

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

From July 1, 1942, to June 30, 1943

RICHMOND:
DIVISION OF PURCHASE AND PRINTING
1943

LETTER OF TRANSMITTAL

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 12, 1943.*

HONORABLE COLGATE W. DARDEN, JR.,
Governor of Virginia,
Richmond, Virginia.

MY DEAR GOVERNOR DARDEN:

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

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

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General.

Personnel of the Office
(Postoffice address, Richmond)

NAME	COUNTY	OFFICIAL TITLE
ABRAM P. STAPLES.....	Roanoke city.....	Attorney General
EDWIN H. GIBSON.....	Culpeper.....	Assistant
W. W. MARTIN.....	Henrico.....	Assistant
*D. GARDINER TYLER, JR.....	Charles City.....	Assistant
G. STANLEY CLARKE.....	Henrico.....	Assistant
KENNETH C. PATTY.....	Tazewell.....	Assistant
†JOSEPH L. KELLY, JR.....	Bristol city.....	Assistant
WALTER E. ROGERS.....	Richmond city.....	Assistant
EDWIN B. JONES.....	Highland.....	Assistant
M. RAY DOUBLES.....	Richmond city.....	Assistant
‡CARRINGTON THOMPSON.....	Pittsylvania.....	Senior Attorney
NERHEA S. EVANS.....	Charlotte.....	Secretary
LOUISE W. POORE.....	Richmond city.....	Secretary
MARIE LOW.....	Roanoke city.....	Secretary
LOIS B. KRUG.....	Richmond city.....	Secretary
MARY M. OWEN.....	Halifax.....	Secretary

Attorneys General of Virginia
From 1776 to 1936

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

*On leave in Military Service.

†On leave in United States Coast Guard.

‡On leave in Naval Service.

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

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

Cases Pending in the Supreme Court of Appeals of Virginia

1. *Albert, Homer v. Commonwealth.* From Circuit Court of Giles County. Manslaughter.
2. *Home Beneficial Life Insurance Co. v. Unemployment Compensation Commission of Virginia, et al.* From Corporation Court City of Norfolk. Unemployment compensation.
3. *Miller, Howard v. Commonwealth.* From Circuit Court of Wise County. Rape.
4. *Willeroy, W. A. v. Commonwealth.* From Hustings Court City of Richmond. Cruelty to animals.

Cases Decided in the Supreme Court of Appeals of Virginia

1. *American Airlines, Incorporated v. Marion S. Battle, Director, etc.* From Circuit Court of City of Richmond. Gasoline tax on airplanes. Affirmed.
2. *American Surety Company of New York v. Commonwealth of Virginia, et al.* From Circuit Court of City of Richmond. Enforcement of liability of surety on clerk's bond. Affirmed.
3. *Anglin, Joseph Gordon v. C. F. Joyner, Jr., Commissioner, etc.* From Corporation Court City of Norfolk, Part II. Appeal from order of court revoking license of chauffeur. Affirmed.
4. *Battle, M. S., Director of the Division of Motor Vehicles, etc., v. Elvin Clark Tucker.* From Corporation Court of City of Danville. Civil proceeding to restore operator's license. Dismissed as moot question because license expired prior to hearing in appellate court.
5. *Bradshaw, James M. v. Commonwealth.* From the Circuit Court of York County. Prohibition. Dismissed.
6. *Carter, John T. and E. P. Macemore v. Commonwealth.* From Circuit Court of Rappahannock County. ABC Act. Affirmed.
7. *Carwile, Howard H. v. Commonwealth of Virginia and State Board of Health, as operators of Blue Ridge Sanatorium.* Case No. 1. From the Circuit Court of the City of Richmond. Torts of employees of Commonwealth. Writ refused.
8. *Cason, Samuel C., owner of Ford Coach, etc., v. Commonwealth.* From Corporation Court, Part II, of City of Norfolk. Forfeiture of automobile. Reversed.
9. *City of Roanoke v. James W. Michael's Bakery Corporation and Commonwealth of Virginia.* From Hustings Court of City of Roanoke. Property tax on capital. Affirmed.
10. *Cody, Earnest C. v. Commonwealth.* From Circuit Court of Amelia County. Murder. Affirmed.
11. *Commonwealth v. Anheuser-Busch, Inc., et al.* From Circuit Court of City of Richmond. Billboard advertising. Reversed.
12. *Commonwealth of Virginia v. Leonard Meyer, et als., and City of Richmond v. Leonard Meyer, et als.* Merchant's license tax. Affirmed.
13. *Commonwealth of Virginia v. Mary R. White.* From Circuit Court of Albemarle County. Tax on intangible property. Affirmed.
14. *Dickerson, Earl, W. O. Page, etc., v. Commonwealth.* From Circuit Court of Prince William County. ABC Act. Affirmed.
15. *Diggs, Guy v. Commonwealth.* From Circuit Court of Elizabeth City County. Desertion and non-support. Reversed.
16. *Francisco, M. G. v. Commonwealth.* From Circuit Court of Hanover County. Violation of Sunday statute. Reversed.
17. *Gillispie, Jack v. Commonwealth.* From Circuit Court of Smyth County. Attempted rape. Reversed.
18. *Grosso, Charles S. v. Commonwealth.* From Corporation Court for City of Staunton. Unlawful practice of chiropractic and medicine. Affirmed.
19. *Jordan, Morton v. Commonwealth.* From Circuit Court of Mecklenburg County. Rape. Affirmed.
20. *Kelly, Samuel v. Commonwealth.* From the Hustings Court of City of Richmond. Grand larceny. Affirmed.
21. *Lawrence, Johnny v. Commonwealth.* From Circuit Court of Sussex County. Involuntary manslaughter Case No. 1. Affirmed.

22. *Lawrence, Johnny v. Commonwealth.* From Circuit Court of Sussex County. Involuntary manslaughter. Case No. 2. Affirmed.
23. *Legions, Samuel v. Commonwealth.* From Circuit Court of Loudoun County. Rape. Reversed.
24. *Lunsford, Roosevelt v. Commonwealth.* From Circuit Court of Surry County. ABC Act. Reversed.
25. *Miller, Charles Walter v. Commonwealth.* From Circuit Court of Roanoke County. Unlawful practice of medicine. Affirmed.
26. *Robertson, Archibald G. v. Commonwealth.* From Law and Equity Court of City of Richmond, Part II. Contempt of court. Affirmed.
27. *Taylor, Roy v. Commonwealth.* From Circuit Court of Wise County. Rape. Reversed.
28. *Trent, Pearl v. Commonwealth.* From Circuit Court of Elizabeth City County. House of ill-fame. Affirmed.
29. *Waller, Odell v. Rice M. Youell,* Superintendent of the Virginia State Penitentiary. Petition for habeas corpus. Petition denied.
30. *Wilkinson, G. Elliott v. W. Frank Smyth, Jr.,* Superintendent of the Virginia State Penitentiary. Petition for writ of habeas corpus. Prisoner remanded.
31. *Williamson, Hugh Raymond v. Commonwealth.* From Circuit Court of Elizabeth City County. Murder. Affirmed.

Cases Decided in the Supreme Court of the United States

1. *Carwile, Howard H. v. Commonwealth of Virginia and State Board of Health,* as operators of Blue Ridge Sanatorium. Case No. 1. From Supreme Court of Appeals of Virginia. Torts of employees of Commonwealth. Writ refused.
2. *Farris, Harry Edward v. Commonwealth of Virginia.* On petition for writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia. Murder. Writ of certiorari denied.

Cases Decided in the United States Circuit Court of Appeals

1. *Otis Mitchell v. Rice M. Youell,* Superintendent of the Virginia State Penitentiary. From the United States District Court. Petition for writ of habeas corpus. Remanded with instructions that the writ of habeas corpus be issued.

Cases Pending in the United States Circuit Court of Appeals

1. *Sanderlin, C. C. v. Frank W. Smyth, Jr.,* Superintendent of the Virginia State Penitentiary. From the United States District Court. Petition for writ of habeas corpus.

Cases Decided in the United States District Court

1. *Sanderlin, C. C. v. Frank W. Smyth, Jr.,* Superintendent of the Virginia State Penitentiary. Petition for writ of habeas corpus. Writ denied.

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

1. *American Bank and Trust Company of Suffolk and Hugh L. Holland v. Independence Indemnity Company and International Reinsurance Corporation and John M. Purcell, Treasurer of Commonwealth of Virginia.* Receivership.
2. *American Insurance Company of Newark, New Jersey v. M. E. Bristow, Commissioner of Insurance and Banking.* Circuit Court of City of Richmond.
3. *Bailey, Bernard B. v. State Highway Commission.* Circuit Court of Fairfax County. Injunction suit.
4. *Bazile, Leon M. and H. M. Bandy, Receivers for Independence Indemnity Company and International Reinsurance Corporation v. Commonwealth of Virginia, State Highway Department, Treasurer of the Commonwealth, James Cain & Company, et al.* Circuit Court of City of Richmond.

