD OF EDUCATION

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to Sponsor State-wide W. P. A. Library Project</td>
<td>166</td>
</tr>
<tr>
<td>Powers:</td>
<td></td>
</tr>
<tr>
<td>To Pay an Acting Superintendent Employed by Local School Board</td>
<td>162</td>
</tr>
</tbody>
</table>

## STATE COLLEGES AND UNIVERSITIES

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additional Compensation to Professors—Payment</td>
<td>100</td>
</tr>
<tr>
<td>Appropriation—Operation of Richmond and Norfolk Divisions of College of William and Mary</td>
<td>37</td>
</tr>
<tr>
<td>Contracts for Binding Library Material—How Let</td>
<td>129</td>
</tr>
<tr>
<td>Payment Membership Fee—Virginia State Chamber of Commerce V. P. I.</td>
<td>163</td>
</tr>
<tr>
<td>Power to Acquire and Hold Real Estate—V. P. I.</td>
<td>209</td>
</tr>
</tbody>
</table>
STATE DEPARTMENTS
Printing of Reports—Consolidation for Two Years 164

STATE HOSPITALS
Authority to Sell Medicine, Coal, Etc., to Employees at Cost 213
Commitment Papers—Sufficiency of 165

STATE INSTITUTIONS
Medical College of Virginia 100

STATE LIBRARY BOARD
Authority to Sponsor State-wide W. P. A. Library Project 166

STATE PENITENTIARY
Sale of Convict-Made Goods to Miscellaneous Agencies Receiving Appropriations From State 126

STATE PORT AUTHORITY
Commissioner Serving as Director 173

STATUTES
Construction of—Amendment by Two Separate Acts at Same Session 173

STREAMS
Duty of Commission of Game and Inland Fisheries to Prevent Pollution of 80

TAXATION
Alcoholic Beverages Sold by Retail Licensee of ABC Board 4
Assessments—Real Estate—Effective Date of Changes Made by Equalization Board 174
Capitation Tax:
  Payment by Agent 61
  Payment of Without being Assessed 70
  New Residents 65, 69
Carnivals 49
Collection—Duty of Treasurer—Personal Solicitation 195
Delinquent:
  Advertisement and Sale of Land 176
  Collection of:
    Fees of Clerks 30
    Treasurer Acting As Attorney—Compensation 194
  Publication of Tax Lists 175, 183
Endowment Funds of Cemeteries 176
Exemptions:
  New Business 178, 180
  Notes Held by Church 179
Gasoline Used by Independent Contractor Employed by Federal Government 182
Inspection Tax on Commercial Feeds 179
Levies—Schools 25
Local—Exemption of New Business 178, 180
Merchant's License:
  Person Taking Orders 182
  Proration of 181
  Retail 189
Personal Property in Territory Annexed to City 183
Reassessment of Real Estate—Within What Time to be Computed 184
Recordation:
Computing Base Consideration .................................. 187
Deeds of Trust Filed for Docketing .......................... 186
Deeds:
   Conveying Life Estate ...................................... 188
   Conveyance by Trustee Under Second Deed of Trust ...... 186
   Religious Organizations .................................... 185
Liens ................................................................. 188
Sale of Delinquent Lands Previously Sold ................. 189
Slot Machines ...................................................... 190, 191
Tangible Personality—Oysters on Leased Bottoms ........... 192
Unemployment Compensation—Payroll tax .................... 203

**TORT LIABILITIES**

State Agencies ....................................................... 161

**TOWN COUNCILS**

 Teachers as Members of ........................................... 114

**TRADE-MARKS**

 Trade Union—How Registered .................................... 192
 Transfer of ............................................................ 53
 Use of Name “Health Center” by Private Interests for a Bowling Alley .................................................. 193

**TREASURERS**

 Acting as Attorney to Collect Delinquent Taxes—Compensation ... 194
 Authority to Apply Proceeds of County School Board Warrant to County Levies Owing by Taxpayer ......................... 185
 Bonds—Fixing Penalty of ............................................ 29
 Depositories—Banks Outside of State ......................... 195
 Duties:
   Collection of Taxes—Personal Solicitation .................. 196
   To Disclose Information Regarding Payment of Taxes by Citizen .................................................. 196

**TRIAL JUSTICES**

 Authority to Suspend Payment of Fine and Costs ............. 197
 Clerks—Salary of .................................................... 202
 Disposition of Papers in Criminal Cases ....................... 199
 Duties—To Collect Bail Fee at Time of Admitting to Bail .... 199
 Eligibility of Minors ............................................... 200
 Military Service—Leave of Absence ............................... 200
 Proceedings for Removal of ........................................ 201
 Salary—Contribution by Towns .................................... 203
 Substitute—Compensation ............................................ 197
 Taxation of Costs—Attorney’s Fees .............................. 198

**UNEMPLOYMENT COMPENSATION COMMISSION**

 Ownership of Property Bought With Federal Funds Granted to State .................................................. 206
 Payroll Tax—Merit Rating of Employees ......................... 203
 Personnel Classification—Attorney ............................... 205