5. *Board of Supervisors of Roanoke County v. Wm. H. Stauffer, Commissioner of Public Welfare of Virginia, and LeRoy Hodges, State Comptroller.* Circuit Court of City of Richmond. Petition for declaratory judgment construing the Public Assistance Act.
6. *Boschen-Schmidt Realty Corp., etc., et al. v. Commonwealth of Virginia and Regina V. G. Millhiser, Exec., etc., et al.* Circuit Court of City of Richmond. Petition for correction of erroneous assessment of taxes.
7. *Bowling, H. T. v. Industrial Commission of Virginia.* Circuit Court of Nelson County. Petition for writ of mandamus.
8. *Buhl Optical Company, a Corporation v. E. R. Bell, et als.,* as Virginia State Board of Examiners in Optometry. Circuit Court City of Richmond. Injunction.
9. *Carter, John T. and E. P. Macemore v. Commonwealth.* From Circuit Court of Rappahannock County. ABC Act. Affirmed.
10. *Carwile, Howard H. v. Commonwealth of Virginia, State Board of Health,* as operator of Blue Ridge Sanatorium, and *H. G. Gilmer, State Comptroller.* Case No. II. Circuit Court of City of Richmond. Torts of employees of Commonwealth.
11. *Commonwealth v. David M. Cooper and Rose Cooper.* Circuit Court of Warwick County. Income tax.
12. *Commonwealth of Virginia,* at the relation of the *DeJarnette State Institution v. Arthur D. Shands.* Circuit Court of City of Richmond. Continued pending negotiations for private settlement.
13. *Commonwealth v. Fruit Growers Co-operative.* Circuit Court of Albemarle County. Income and Merchants' license taxes.
14. *Commonwealth v. Cralon Corporation.* Circuit Court City of Richmond. Receivership.
15. *Commonwealth of Virginia,* at the relation of the *Attorney General v. Grand Fountain United Order of True Reformers, et al.* Circuit Court City of Richmond. Receivership.
16. *Commonwealth of Virginia v. Guaranty Realty Company, Inc.,* sometimes known as Guaranty Realty Corporation. Circuit Court City of Richmond. Notice of motion.
17. *Commonwealth of Virginia v. J. W. Newsom.* Circuit Court of Henrico County. Involving the regulation of the ABC Board dealing with through interstate commerce.
18. *Commonwealth of Virginia v. J. Herbert Mercer, Sheriff, etc.,* Administrator of the estate of H. Stewart Jones, deceased, et al. Circuit Court of City of Richmond. Action on surety bond. Judgment in favor of Commonwealth.
19. *Commonwealth of Virginia,* at the relation of the *Virginia Alcoholic Beverage Control Board v. Schlitz Brewing Company and General Outdoor Advertising Co., Inc.* Circuit Court of City of Richmond. Testing reasonableness of regulations of ABC Board governing outdoor advertising, etc.
20. *Consolvo & Cheshire, Inc., v. Virginia Alcoholic Beverage Control Board and T. McCall Frazier, et al.,* members constituting the Virginia Alcoholic Beverage Control Board. Circuit Court City of Richmond. Injunction.
21. *Cowan, C. M. and James T. Horton v. T. McCall Frazier,* Director of the Division of Motor Vehicles. Circuit Court of City of Richmond. Injunction.
22. *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.
23. *DeJarnette, H. C., Special Commissioner, etc., et al. v. Commonwealth of Virginia and County of Orange.* Circuit Court of City of Richmond. Damage suit.
24. *Eastern Building Supply Co., Inc. v. Commonwealth.* Circuit Court of City of Richmond. Petition for correction of erroneous assessment of license taxes.
25. *Evans, Emma F. v. Consolidated Indemnity and Insurance Company and John M. Purcell, Treasurer.* Circuit Court of City of Richmond. Receivership.
26. *Gibbs, Green B. H. v. Commonwealth.* Chancery Court City of Richmond. Income tax.
27. *Home Beneficial Life Insurance Company v. Unemployment Compensation Commission.* Corporation Court City of Norfolk. Petition for review of decision handed down by the Unemployment Compensation Commission involving interpretation of section 2 (j7N) of the UCC Act.

28. *Lucerne Cream and Butter Corporation v. Milk Commission*. 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.
29. *New Amsterdam Casualty Company, a corporation v. Alemite Company of the Virginias, Inc., et als., Commonwealth of Virginia, John M. Purcell, Treasurer, Henry G. Shirley, Chairman of the State Highway Commission, et al.* Circuit Court of City of Richmond.
30. *New Amsterdam Casualty Company v. Jim Frank, et al., together with Henry G. Shirley, Highway Commissioner, and A. B. Gathright, State Treasurer*. Circuit Court of City of Richmond.
31. *Powell, Blanche P. v. Commonwealth*. Hustings Court of City of Richmond. Petition for correction of assessment of State taxes on intangible personal property.
32. *Powell, Jr., Legh R., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company v. Commonwealth of Virginia and State Corporation Commission*. Circuit Court of City of Richmond. Petition for correction of erroneous assessment of taxes.
33. *Ridenour, J. M. v. John Q. Rhodes, Jr., Director of the Division of Motor Vehicles*. Circuit Court of City of Richmond. Petition for mandamus.
34. *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.
35. *Standard Drug Co. v. California Growers Wineries and Virginia Alcoholic Beverage Control Board*. Circuit Court of City of Richmond. Attachment of funds in hands of ABC Board.
36. *State Corporation Commission v. American Bank and Trust Company of Richmond*. Circuit Court of City of Richmond. Receivership.
37. *State Corporation Commission v. National Benefit Life Insurance Co. and John M. Purcell, Treasurer of the Commonwealth*. Circuit Court of City of Richmond.
38. *State-Planters Bank and Trust Company v. Commonwealth*. Circuit Court of City of Richmond. Petition for correction of erroneous assessment of taxes.
39. *United States Trust Company of New York, Trustee of the Estate of Rachel Gaff Holmes, deceased v. Commonwealth of Virginia*. Circuit Court of City of Richmond. Petition for correction of erroneous assessment of taxes.
40. *Virginia Electric & Power Co. v. Commonwealth of Virginia and John Q. Rhodes, Director of the Division of Motor Vehicles*. Circuit Court of City of Richmond. Petition for correction of erroneous assessment of taxes.
41. *Virginia Equipment and Supply Co., Inc. v. Commonwealth*. Circuit Court City of Richmond. Petition for correction of erroneous assessment of taxes.
42. *Virginia Public Service Company v. Commonwealth—State Corporation Commission*. Circuit Court of City of Richmond. Franchise tax.
43. *Walker, George v. Henry G. Gilmer, Comptroller of Virginia*. Circuit Court of City of Richmond. Petition to recover bonus.
44. *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.
45. *Whiting Oil Company, Inc. v. Commonwealth*. Circuit Court of City of Clifton Forge. Merchant's license tax.
46. *Wilkins, Julia C. v. Commonwealth*. Circuit Court of City of Richmond. Income tax.
47. *Willard, Belle L., Ex'or of Jos. E. Willard v. Commonwealth*. Circuit Court of Fairfax County. Inheritance tax.
48. *Wolcott, Jas. M. v. Jno. M. Purcell, Treasurer of the Commonwealth*. Circuit Court of City of Richmond. Petition for mandamus.

OPINIONS

ACCOUNTANTS—Qualifications of Applicants for C. P. A. Certificate.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 23, 1942.

MR. FRANK S. CALKINS,
*Secretary-Treasurer,
Virginia State Board of Accountancy,
Richmond, Virginia.*

MY DEAR MR. CALKINS:

This will acknowledge receipt of your letter of December 16, from which I quote as follows:

"Section 567 of the Code of Virginia as amended at the last session of the Legislature provides certain experience requirements of candidates applying for C. P. A. certificates. Among these experience requirements is one which reads as follows: 'or who shall have been actively employed for at least four years preceding the date of his or her application by any Federal or State supervisory agency or instrumentality as an auditor or examiner, whose duties entail the audit or verification of accounts and records and the preparation, based thereon, of reports to such agency or instrumentality for the purposes of supervision or regulation.'

"I am enclosing herewith a copy of the Social Security Act and I would appreciate it very much if you would advise me whether, in your opinion, the Social Security Board is a supervisory agency or instrumentality within the purview of section 567 of the Code, considered particularly in the light of the provisions of Title III, which are set forth on page 61 of the enclosed booklet."

In my opinion, there can be no question but that the Social Security Board is a Federal supervisory agency or instrumentality within the meaning of section 567 of the Code. Whether or not any particular individual applying for a certificate of certified public accountant is an auditor or examiner whose duties have entailed the audit or verification of accounts and records and the preparation, based thereon, of reports to such agency or instrumentality is, of course, a question of fact which will have to be passed upon by the Board in each particular case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AFFIDAVITS AND ACKNOWLEDGMENTS—By Commissioned Military Officers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 18, 1942,*

HONORABLE W. L. PRIEUR, JR.,
Clerk of Courts,
Norfolk, Virginia.

MY DEAR MR. PRIEUR:

This is in reply to your letter of November 14, in which you request my opinion upon the question whether or not section 5205a of the Code, which was enacted by chapter 302 of the Acts of 1942, page 426, authorizes commissioned officers to take the affidavits of persons in the armed forces.

The section, in my opinion, is restricted solely to acknowledgments of instruments for the purpose of rendering the same eligible for admission to record in the office of a court or clerk.

I know of no statute in Virginia which requires an affidavit as a condition for the admission of any instrument to record, but, even if there is such a statute, I do not believe that this section would authorize an affidavit in such a case. There is a clear legal distinction between acknowledging an instrument and making an affidavit as to the truth of certain facts.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AGRICULTURE AND IMMIGRATION—Authority of Commission to Enter Into Reciprocal Agreements.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 4, 1942.*

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

DEAR MR. FRENCH:

This will acknowledge receipt of your letter of August 1, in which you refer to section 882a as added to the Code by Chapter 308 of the Acts of 1942 (Acts 1942, page 430). This section reads as follows:

"The Commissioner of Agriculture and Immigration may enter into reciprocal agreements with the responsible officers of other states under which nursery stock owned by nurserymen or dealers of such states may be sold or delivered in this State without the payment of a Virginia registration fee, provided like privileges are accorded to Virginia nurserymen or dealers by such other states."

You then ask:

"In your opinion, does the Virginia Law as now amended authorize the Commissioner of Agriculture or the State Entomologist to enter into reciprocal agreements with the proper officers of such states to the effect that the nurserymen in those states who wish to ship nursery stock in Virginia must pay the same registration fee that is charged Virginia nurserymen to ship nursery stock into such states? Moreover some of these states require that a special permit tag be obtained at cost from officers of the particular states. Is this Department, through the Commissioner or the State Entomologist now authorized by our law to enter into an agreement with other states and to charge a similar fee for permit tags which would be issued and sold at cost to the nurserymen of the other states?"