**VIRGINIA PROTECTIVE FORCE**

 Authority of Board of Supervisors to Furnish Uniforms for .... 16

**VIRGINIA SCHOOL FOR DEAF AND BLIND**

 Appropriation—Transfer of Item to Another Purpose .......... 5

**WAGES**

 Payment of—Punishment for Violation of Act Relating to .... 53
WEAPONS
Unconcealed—Carrying of by Pickets ........................................ 52
Used in Committing Crime—Forfeiture of ................................. 52

WARRANTS
Service of by State Police Officers ........................................... 211

WEIGHTS AND MEASURES
Use of Gasoline Pump Calculated to Falsify Measure ................. 211

WILLIAM AND MARY COLLEGE
Appropriation—Operation of Richmond and Norfolk Divisions ...... 37

WILLS
Renunciation of—Where Recorded ............................................. 35

WITNESSES
Authority of Division of Motor Vehicles to Compel Attendance of.. 56
Legality of Verbal Summons in Criminal Cases .......................... 213

WOMEN
Hours of—Drug Store Serving Light Lunches .............................. 87

WORKMEN'S COMPENSATION
Authority of State Agency to Require Independent Contractor to
Carry .................................................................................. 41

W. P. A.
Library Project:
Authority of State Board of Education to Sponsor .................. 166
Authority of State Library Board to Sponsor ....................... 166
# Consecutive List of Statutes Referred to in Opinions

## ACTS OF ASSEMBLY

<table>
<thead>
<tr>
<th>Acts of 1902-4</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>501</td>
<td></td>
<td>198</td>
</tr>
</tbody>
</table>

### Acts of 1910

<table>
<thead>
<tr>
<th>Acts of 1910</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>151</td>
<td></td>
<td>180</td>
</tr>
</tbody>
</table>

### Acts of 1912

<table>
<thead>
<tr>
<th>Acts of 1912</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>165</td>
<td></td>
<td>29</td>
</tr>
</tbody>
</table>

### Acts of 1916

<table>
<thead>
<tr>
<th>Acts of 1916</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>371</td>
<td></td>
<td>180</td>
</tr>
</tbody>
</table>

### Acts of 1918

<table>
<thead>
<tr>
<th>Acts of 1918</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>382</td>
<td></td>
<td>74</td>
</tr>
<tr>
<td>389</td>
<td></td>
<td>53</td>
</tr>
</tbody>
</table>

### Acts of 1920

<table>
<thead>
<tr>
<th>Acts of 1920</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>88</td>
<td></td>
<td>11, 133</td>
</tr>
<tr>
<td>203</td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>458</td>
<td></td>
<td>94</td>
</tr>
</tbody>
</table>

### Acts of 1926

<table>
<thead>
<tr>
<th>Acts of 1926</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>371, sec. 7</td>
<td></td>
<td>3</td>
</tr>
</tbody>
</table>

### Acts of 1928

<table>
<thead>
<tr>
<th>Acts of 1928</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>247</td>
<td></td>
<td>38</td>
</tr>
<tr>
<td>365</td>
<td></td>
<td>136</td>
</tr>
</tbody>
</table>

### Acts of 1930

<table>
<thead>
<tr>
<th>Acts of 1930</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>170</td>
<td></td>
<td>31</td>
</tr>
<tr>
<td>272, sec. 2</td>
<td></td>
<td>56</td>
</tr>
<tr>
<td>342, sec. 7</td>
<td></td>
<td>57</td>
</tr>
<tr>
<td>403</td>
<td></td>
<td>120</td>
</tr>
</tbody>
</table>

### Acts of 1932

<table>
<thead>
<tr>
<th>Acts of 1932</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>94</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>357</td>
<td></td>
<td>171</td>
</tr>
<tr>
<td>389</td>
<td></td>
<td>56</td>
</tr>
</tbody>
</table>

### Acts of 1934

<table>
<thead>
<tr>
<th>Acts of 1934</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>47, sec. 12</td>
<td></td>
<td>133</td>
</tr>
<tr>
<td>84</td>
<td></td>
<td>168</td>
</tr>
<tr>
<td>380</td>
<td></td>
<td>164</td>
</tr>
</tbody>
</table>

### Acts of 1936

<table>
<thead>
<tr>
<th>Acts of 1936</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>45</td>
<td></td>
<td>167</td>
</tr>
<tr>
<td>85</td>
<td></td>
<td>99</td>
</tr>
<tr>
<td>122</td>
<td></td>
<td>151</td>
</tr>
</tbody>
</table>