In my opinion both of your questions should be answered in the negative. It seems to me that the quoted section only authorizes the Commissioner of Agriculture and Immigration to enter into reciprocal agreements with other states to the effect that nursery stock owned by nurserymen or dealers of this State may be sold or delivered in this State without the payment of a Virginia registration fee where like privileges are accorded to Virginia nurserymen or dealers by such other states. In other words, the extent of the Commissioner's authority is to enter into agreements eliminating the registration fee entirely where similar privileges are accorded to Virginians by the other states.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Authority of A. B. C. Board to
Ration Alcoholic Beverages and Charge Fee for Ration Permit.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 23, 1943.*

SENATOR R. R. FULLER,
SENATOR CHARLES W. CROWDER,
SENATOR E. GLENN JORDAN,
DELEGATE W. H. ADAMS,
DELEGATE ALBERT O. BOSCHEN,
DELEGATE CHARLES W. MOSS,
DELEGATE WALTER L. HOPKINS,
DELEGATE BEECHER E. STALLARD,
Richmond, Virginia.

GENTLEMEN:

This is in reply to your joint request for my opinion upon the question of the authority of the Virginia Alcoholic Beverage Control Board to impose a charge of twenty-five cents upon persons to whom it issues ration books for the purchase of alcoholic beverages in State stores. You state that your request for this opinion is made pursuant to a resolution of the Council of the City of Richmond.

The General Assembly of Virginia in the exercise of its police power and pursuant to the recommendations made to it by the Liquor Control Committee in 1933, created the Alcoholic Beverage Control Board to supervise and regulate the sale and distribution of alcoholic beverages, and conferred upon it wide discretionary powers to adopt such regulations from time to time as changing conditions might demand. (Alcoholic Beverage Control Act, sections 4-b, 4-m, 5-a and 9-g.)

The present shortage in the inventory stocks of the beverages possessed by the Board, and the prospect that the shortage would grow more acute, presented the following two-fold situation: (1) That the stock would be rapidly depleted; (2) That "bootleggers" would buy up the available stock and resell it illegally and at exorbitant prices. The Board has ample authority, under the discretion given it, to prevent either of these conditions, and in my opinion, a system of rationing constitutes a reasonable method of regulation to prevent the said conditions from occurring.

The citizen possesses no inherent right to purchase alcoholic beverages. On the contrary, the legislature, in the exercise of the police power of the State, may entirely withhold the privilege as was the case in the prohibition era. The Virginia statute has delegated to the Alcoholic Beverage Control Board the regulatory power to prescribe under what conditions such beverages may be purchased, the only limitation of this power being that it must be exercised reasonably and in furtherance of the purposes of the statute.

If the Board has the power to institute a system of rationing, and as I have indicated in my opinion it does have such power, then in my opinion it has the further authority, as an incident thereto, to issue permits and charge reasonable fees therefor in the nature of a service charge to cover the reasonably estimated costs incident to issuing the permits and administering the rationing system. It is a well recognized principle of law that the State may charge reasonable fees to cover service costs in such matters where the individual has the option to obtain the particular privilege or reject it as he sees fit, and the only question is whether the statute has delegated this power to the Board.

In a system of rationing, the burden is upon the purchaser to demonstrate that he is entitled to the quota he requests, and the Board can require that he furnish reasonable proof of his right to make the particular purchase. The means devised by the Alcoholic Beverage Control Board is probably the simplest and most economical method from the purchaser's point of view that could be devised to enable the purchaser to produce this proof. In my opinion, by virtue of its statutory power "generally to do all such things as may be deemed necessary or advisable by the Board for the purpose of carrying into effect the provisions of the act," there has been delegated to the Board the authority to make the service charge incident to the issuance of the rationing permits.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Sole Authority to Regulate
Hours of Licensees Is Vested in A. B. C. Board.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 1, 1942.

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

MY DEAR MR. LYNCH:

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

"Enclosed herewith you will find copy of letter from Rear Admiral M. H. Simons, Commandant of the Fifth Naval District, to the Board of Supervisors of Norfolk County with reference to conditions obtaining in several so-called clubs in Norfolk County which cater to enlisted men. As will be seen from this letter the Board has been requested to adopt an ordinance requiring these places to be closed for all purposes during the hours between midnight and eight o'clock A. M. to conform to similar closing hours in force in the Cities of Norfolk and Portsmouth. "Information is requested as to whether or not the Board of Supervisors has the authority under the law to adopt such an ordinance."

I call your attention to the following regulation of the Alcoholic Beverage Control Board:

"On and after 12:01 A. M., Eastern Standard Time, September 15, 1940, all persons licensed to sell wine and/or beer, and/or beverages, under the provisions of the Alcoholic Beverage Control Act, as amended, and Chapter 3 of the Acts of the General Assembly, Extra Session of 1933, as amended, shall, subject to the exceptions and provisions hereinafter mentioned, refrain from selling wine and/or beer, and/or beverages, or permitting the consumption of the same, upon the licensed premises during the hours between 12:00 o'clock Midnight and 5:00 o'clock A. M."

This regulation is applicable to licensees of the Board in Norfolk County. The Board has further provided by regulation, however, that the above quoted regulation "shall not apply to persons holding club type licenses issued by this Board." I assume, therefore, that the places to which Rear Admiral Simons refers hold "club type licenses."

Section 24 of the Alcoholic Beverage Control Act provides:

"Hours of sale for licensees.—The Board shall prescribe by regulations, which it may from time to time alter, amend or repeal, between what hours and on what days wine and beer shall not be sold, or allowed to be consumed upon the premises of any licensed establishment, by persons licensed under the provisions of this act."

In view of this provision, I am of the opinion that the control of the times when beer and wine may be sold by licensees of the Alcoholic Beverage Control Board is vested in the Board, and that this power is not within the Board of Supervisors of a county other than the power given the localities to regulate the sale of beer and wine on Sunday, with which you are, of course, familiar. (See Acts 1940, page 29.)

My suggestion is, therefore, that the problem be taken up with the Alcoholic Beverage Control Board and I am sure it will be given careful consideration.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Distribution of Profits to Localities Where Annexation Has Occurred.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 23, 1942.

HONORABLE I. R. DOVEL,
Commonwealth's Attorney,
Luray, Virginia.

DEAR MR. DOVEL:

This will acknowledge receipt of your letter of September 15, requesting an opinion from this office as to whether or not Alcoholic Beverage Control profits distributed to the County of Page for the fiscal year beginning June 30, 1942, should be apportioned between the county and the Town of Luray as to a portion of the county which was annexed to the town as of January 1, 1942.

The statute to which you have referred (section 4675(16), 1940 Supplement to Michie's Code of 1936) provides:

" * * * If the population of any city or town shall have been increased through the annexation of any territory since the last preceding United States census, such increase shall, for the purpose of this act, be added to the population of such city or town as shown by the said last preceding United States census and a proper reduction made in the population of the county or counties from which the said annexed territory was acquired. The judge of the circuit court of the county in which the said town or greater part thereof is located and seeking an increase under the provisions of this act is hereby authorized and empowered to appoint two disinterested parties as commissioners, who shall proceed to determine the population of the annexed territory to the said town as of the date of the last preceding United States census, and report their findings to the said court, and future distribution of the moneys allocated under the provisions of this act shall be distributed in accordance therewith. * * * "

I gather from your letter that the portion of the profits based upon the population of this annexed area had already been paid to the county before the annexation was brought to the attention of the State Department of Finance. It is my opinion that, if the commissioners provided for in the statute had been appointed and performed their functions and ascertained the population of the annexed area prior to the distribution by the State, then the town would have been entitled to the portion of the profits based upon the population of the annexed area for the distribution would be a "future distribution" within the meaning of the statute. Although the statutory ascertainment was not made prior to the distribution by the State Comp-

troller, it is my opinion that it would now be proper for the Board of Supervisors of the county to pay to the Town of Luray the amount it would have otherwise received. It does not seem to me that the town should be deprived of the share of the profits the statute clearly contemplates it should receive by the mere failure to comply with the mechanics of the statute for determining the town's new population before the distribution was made.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Local Option.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 16, 1943.*

HONORABLE HAROLD B. SINGLETON,
Member of the House of Delegates,
Madison Heights, Virginia.

MY DEAR MR. SINGLETON:

Responding to your communication of February 10, you are advised that subsection (a) of section 31 of the Alcoholic Beverage Control Act, provides that after any county, city or town has voted against the sale of wine and beer therein, and the court or judge in vacation has entered such order certifying to the fact, then, on and after sixty (60) days from that date no beer and wine shall be sold in such county, city or town, except for delivery or shipment to persons outside of or to druggists in such county, city or town.

It, therefore, appears that persons engaged in the wholesale of wine and beer, located in such territories, may continue to do business, provided sales are made out of the jurisdiction which has voted against its sale, and licenses may be issued for that purpose.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL—Sale of Confiscated Automobile
Is Judicial Sale and Not a Sheriff's Sale.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 18, 1943.*

JUDGE E. HUGH SMITH,
c/o Honorable Fleet Dillard,
Commonwealth's Attorney,
Tappahannock, Virginia.

MY DEAR JUDGE SMITH:

This is in reply to your letter of June 17, in which you request my opinion upon the question whether or not a sale, ordered by a circuit court, of a

motor vehicle seized by a State officer pursuant to the provisions of section 4675 (38a) of Michie's Code is a judicial sale or sheriff's sale held under writ within the meaning of a regulation of the Office of Price Administration, Part 1305, Supplementary Order No. 10, a copy of which you sent to me along with your letter.

Without quoting the language of the regulation, it seems clear to me that same intended to draw the well recognized distinction between a judicial sale and a sale under a writ of execution. The Virginia decisions, as well as the decisions of the courts, generally recognize this distinction. See *Alexander v. Howe*, 85 Va. 201; 31 Am. Jur. 396; 23 Words and Phrases 335.

In directing the sale of a motor vehicle under the statute above referred to, the court in its order may require the sheriff to report the sale, and may not confirm same unless satisfied that it should be confirmed. After confirmation of the sale and collection of the purchase money by the sheriff, the court may ascertain how the money shall be paid out, whether to lien creditors, costs, and the balance, if any, to the literary fund of the State. It is clear that such a sale is *pendente lite*.

The regulation of the Office of Price Administration referred to deals with ceiling prices and it would certainly obstruct very seriously the carrying out of an order of the court dealing with this specific property if any such ceiling price were to be held controlling, in the event there should be more than one person who would bid the ceiling price. The case here involved differs essentially from a sheriff's sale under an execution, in that the court itself has jurisdiction over a specific article of property, whereas the execution sale is the result of action taken by the officer after rendition of judgment and independent of any specific action or order of the court.

The manner in which the sheriff is to conduct the sale pursuant to the order of the court is, in my opinion, controlled by section 2832 of the Code, and it will be noted that this section covers both goods and chattels sold pursuant to a distraint or levy under execution, as well as goods and chattels which an officer may be directed to sell by an order of the court. Said section provides for a notice of the time, place, and terms of sale, and also that the officer shall sell to the highest bidder for cash.

From the foregoing it follows that I am of opinion that the sale of an automobile seized under the Alcoholic Beverage Control Act, pursuant to an order of the court, is a judicial sale within the meaning of said Supplementary Order No. 10, and is not affected by the ceiling prices fixed by the Office of Price Administration relating to such article.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Appropriation to Cover a Deficit Can Only Be Used for That Purpose.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 25, 1942.

DR. W. T. SANGER,
*President, Medical College of Virginia,
Richmond, Virginia.*

MY DEAR DOCTOR SANGER:
This is in reply to your letter of August 24, which is as follows:

"During Governor Price's administration deficit authority was given this institution to purchase real estate in the amount of \$33,100. To cover this deficit the General Assembly made an appropriation of this amount as set forth on page 822 of the Acts of the Assembly, item 191. In attempting to secure the desired real estate composing a number of small parcels it soon became evident that if economical purchases were to be made it would be necessary to wait in instances until certain heirs would agree to sell on a reasonable basis, or until owners would get over the idea that we had to have the property. In following that policy \$31,321.16 of the deficit authorized was used prior to July 1, 1942. Last week it became evident that several owners who had held us up on price were now willing to sell on the basis on which previous purchases were made. Accordingly, I asked of the Governor whether we should proceed.

"This morning we have received a letter from Mr. Bradford stating that during the last biennium you ruled that an appropriation for the repayment of a deficit could be used only for the repayment of a deficit and that no expenditures could be made from the appropriation for any other purpose. We are not suggesting that payment be made for any other purpose. We are attempting to carry out the original purpose and our question is whether we have a right to do so in the circumstances. In other words, how long can we be allowed in which to achieve our original purpose? Certainly from a common sense and public policy it was unwise to buy when prices were out of line."

Mr. Bradford is correct in advising you that this office has ruled that an appropriation to pay a deficit incurred or authorized during a biennium is available only for the purpose of paying the deficit, or such part thereof, as was incurred during that biennium.

It appears from your letter that the deficit incurred was not as much as you would have been permitted to incur and charge against said appropriation. It seems clear, however, that the appropriation to repay said deficit cannot be treated as an appropriation for the purchase of real estate during the 1942-1944 biennium.

If it is desired to incur a further deficit for the purchase of real estate during this biennium, it would be necessary to secure the approval of the Governor as in other cases. The authorization from Governor Price applied only to the last biennium and would not be effective at the present time.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ATTORNEYS—Fees When Appointed by Court to Defend Accused.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., May 11, 1943.

HONORABLE J. HUME TAYLOR,
Commonwealth's Attorney,
Norfolk, Virginia.

MY DEAR MR. TAYLOR:

I have your letter of May 10, in which you request my opinion upon the question whether or not there is any provision made in our statutes for

the compensation of attorneys appointed by courts to defend persons charged with the commission of crimes, except in cases provided for by section 3518 of the Code where the person is a poor person not able to employ counsel and is charged with an offense punishable by death or by confinement in the penitentiary for a period of more than ten years.

In such a case the statute provides that the court may direct the treasurer of a county or city to pay the attorney so appointed a fee not in excess of \$25. There is no provision whatever in the statute for the payment to an attorney so appointed either in a felony or a misdemeanor case of a fee out of the State treasury. The legislature has obviously assumed that, except in the cases covered by the above section, the attorney appointed to defend the prisoner will discharge his well established duty so to do without compensation. In *Barnes v. Commonwealth*, 92 Va. 794, 803, our Supreme Court of Appeals said:

"If a prisoner is unable to employ counsel, the court may appoint some one to defend him, and it is a duty which counsel owes to his profession, to the court engaged in the trial, to the administration of justice, and to humanity, not to withhold his aid, nor spare his best efforts in the defence of one 'who has the double misfortune to be stricken with poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so.'"

In my opinion, section 4960 of the Code is not applicable to a case of this kind. The statute has been on the books for many years but so far as I am able to learn there has never been any case where such an attorney has been compensated out of the State treasury. The practice is well established in Virginia that, except as provided for in section 3518 of the Code, attorneys who are appointed to defend poor persons are not entitled to compensation out of the treasury either of the State, county or municipality.

The above, of course, is upon the assumption that there is no ordinance in the City of Norfolk which would permit the payment of such fees out of the city treasury.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

**AUDITOR OF PUBLIC ACCOUNTS—Localities to Bear One-Half of
Expense of Audit.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 3, 1942.

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

DEAR MR. BUTLER:

This will acknowledge receipt of your letter of June 30, in which you ask if the Board of Supervisors of Alleghany County is legally required to pay one-half of the expenses incurred by the Auditor of Public Accounts in making a recent audit of the accounts and records of Olin J. Payne, Clerk of the Circuit Court of Alleghany County.

Section 565a of the Code (Michie 1936) provides that at least once in every two years it shall be the duty of the Auditor of Public Accounts to audit the accounts and records of county officials handling State funds and to make a detailed written report thereof to the Governor. The section further provides that the locality, the accounts and records of whose officials are audited "shall reimburse the State to the extent of one-half of the expense connected therewith, the same to be paid into the State treasury on the presentation by the State accountant [Auditor of Public Accounts] of a bill therefor."

The clerk of the Circuit Court of Alleghany County is an officer handling State funds and I am of opinion, therefore, that pursuant to the statute to which I have referred the Board of Supervisors should pay the bill submitted by the Auditor of Public Accounts.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

BAIL—Power of Civil Justice Clerk to Admit to Bail Persons to Be Tried in Counties.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND VA., *September 25, 1942.*

HONORABLE COLEMAN B. YEATTS.
Acting Trial Justice,
Chatham, Virginia.

DEAR MR. YEATTS:

This is to acknowledge receipt of your letters of September 17 and September 23, requesting my opinion as to whether or not the clerk of the Civil Justice Court of Danville has authority to take criminal bonds for the appearance of defendants in the Trial Justice Court of Pittsylvania or the Circuit Court of Pittsylvania County.

Your letter of September 23 refers to a portion of chapter 463 of the Acts of 1942, which is as follows:

"The clerk of the civil justice court (or of the trial justice court, when and if such shall be created as hereinbefore provided) and the substitute clerk on days when he acts as such, shall have the same power to admit to bail as the corporation court of Danville or the judge thereof in vacation would have if application had been made to said court or judge thereof in vacation in the first instance. * * *."

Section 4829 of the Code appears to deal with bail in courts of record. It provides in part:

"But 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." One of my previous opinions on this general subject is to this effect:

"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." (Report of the Attorney General, 1940-1941, p. 12.)

In line with the above conclusion, it is my opinion that the clerk of the Civil Justice Court of the City of Danville does not have authority to accept bonds for criminal defendants to appear before the Trial Justice Court or the Circuit Court of Pittsylvania County.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF CORRECTIONS—Power of Board to Supervise Jail Expense.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 9, 1942.

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

This will acknowledge receipt of your letter of December 8, in which you ask the following question:

"Does the State Board of Corrections have the authority, under the provisions of Chapters 217 and 386 of the 1942 Acts of Assembly, to prescribe the maximum amounts which shall be paid by sheriffs and sergeants for foodstuffs, provisions, clothing, medicines, disinfectants and other necessary supplies required for prisoners confined in jails?"

In my opinion, the State Board of Corrections does not have the authority to arbitrarily fix maximum amounts which shall be paid by sheriffs and sergeants for foodstuffs, provisions, clothing, medicines, disinfectants and other necessary supplies required for prisoners confined in jails. Chapter 386 of the Acts of 1942 contemplates that these supplies shall be purchased by the officers "at prices as low as reasonably possible." The Board of Supervisors then goes over the accounts of the sheriff and, after satisfying itself that they are correct, orders them to be paid. The Commonwealth then reimburses the county or city for its proportionate part of "the reasonable cost of" these supplies. In my opinion, it is contemplated that each account submitted to the State upon the basis of which the county or city shall be reimbursed stands on its own merits and where an account is unreasonable then objection may be made to same. I do not think, however, that the State Board of Corrections may fix an arbitrary maximum, even if

such a plan were practicable, for the various items of supplies beyond which it will not reimburse the localities.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

BOARD OF CORRECTION—Authority to Approve Vouchers Reimbursing Localities for Jail Physician Expenditures.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 5, 1943.*

MAJOR R. M. YUELL,
Commissioner of Corrections,
Richmond, Virginia.

MY DEAR MAJOR YUELL:

This will acknowledge receipt of your letter of February 4, from which I quote as follows:

"Chapter 386, section 9, subsections (d) and (e) read as follows:

"(d) If the board of supervisors of a county or the council of a city shall elect to employ a jail physician at a definite monthly compensation to care for the prisoners in the jail who are in need of medical attention, it shall have the power to do so, but the amount of compensation for each physician shall be approved by the Compensation Board in advance. If the approval of the Compensation Board is not given, or if the board of supervisors or city council does not elect to appoint a regular jail physician at a definite monthly compensation, the rate established by law for the payment of physicians for caring for the sick in jails shall continue to be in effect. In either event the Commonwealth shall reimburse the county or city by two-thirds of the amount expended for medical care by such county or city.