### Acts of 1938

<table>
<thead>
<tr>
<th>Acts of 1938</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>129</td>
<td></td>
<td>29</td>
</tr>
<tr>
<td>171</td>
<td></td>
<td>65</td>
</tr>
<tr>
<td>234, sec. 40</td>
<td></td>
<td>119</td>
</tr>
<tr>
<td>357</td>
<td></td>
<td>80</td>
</tr>
<tr>
<td>378</td>
<td></td>
<td>140</td>
</tr>
<tr>
<td>379</td>
<td></td>
<td>119</td>
</tr>
<tr>
<td>379, sec. 6</td>
<td></td>
<td>112, 113</td>
</tr>
<tr>
<td>379, sec. 7(d)</td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>379, sec. 27(b)</td>
<td></td>
<td>116</td>
</tr>
<tr>
<td>379, sec. 40</td>
<td></td>
<td>116</td>
</tr>
<tr>
<td>379, sec. 45</td>
<td></td>
<td>117</td>
</tr>
<tr>
<td>380</td>
<td></td>
<td>110</td>
</tr>
<tr>
<td>387</td>
<td></td>
<td>38</td>
</tr>
<tr>
<td>394, sec. 6</td>
<td></td>
<td>63</td>
</tr>
<tr>
<td>409</td>
<td></td>
<td>87</td>
</tr>
<tr>
<td>428</td>
<td></td>
<td>9</td>
</tr>
</tbody>
</table>

### Acts of 1940

<table>
<thead>
<tr>
<th>Acts of 1940</th>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td></td>
<td>153, 174</td>
</tr>
<tr>
<td>38</td>
<td></td>
<td>129</td>
</tr>
<tr>
<td>43</td>
<td></td>
<td>15</td>
</tr>
<tr>
<td>102</td>
<td></td>
<td>103</td>
</tr>
<tr>
<td>144</td>
<td></td>
<td>1, 4</td>
</tr>
<tr>
<td>146</td>
<td></td>
<td>82</td>
</tr>
<tr>
<td>155</td>
<td></td>
<td>37, 188</td>
</tr>
<tr>
<td>157</td>
<td></td>
<td>164</td>
</tr>
<tr>
<td>167</td>
<td></td>
<td>23</td>
</tr>
<tr>
<td>177</td>
<td></td>
<td>37</td>
</tr>
<tr>
<td>215</td>
<td></td>
<td>176, 190</td>
</tr>
<tr>
<td>216</td>
<td></td>
<td>122, 123</td>
</tr>
<tr>
<td>218</td>
<td></td>
<td>51</td>
</tr>
<tr>
<td>220</td>
<td></td>
<td>15, 46</td>
</tr>
<tr>
<td>224</td>
<td></td>
<td>204</td>
</tr>
<tr>
<td>285</td>
<td></td>
<td>53</td>
</tr>
<tr>
<td>314</td>
<td></td>
<td>210</td>
</tr>
<tr>
<td>321</td>
<td></td>
<td>128</td>
</tr>
<tr>
<td>326</td>
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**Code of Virginia** *(Michie, 1936, and Supplements)*

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</table>

**Section** | **Page**

| 657 | 147 |
| 658 | 25 |
| 660 | 138, 139, 140, 141 |
| 667 | 46 |
| 673 | 142, 149 |
| 698 | 15, 25, 46, 142 |
| 708 | 144, 145 |
| 713 | 167 |
| 856 | 146 |
| 860 | 209 |
| 1017 | 166 |
| 1021 | 89, 153 |
| 1026 | 165 |
| 1190(a) | 53 |
| 1190(k) | 54 |
| 1190(p) | 53 |
| 1211(q) | 48 |
| 1211(t) | 48 |
| 1211(v) | 48 |
| 1233 | 180 |
| 1239 | 54, 179 |
| 1257 | 181 |
| 1265 | 181 |
| 1485(23) | 212 |
| 1492 | 22, 99 |
| 1493 | 99 |
| 1494 | 99 |
| 1498 | 22, 99 |
| 1545a | 99 |
| 1613 | 107 |
| 1622 | 107 |
| 1623 | 70, 71 |
| 1624 | 70 |
| 1627 | 45 |
| 1808(d) | 87 |
| 1818 | 53 |
| 1819 | 53 |
| 1820 | 53 |
| 1887(109) | 205 |
| 1904(18) | 119 |
| 1905 | 88 |
| 1910 | 102 |
| 1922 | 88 |
| 1922b | 94, 119, 151, 197, 211 |
| 1944a | 121 |
| 1953a | 172 |
| 1953e | 97 |
| 2073 | 126 |
| 2073a | 126 |
| 2095 | 90 |
| 2154(53) | 211 |
| 2154(55) | 76 |
| 2154(82)n | 109 |
| 2154(187) | 56 |
| 2154(205) | 56 |
| 2154(205) | 176, 190 |
| 2154(205) | 78 |
| 2154(205) | 211 |
| 2550 | 32, 33 |
| 2553 | 32 |
# REPORT OF THE ATTORNEY GENERAL

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<td>37, 186</td>
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<td>37, 186, 188</td>
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(Michie, 1936)

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## Appropriation Act, 1940

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## Constitution of Virginia

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