"(e) The payment by the Commonwealth of its share of the costs of feeding, clothing, and caring for jail prisoners, hereinbefore provided to be paid, shall be made to the respective counties and cities by the State Treasurer upon warrants of the Comptroller issued upon vouchers certified by the boards of supervisors of the counties or councils of the cities, or their duly authorized representatives, and approved by the Commissioner of Corrections, or by such other person or persons as may be designated by the State Board of Corrections for such purpose, out of the funds appropriated in the general appropriation act for criminal charges."

In my opinion the provisions of subsection (e) of section 9 of Chapter 386 of the Acts of 1942 quoted in your letter contemplate that vouchers reimbursing the localities for the compensation of jail physicians shall be approved by the Commissioner of Corrections or some person designated by the State Board of Corrections. The only function of the Compensation Board in connection with the pay of jail physicians is in passing on the salary fixed for such physicians by the Board of Supervisors of the county or the Council of the city where such county or city elects to pay the jail physician a definite salary. The actual approval of the vouchers, however,

for the reimbursement of the county or city for the State's share of the compensation of a jail physician is in the hands of the Commissioner of Corrections.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

BOARDS OF SUPERVISORS—Appropriation for Civilian Defense.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 11, 1943.*

HONORABLE C. H. SHEILD, JR.,
*Attorney for the Commonwealth,
Denbigh, Virginia.*

MY DEAR MR. SHEILD:

I am in receipt of your letter of January 7, in which you ask the following questions:

"Does the law provide for the county to pay any expense or clerk hire for the local rationing board?"

This office has heretofore expressed the opinion that under existing law boards of supervisors of counties generally do not have authority to pay salaries of employees of local rationing boards, such boards being Federal agencies. Under date of September 25, however, Governor Darden issued an executive order by virtue of his authority as Governor and director of Civilian Defense, in which he authorized local councils of defense in certain designated counties to spend such funds as may be appropriated by the respective boards of supervisors in assisting county rationing boards. I enclose a copy of that order, but, as you will see therefrom, the county of Warwick is not included therein. Unless the order of the Governor has been amended, I am of opinion that the board of supervisors of Warwick county may not make an appropriation to pay clerk hire for the local rationing board in that county.

Your next question is:

"Does the law provide for the county to pay any expense or clerk hire for the selective service board?"

I know of no authority that the board of supervisors has to pay clerk hire for the local selective service board.

You then ask:

"Does the law provide for the county to pay any expense of civilian defense?"

I call your attention to Chapter 10 of the Acts of 1942, providing for the coordination of defense activities and especially to section 7 thereof, which reads as follows:

"The boards of supervisors, and the councils or other governing bodies of the counties, cities and towns are hereby authorized to make

appropriations of funds for expenditure by any local or regional council of defense established pursuant to this act, and for local or regional defense activities."

You will observe that the quoted language clearly gives boards of supervisors authority to appropriate money to the local councils of defense for defense activities.

Very sincerely yours,

ABRAM P. STAPLES.

Attorney General.

BOARDS OF SUPERVISORS—Appropriation to Maintain Aircraft Observation Towers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 1, 1942.*

HONORABLE A. D. JOHNSON,
*Attorney for the Commonwealth,
Windsor, Virginia.*

MY DEAR MR. JOHNSTON:

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

"I have read your opinion to Mr. L. McCarthy Downs, Auditor of Public Accounts, dated July 20, 1942, in connection with expenditures of county funds in connection with a county rationing board. A similar question has been raised in regard to the expenditure of county funds by the board of supervisors in connection with aircraft observation towers. These towers or posts are located at various points throughout the county, and, as you know, over the entire State, and are manned by civilians. They are, I believe, under the supervision of the interceptor command of the army. The expenditures in question are the costs of building such towers, telephone, heat, purchase of equipment, etc. I will appreciate your advising me your opinion as to whether or not the board of supervisors has authority to make such expenditures from county funds."

I quote below from a letter written to me by Mr. J. H. Wyse, Co-ordinator of Civilian Defense:

"The aircraft warning system, whose volunteers are commonly referred to as 'spotters', is organized by this officers through its local defense councils. It is the duty of the local defense councils to secure volunteers to man the observation posts, and to provide quarters and telephone facilities.

"When these have been provided, the activities are under the supervision of the army. After telephone facilities are provided, the army pays the cost of tolls from the observation post to the filter center (one in Richmond and one in Norfolk).

"These so-called spotters serve without compensation and are in no way considered Federal employees. The detail supervision of the operation of these posts is by an employee of this office—Mr. G. E. Heller, Assistant Co-ordinator."

It is obvious from the statement of Mr. Wyse that the aircraft observation towers, to which you refer, directly contribute to local defense, and I am of the opinion, therefore, that the board of supervisors of a county may appropriate funds for the purchases mentioned by you, such funds to be expended by the local council of defense. See Acts 1942, page 9.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

BOARDS OF SUPERVISORS—Appropriation to Buy Uniforms for Local Militia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 3, 1943.*

HONORABLE HENRY HUNTER WATSON,
*Attorney for the Commonwealth,
Crewe, Virginia.*

MY DEAR MR. WATSON:

I am in receipt of your letter of January 30, in which you ask if the Board of Supervisors of Nottoway County may make an appropriation to buy uniforms for a company of the Virginia Reserve Militia organized at Crewe.

My information from Adjutant General Waller is that this company was organized under the authority of a general order of the Governor as Commander in Chief of the Militia of the State, and that the company may be called out in aid of the local civil authorities in Nottoway County. Indeed General Waller informs me that under existing orders the company may not be called out for service outside of Nottoway County.

In the light of the information furnished by General Waller, if the Board of Supervisors is of the opinion that this company tends to promote the safety and general welfare of the county, I am of opinion that it may make an appropriation to buy uniforms for the members of the company. I may say that I have heretofore expressed this view relative to the purchase of uniforms for the Virginia Protective Force.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

BOARDS OF SUPERVISORS—Appropriation Toward Airfield; When Proper.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 5, 1942.*

HONORABLE W. J. TEMPLE,
*Treasurer,
Lawrenceville, Virginia.*

DEAR MR. TEMPLE:

I am in receipt of your letter of October 1, in which you inquire as to

the authority of the Board of Supervisors of Brunswick County to appropriate \$500.00 to be used in the construction of or for improvements to an airport owned by the Town of Lawrenceville. You state that the county has no interest in the airport nor any control over it, it being purely an enterprise of the Town of Lawrenceville.

Sections 3074a to 3074i of the Code (Michie 1936) authorize cities, towns and counties of the Commonwealth, or any two or more of them together, to acquire, construct, own and operate airports. However, as stated, it appears that the airport in question is to be owned and operated by the Town of Lawrenceville, and that it is not being acquired, owned or operated by the town and county together under the provisions of the aforesaid sections of the Code. The town and county could unquestionably have joined together and constructed and operated the airport, but, since they have not done so, I know of no authority given the town to make an appropriation of the character you mention, which would in effect, from the facts as stated by you, be nothing more or less than a gift to the town.

Very truly yours,

ABRAM P. STAPLES.
Attorney General.

BOARDS OF SUPERVISORS—Appropriations to American Red Cross and U. S. O.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 25, 1943.*

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

MY DEAR MR. HARRISON:

I am in receipt of your letter of March 23, in which you ask for my opinion concerning the power of the Board of Supervisors of Brunswick County to make appropriations to the USO and the American Red Cross. You state that the Board has expressed a willingness to make these appropriations provided it has a legal right to do so, but that you "can find no authority for the Board to make such appropriations of county funds, since it will have no control over same, and neither organization would be accountable in any way to the Board for the disposition of the appropriation."

It is well settled, of course, that a board of supervisors may not order the payment of county funds except in accordance with authority given it by statute. Like you, I can find no specific authority for a board of supervisors to make such appropriations as you describe, unless it be that this authority is contained in section 2743 of the Code, conferring certain powers upon boards of supervisors and sometimes referred to as the "general welfare section."

I can only say that whether or not a contribution to this organization would "promote the health, safety and general welfare of the inhabitants of" your county is a question of fact, which can best be determined by you and the board of supervisors upon a consideration of these purposes and what local activities the organization is conducting in Brunswick.

What I have said concerning an appropriation to the USO is applicable on principle to the American Red Cross.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Appropriation to Supplement Salary of Sheriff.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 3, 1943.*

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

MY DEAR MR. RANDALL:

I am in receipt of your letter of February 2, in which you present the following question:

"The Supervisors of Norfolk County, under section 2726-a of the code of Virginia, have been allowing the sheriff of this county \$2,500 per annum as a supplement to his State allowance. Under Chapter 386 of the Acts of Assembly of 1942, placing the sheriffs on a salary basis, the question has arisen as to whether or not the sheriff of this county is still entitled to receive the sum of \$2,500 per annum as a supplement to the salary allowed him under this law."

Chapter 386 of the Acts of 1942 abolishes the fee system of compensating sheriffs and sergeants and provides for the salary of these officers to be fixed by the State Compensation Board within the limits prescribed for the various counties and cities by the Act. Two-thirds of such salaries so fixed by the Board are paid by the State and one-third by the counties and cities respectively. The Act further repeals all Acts general and special inconsistent with the provisions of the Sheriffs' and Sergeants' Salary Act.

In my opinion, it is entirely plain that the General Assembly intended that the salary fixed for a sheriff under the provisions of Chapter 386 is to be the entire salary received by the sheriff for performing the duties of his office. It follows, therefore, that section 2726-a of the Code (Michie 1942) insofar as it is inconsistent with Chapter 386 is to that extent repealed. Indeed, section 2726-a of the Code as amended in 1942 expressly provides that the "provisions of this Act shall not supersede or in any wise affect the provisions" of the Sheriffs' and Sergeants' Act. It is my opinion, therefore, that your question must be answered in the negative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Appropriation of Salary for Clerk in Office of County Agricultural Agent.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 18, 1942.

HONORABLE CHARLES J. ROSS,
Clerk, Circuit Court of Madison County,
Madison, Virginia.

DEAR MR. ROSS:

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

"The Board of Supervisors have been requested by the Agricultural Board to make an appropriation to supplement the salary of a clerical worker in the office of the County Agent.

"It is a question in the minds of the Board of Supervisors whether they have the authority to make such an appropriation from county funds.

"Would you give us an opinion as to the authority of the Board of Supervisors to make such an appropriation?"

By section 924 of the Code, boards of supervisors are authorized to appropriate county funds in paying the salary and expenses of the county agent. In my opinion, where the volume of work justifies it, the clerical help would be included within the scope of the expenses of the county agent and the board of supervisors could make an appropriation for this purpose. I direct your attention to the fact, however, that section 924 of the Code contemplates that all expenditures, including local appropriation, for demonstration work in the counties shall be made under the supervision of the State agent in charge of demonstration work at Virginia Polytechnic Institute. I should think, therefore, that the matter of supplementing the salary of a clerical worker in the office of the county agent should first be taken up with the State agent in charge of the demonstration work.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Appropriation to Supplement Salary of Clerk of Trial Justice Court.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 3, 1943.

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of, February 2, enclosing a communication addressed to you under date of January 28 by Lawrence H. Hoover, Commonwealth's Attorney for Rockingham County, in which Mr. Hoover writes the following:

"I am in receipt of your letter of the 26th instant, wherein you advise that the Committee of Judges to fix salaries of Trial Justices and Clerks has disallowed the request for salary increase of Mr. J. R. Donnelly, Clerk for the County of Rockingham and the City of Harrisonburg.

"I am wondering whether or not it would be lawful and recognized as a valid expenditure of county funds if the Board of Supervisors of the County were to agree to supplement Mr. Donnelly's present salary of \$105 per month. I would like to have an opinion on this question before presenting the matter to the Board. If you are not in a position to advise me in this connection, I will appreciate it if you will refer this communication to Attorney General Staples with a request that he give us a ruling thereon."

By section 4987-e of the Code as amended by Chapter 376 of the Acts of 1942, a committee of three circuit court judges was set up to fix the salaries of trial justices and their clerks. The section further provides that on and after July 1, 1942, the State shall pay the entire salary of trial justices and their clerks. It is clear, in my opinion, that it was the intention of the General Assembly that the aforesaid committee was to fix the compensation of clerks of trial justice courts and that the compensation so fixed was to be the entire compensation paid to such clerks for performing the duties of their office. Furthermore, I can find no provision in any section of the Code dealing with trial justices and their clerks which authorizes a county to allow additional compensation to these officers. It is my opinion, therefore, that the board of supervisors of a county may not out of local funds provide additional salary for performing the duties of the office of clerk of the trial justice court.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Expense of Furnishing Trial Justice With Office Supplies Is Upon County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 5, 1943.

HONORABLE H. A. HADEN,
County Executive,
Charlottesville, Virginia.

MY DEAR MR. HADEN:

Referring to our recent correspondence, I am writing to say that the Auditor of Public Accounts has furnished me a copy of Trial Justice Form No. 7. This seems to be a form used by trial justices covering miscellaneous receipts. According to the instructions thereon, it is not the form used for covering receipts for "State fines and costs." Under the provisions of sections 4987-e(1) and 4987-i of the Code, requiring the board of supervisors of a county to furnish the trial justice with office supplies and printing, I am of opinion that these forms should be paid for by the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Expense of Furnishing Trial Justice With Postage Is Upon County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 17, 1942.

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

MY DEAR MR. WILSON:

This will acknowledge receipt of your letter of August 11, from which I quote as follows:

"On account of changes made in regard to distribution of fees collected by the trial justice court and payment of expenses of operation, Code section 4987-e, paragraphs 1 and 2, the County Executive H. A. Haden, of Albemarle county, has refused to continue to supply postage for the official mail from this office.

"I request that you advise me whether this expense is covered under the language of paragraph 1 of the quoted section as follows: 'The committee shall not allow any expenses for supplies (office), printing, etc., but such expenses shall be borne by the respective counties.'

As you know, section 4987-e of the Code was amended at the last session of the General Assembly (Acts 1942, at page 577) so as to provide that after July 1, 1942, the State would pay all of the salaries of the trial justices, substitute trial justices, clerks, deputy clerks and clerks' assistants, such salaries to be fixed by a committee of three circuit court judges appointed by the Governor. The section expressly provides that "the committee shall not allow any expense for supplies (office), printing, et cetera, but such expense shall be borne by the respective counties."

In my opinion, the plain meaning of the quoted language is that each county shall bear the office expenses of the trial justice, and I am further of the opinion that postage for the official mail of the trial justice's office constitutes a part of the expenses of such office. I do not see how any other conclusion could reasonably be reached. Furthermore, section 4987-i of the Code also states that the localities "shall provide necessary books and stationery and supplies" for the trial justices. It appears from your letter that the county of Albemarle has in the past, under this section, been supplying postage for the official mail of the trial justice, and the section is still in effect and is not in conflict with the quoted language from section 4987-e.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Authority to Supply Trial Justice With Copy of Code of Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 18, 1943.*

HONORABLE A. PLUNKETT BEIRNE,
*Trial Justice of Orange County,
Orange Court House, Virginia.*

MY DEAR MR. BEIRNE:

I am in receipt of your letter of February 17, in which you inquire if the board of supervisors has the authority to supply the trial justice of Orange county with a Virginia Code and pay for the same out of county funds.

Section 4987-e of the Code (Michie 1942) provides that the expense of "supplies (office), printing, et cetera," shall be borne by the respective counties, and section 4987-i provides that the board of supervisors of a county shall provide the trial justice with "necessary books and stationery and supplies * * *."

In my opinion, the quoted provisions are unquestionably broad enough to include a Code and, if the board of supervisors is satisfied that a Code is necessary to the trial justice in performing the duties of his office, I think the board has authority to furnish the trial justice with such a Code and to pay for it out of county funds.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Proper to Pay for Telephone in Trial Justice's Office.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 9, 1942.*

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

MY DEAR MR. BUTLER:

This will acknowledge receipt of your letter of December 7, in which you ask if the Board of Supervisors of Alleghany County "are legally required to pay the telephone bill for the Trial Justice of Alleghany County, Virginia."

As you state, the counties are required to pay for "supplies (office), printing, et cetera," for the trial justice (section 4987-e of Michie's Code of 1942), or, as section 4987-i of the Code expresses it, the counties "shall provide necessary books and stationery and supplies" for the trial justices.

Construing the quoted language literally, I cannot say that a telephone comes within the scope thereof. After careful consideration, however, I am inclined to be of the opinion that the two sections in reality contemplate that the necessary office expenses of a trial justice in performing the duties of his office should be borne by the county. Whether or not the business

of the trial justice of Alleghany County is such as to necessitate a telephone is a question of fact on which, of course, I cannot pass. While the question that you put is not at all free from doubt, in my opinion, the better view is that where a telephone is absolutely necessary to enable a trial justice to properly perform his duties the county should bear the expense of such telephone. Certainly a county would be justified in bearing such an expense.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Authority to Make a General County Levy to Meet Excessive School Budget.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 2, 1943.

HONORABLE HENRY HUNTER WATSON,
*Attorney for the Commonwealth,
Crewe, Virginia.*

MY DEAR MR. WATSON:

I have your letter of February 27, in which you state that the Board of Supervisors of Nottoway County desires to have my opinion as to the authority of the board to lay a general county levy in order to make a cash appropriation for school purposes, such cash appropriation to be in excess of the amount which the maximum school levy prescribed for Nottoway county would have yielded if such school levy had been made. You state also that the amount of the school budget proposed by the school board is in excess of the amount which the maximum school levy would yield.

Section 698 of the Code as enacted by chapter 2 of the Acts of the Special Session of the General Assembly of 1942 fixes the minimum and maximum school levy which may be made in the several counties and cities of the State. However, the section also authorizes the board of supervisors, instead of making the school levy, to "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 * * * approved by the board of supervisors of the county * * * in no event to be less than the amount which would result from the laying of the minimum school levy."

In view of this provision of section 698 of the Code, if the board of supervisors approves the school budget which has been submitted to it, the board may fix the general county levy in such an amount so as to enable it to make the cash appropriation called for by such school budget. In this connection I call your attention to section 2577-m(4) of Michie's Code of 1942.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**BOARDS OF SUPERVISORS—Improper to Act as Agent for Individuals
in Buying Materials from Highway Department.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 20, 1943.

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

MY DEAR MR. BICKERS:

This will acknowledge receipt of your letter of January 16, from which I quote as follows:

"I have been requested by the Board of Supervisors of Culpeper County to get a ruling from you upon the following proposition:

"Certain private citizens of the County of Culpeper needing crushed rock and related material to repair their private roads requested the Board of Supervisors to make arrangements to get the material from the State Highway Department at its quarry at Culpeper, the Board to pay for same and the citizens to reimburse the Board. The reason for this is that all of the private quarries in this section have shut down in the last twelve months."

I assume from your letter that the Board of Supervisors is simply acting as agent for the individuals involved in purchasing the crushed rock from the State Highway Department.

It is my opinion that such a practice as you describe, to be permissible should be under express statutory authority, and I have been able to find no such statute. The State Highway Department advises me that it does not sell crushed stone to individuals, and I am of opinion that for obvious reasons this practice of the Department is entirely proper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**BOARDS OF SUPERVISORS—Value of Sheep Killed by Dogs Cannot
Be Changed by Board.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 17, 1942.

Honorable Edward McC. Williams,
*Attorney for the Commonwealth,
Berryville, Virginia.*

MY DEAR MR. WILLIAMS:

This will acknowledge receipt of your letter of September 15, in which you ask the following question:

"Please be good enough to advise the writer whether or not the board of supervisors have authority to adopt an ordinance providing that

for each sheep killed by dogs in the county, a certain fixed sum shall be paid to the owner of the sheep, so long as the sum so paid does not exceed the fair market value of the animal, and instead of paying the assessed value to use the figure set by the ordinance."

In my opinion, the board of supervisors does not have authority to pass such an ordinance as you describe. Section 3305(75) of the Code expressly provides that the compensation for livestock or poultry killed or injured by a dog shall be "the assessed value of such livestock and fair value of unassessed lambs or poultry." In my opinion, the board of supervisors of a county may not supersede this statutory provision by ordinance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONDS—Payment of Premiums on Bonds of Officials.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 4, 1942.*

MR. F. S. CALKINS,
*Secretary-Treasurer,
Virginia State Board of Accountancy,
15th Floor, State-Planters Bank Building,
Richmond, Virginia.*

MY DEAR MR. CALKINS:

I am in receipt of your letter of November 3, which reads as follows:

"The State Auditor of Public Accounts has recommended that the Secretary-Treasurer of the State Board of Accountancy be bonded. You have advised Governor Darden that the State Board may require the Secretary-Treasurer to be bonded, but that the Governor cannot do so. The State Board would like very much to comply with the Governor's request that the Secretary-Treasurer be bonded and has instructed me to proceed to take out bond provided the cost of the bond can properly be paid by the Commonwealth of Virginia in the budget for the expenses of the State Board.

"Will you please advise me whether the cost of the bond is a proper charge against the appropriation for expenses of the State Board?"

It is the well-established policy of the State to pay the premiums on bonds of public officers from the funds appropriated for the expenses of the office. In view of this policy I am of the opinion that the State Board of Accountancy would be justified in paying the premium on the bond of the Secretary-Treasurer out of the appropriation made for the expenses of said Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONDS—Funds Useable to Pay Off County Road Bonds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 23, 1942.

HONORABLE C. W. CARTER,
*Attorney for the Commonwealth,
Warrenton, Virginia.*

MY DEAR MR. CARTER:

This will acknowledge receipt of your letter of December 18, from which for convenience in replying I quote as follows:

"On the 1st day of December, 1925, the County of Fauquier issued a series of bonds in the amount of \$120,000 pursuant to an election duly called and held in Marshall Magisterial District on the 8th day of September, 1925, for road improvement in Marshall Magisterial District. Of course, the full faith and credit of the entire County of Fauquier was pledged for their payment. The election was held pursuant to chapter 513 of the Acts of 1922 of Virginia. There is at this time approximately \$70,000 of these bonds outstanding.

"I enclose for your information a copy of one of the bonds.

"Some time prior to 1932 Fauquier County purchased out of the county road fund a certain lot of land with buildings thereon as a storage place for the county road machinery. Subsequently under Act approved March 31, 1932, all the roads of Fauquier County, County and District, were taken into the State Secondary System.

"The County has recently sold the property formerly used as a county road camp and the question has arisen as to whether or not the Board of Supervisors of this County would have the right under section 3 of this Act approved March 31, 1932, to apply the proceeds of this sale to the payment of the road indebtedness of Marshall Magisterial District for which the said district is primarily responsible and the County secondarily responsible."

The Byrd Road Law (Acts 1932, page 872) in effect did away with the construction, maintenance and improvement of public roads by the counties, this obligation being taken over by the State. Section 3 of the Act provides in part that all balances in the hands of the local authorities for county or district road purposes shall "be disbursed in payment of obligations heretofore contracted for county or district road purposes and remaining unpaid," which, of course, would include district road bonds. Section 6 further provides that the proceeds from the sale or other disposition of "road machinery, equipment, teams, materials and supplies" shall be "applied on account of obligations heretofore contracted for county or district road purposes and the balance, if any, for general county road purposes." Since the counties were no longer to levy taxes or appropriate funds for the construction, improvement or maintenance of public roads, it was plainly the intent of the Byrd Road Law that all county and district road funds on hand in 1932 and the proceeds of the sale of road machinery, equipment and other kindred items were to be used first for the retirement of district and county road obligations. See in this connection *Godwin v. Board of Supervisors*, 161 Va. 494, which throws much light on the spirit and purpose of the Byrd Road Law.

It is important, I think, to note that the tract of land which the Board of Supervisors of Fauquier County has recently sold was purchased out of county road funds for county road purposes. While there may be some

doubt as to whether this tract of land, with the buildings thereon, comes within the literal and technical meaning of road machinery or equipment, although there is some authority to the effect that it may be included in these terms, I am of the opinion that when the real intent of the Legislature when enacting the Byrd Road Law is considered it is clearly within the power of the Board of Supervisors of your county to apply the proceeds of the sale of this real estate to the road indebtedness of Marshall Magisterial District in such county.

I am returning the cancelled bond which you enclosed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONDS—Deputy Clerk of Trial Justice Court.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 23, 1942.*

HONORABLE M. W. PULLER,
*Clerk, Circuit Court of Henrico County,
Richmond, Virginia.*

MY DEAR MR. PULLER:

This will acknowledge receipt of your letter of October 20, with reference to the bond of a deputy clerk of the Trial Justice Court of Henrico County.

The two statutory provisions dealing with this bond are that part of section 4987-g of the Code as amended in 1942 (Acts 1942, at page 579) reading as follows:

" * * * any deputy clerk so appointed (referring to the deputy clerk of the Henrico Trial Justice Court) shall qualify before the Trial Justice and give bond as required by section forty-nine hundred and eighty-seven d, * * * ,"

and section 4987-d of the Code as amended in 1942 (Acts 1942, page 12) reading as follows:

"Before entering upon the performance of their duties, the trial justice and the substitute trial justice, and clerk, if a clerk be appointed as hereinafter provided, shall each take the oath as required by law, before the court, judge or clerk before whom bond is given as next herein provided, and shall each enter into bond before the circuit court of the county, or of each county, or the hustings or corporation court of the city, for which they are appointed, or before the judge of such court, in vacation, or before the clerk of such court, in the penalty of not less than five hundred dollars nor more than two thousand dollars in the discretion of such court or judge, with surety to be approved by the court, judge or clerk before whom said bond is given, and conditioned for the faithful performance of their duties."

Reading the quoted provisions together, it is my opinion that the proper construction is that the deputy clerk shall qualify and give bond before the Trial Justice in an amount to be fixed by the Trial Justice of not less than

\$500 nor more than \$2,000. It is my view that when the first quoted provision refers to qualifying before the Trial Justice and giving bond as required by section 4987-d it means that the bond shall be given before the Trial Justice, but that section 4987-d is to be referred to by the Trial Justice in determining the amount of the bond. In other words, section 4987-d is incorporated by reference in the quoted language of section 4987-g except that the bond is to be given before the Trial Justice instead of before the Circuit Court of the County, or the Judge or Clerk thereof.

I know of no statutory requirement which specifies that this particular bond shall be lodged in the office of the Clerk of the Circuit Court. In my opinion, it should be retained by the Trial Justice. So far as the State Comptroller is concerned, he advises me that all that he will require in connection with the payment of the premium on the bond is that the Clerk of the Trial Justice Court shall certify to him that the bond has been given, the date thereof, and the amount of the premium thereon.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1942—Right to Bonus Depends Upon Aggregate Earnings for Six-Months' Period.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 10, 1942.

HONORABLE HENRY G. GILMER,
*State Comptroller,
Finance Building,
Richmond, Virginia.*

MY DEAR MR. GILMER:

This is in reply to your letter of July 9, in which you make the following inquiry:

"The question has arisen as to the proper interpretation of Chapter 381 of the Acts of the Assembly of 1942, and especially with respect to the proper interpretation of Section 2 of said Act.

"I would like to have your opinion as to how to calculate the amount of bonus due an employee of the State who was full time employed by the State between January 1, 1942, and June 30, 1942, and who, during that period of time, earned less than total compensation from the State of \$1,200.00, but who, during that time, received compensation at the rate of \$200.00 per month for a part of the time. To make my problem clear, if possible, I have in mind one State employee who during the month of January earned \$150.00 and during the month of February he earned \$156.67. As of the first of March this employee's compensation was raised to \$200.00 per month, and he has drawn that amount for each of the months of March, April, May and June, making a total compensation of \$1,106.67."

Section 2 of the Act to which you refer is as follows:

"The rate of such additional cash compensation for each period of six months shall be ten per centum of the first five hundred dollars or fractional part thereof earned during each said period and five per centum of the next five hundred dollars or fractional part thereof. No such cash compensation paid any person shall make such person's total cash compensation for each said period of six months more than twelve hundred dollars and in the event such person is employed only a part of any said period such person's additional cash compensation shall be prorated on the above basis for such period of employment."

You will note that the base period established by the Act for the payment of the additional compensation is a period of six months. The maximum amount of additional compensation which any person may receive is seventy-five dollars, which is payable to a person earning as much or more than one thousand dollars during said period. The section does not take any cognizance of the amount earned during any one month where the employee has been employed the entire time, the only limitation in such a case being that the combined regular compensation and additional compensation shall not exceed the sum of twelve hundred dollars.

Referring to the particular case you present, since the employee worked the entire six months and his total compensation was only eleven hundred six dollars and sixty-seven cents, in my opinion he is entitled to additional compensation of seventy-five dollars as this will not make his combined total greater than twelve hundred dollars. I do not think the fact that he received two hundred dollars per month for a part of the time in any way affects his rights in the matter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1942—Employee Who Worked 3 Months With One State Agency and 2 Months With Another.

COMMONWEALTH OF VIRGINIA;
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 6, 1942.

HONORABLE HENRY G. GILMER,
*State Comptroller,
Finance Building,
Richmond, Virginia.*

DEAR MR. GILMER:

This is in reply to your letter of June 30, 1942, with which you enclose a letter addressed to you by the Alcoholic Beverage Control Board concerning the right of an employee, who for the first three months of the present year was employed by the Unemployment Compensation Commission, and during the month of April was not employed by the State or any of its agencies, but who on May first was employed by the said Alcoholic Beverage Control Board and remained in the employment of said Board until after July 1, to receive additional compensation under Chapter 381, page 606, of the Acts of 1942.

It appears from the employee's letter to Mr. Sebrell, Chairman of the Alcoholic Beverage Control Board, that her compensation for the first three months of this year was at the rate of \$85 per month, and that her compen-

sation under her present position with the Board was \$75 per month for two months. Thus, her total earnings for the five months have amounted to \$405. If she had worked the other additional month with the Commission at \$85 per month, the amount earned still would not have brought the rate of percentage of additional compensation applicable into the five per cent class. Since the rate of additional compensation would not have been affected if she had worked the entire six months, the provisions of section 2 relating to proration of additional compensation where an employee is not employed during the entire six months' period is not applicable.

I am of opinion, therefore, that the employee is entitled to additional compensation of ten per cent on the sum of \$405, her total earnings for the five months' period, that is, \$40.50. Of this total compensation \$255 was paid by the Unemployment Compensation Commission, and, therefore, \$25.50 of the additional compensation should be paid by the said Commission. \$150 was paid by the Alcoholic Beverage Control Board, and \$15 of the additional compensation should be paid by said Board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1942—Death of Employee Before End of Service Period.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 4, 1942.*

MR. C. S. MULLEN,
*Chief Engineer,
Department of Highways,
Richmond, Virginia.*

DEAR MR. MULLEN:

This will acknowledge receipt of your letter of December 2, from which I quote as follows:

"Our Auditing Department has turned over to me some bonus payrolls covering bonus for employees who died between January and June 30, 1942. We are of the opinion that the law is quite clear on this, however, at the time the bonus payrolls were made up there was a question raised and it was thought there was some moral obligation to pay this bonus.

"You will please note letter from Mr. Day, Assistant Comptroller, and we will appreciate very much opinion from you on this question. We would be pleased if you would return the attached payrolls to us for our files."

Mr. Day states in his letter, to which you refer, that "It is our understanding that only persons who were on the payroll of the State on June 30, 1942, were entitled to the bonus, * * *." Mr. Day's understanding is correct and is in accordance with section 1 of the so-called Bonus Act (Acts 1942, page 606). That section limits the bonus for the period beginning January 1, 1942, and ending June 30, 1942, to those "who remain employed at the end of said period."

The only exception to the literal application of this provision which I have held permissible is in case the deceased employee at the time of his death has sufficient time left in unused vacation to extend his service to the end of said period. In such a case, in my opinion, there has been a substantial compliance with the statute and the bonus should be paid.

I am returning the payrolls enclosed in your letter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1942—As Applied to Teachers in State Colleges.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 3, 1942.*

MR. EDGAR E. WOODWARD,
*Treasurer, Mary Washington College,
Fredericksburg, Virginia.*

DEAR MR. WOODWARD:

This is in reply to your letter of June 30, in which you request my opinion upon the question whether or not employees of the Mary Washington College who are employed for a period of nine months in each year at a compensation of two hundred dollars per month, or eighteen hundred dollars for the said nine months, are entitled to receive additional compensation under what is generally known as the Bonus Act, being Chapter 381, page 606, of the Acts of 1942.

The Act provides for such additional compensation to be paid at the rate of ten per centum of the first five hundred dollars, or fraction thereof, earned during each six months' period, and five per centum of the next five hundred dollars, or fraction thereof, earned during said period. The Act further provides:

“ * * * No such cash compensation paid any person shall make such person's total cash compensation for each said period of six months more than twelve hundred dollars and in the event such person is employed only a part of any said period such person's additional cash compensation shall be prorated on the above basis for such period of employment.”

In view of the foregoing provisions for proration, where the employee is not employed for the entire time covered by each six months' period, it is my opinion that any such employee who during the entire time of his employment by the State earns as much as two hundred dollars per month is not entitled to receive any additional compensation. A person employed for only nine months is perfectly free to accept other employment during the other three months, but, within the meaning of section 2 of said Act, his right to additional compensation is exactly the same as if he had been employed during the entire time of each six months' period and had earned two hundred dollars for each month, or twelve hundred dollars for said period.

It follows, therefore, that I am of opinion that a person employed for

nine months of either the calendar year or the fiscal year, who receives eighteen hundred dollars compensation for said nine months' employment, is not entitled to receive any additional compensation.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1942—Interpretation of As Applied to Trial Justices.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 31, 1942.*

HONORABLE L. MCCARTHY DOWNS,
*Secretary, Committee of Judges Fixing the Salaries and
Expenses of Trial Justices,
225 Finance Building,
Richmond, Virginia.*

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of December 30, which reads as follows:

"The question has been raised by several of the trial justices as to whether or not they and their clerks are entitled to receive the bonus which is being paid to the regular State employees for the six-months' period ending December 31, 1942.

"You will recall that commencing with July 1, 1942, the entire salaries of the trial justices and their clerks have been paid by the Commonwealth on the basis of amounts fixed by the committee of circuit court judges appointed by the Governor for this purpose. I have discussed this matter with Judge A. C. Buchanan, the chairman, and he has requested me to ask for your opinion in this matter."

In my opinion, now that the compensation of trial justices and their clerks is paid entirely by the Commonwealth, these officers come within the scope of the provisions of chapter 381 of the Acts of 1942 (the Bonus Act).

The Act provides that "all persons employed for thirty days or more during each said period, who remain employed at the end of said period and who receive their total cash compensation as salary or wages from the State of Virginia for services rendered the Commonwealth, its departments, divisions, boards, commissioners, institutions, offices and agencies, shall be entitled to" the bonus. I call your attention, however, to the fact that under the terms of the Act any trial justice or clerk who receives any compensation from any source other than the Commonwealth is not entitled to the bonus. I mention this because I am informed that many trial justices and many clerks do not devote their entire time to performing the duties of their offices as such trial justices and clerks.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1942—Interpretation of As Applied to Trial Justices.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 11, 1943.

HONORABLE WILLIAM D. PRINCE,
Trial Justice,
Stony Creek, Virginia.

MY DEAR MR. PRINCE:

I am in receipt of your letter of January 9, in which you refer to my recent communication to Honorable L. McCarthy Downs relative to the eligibility of trial justices and their clerks for the so-called "bonus" provided by Chapter 381 of the Acts of 1942. You refer to that portion of my letter to Mr. Downs in which I stated that a trial justice or clerk who receives compensation for services from any source other than the Commonwealth is not entitled to the bonus, and ask:

"Does this mean that any trial justice who receives money or other considerations from any other source as, for example, a lawyer or doctor or any other citizen who may receive house rent, interest on notes, bonds or premiums on stocks, etc., is barred from receiving this bonus compensation?"

I did not intend to convey the impression, for such is not my opinion, that a trial justice who receives rent from property owned by him or who is paid interest or dividends on his stocks and bonds is disqualified from receiving the bonus. I did, however, express the opinion, and it is just as applicable to other State officers and employees as it is to trial justices and their clerks, that a trial justice who receives compensation from any source other than the Commonwealth for any services rendered in any other capacity than that of trial justice is not entitled to the bonus. For example, a doctor or a lawyer who, in addition to being a trial justice, is also practicing his profession and receiving fees for such services is not entitled to the bonus.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—Repeal of Charter.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 29, 1943.

HONORABLE ROBERT J. McCANDLISH, JR.,
Member of House of Delegates,
Fairfax, Virginia.

MY DEAR MR. McCANDLISH:

This is in reply to your letter of March 23, from which I quote as follows:

"I would appreciate it if you would give me your opinion as to whether or not it will be possible to annul the charter of a town incorporated by the General Assembly prior to 1920, except by an act of the Legislature under the provisions of section 117 of the Constitution.

"I note that Code section 2885-a gives the Circuit Court the right to amend the charter of a town incorporated by the Legislature under certain conditions, and Code section 2885-b gives the court the right to annul the charter of a town which has been incorporated by the court under certain conditions.

"I am interested in knowing whether or not the charter can be annulled by some action of a majority of the qualified voters without an act of the General Assembly."

When you speak of annulling the charter of a town, I presume that you are referring to a repeal of the charter, with the result that the town would be restored to its original status of an unincorporated community, and that you are not referring to the change in the form of government of a town authorized by several sections of the Code.

I know of no general law which provides for a repeal of the charter of a town by a vote of the qualified voters and, in the absence of such general law, I am of opinion that this action may not be taken.

What I have written is based upon the assumption that there is no provision in the legislative charter granted to the town authorizing the repeal thereof by a vote of the people.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES AND TOWNS—When Local Ordinances May Parallel State Laws Punishing Crime.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 19, 1943

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of May 5, from which I quote as follows:

"I should be very much pleased if you will advise me whether or not a town may parallel the State law with reference to alcoholic beverages as interpreted to mean 'traffic' in illegal liquor and also whether or not a town may parallel the State law for failure of a person to have an operator's permit or a State license automobile tag. Furthermore, I should appreciate it if you will let me have your views as to whether or not a town may pass an ordinance providing punishment for larceny and, lastly, whether or not a locality may parallel the State statute providing punishment for 'maiming-assault with a deadly weapon with intent to maim, disfigure, disable and kill.'"

My answers to your questions are based upon the assumption that the charter of any particular town does not specifically authorize it to parallel the State laws you mention, and I shall also assume that the town has general police power granted to it by the legislature by what is commonly termed a general welfare clause. Certainly the town of Hillsville, concerning whose ordinances you write, has had granted to it by its charter (Acts 1940, page 89) no express power to parallel the State laws to which you refer, but such town does have general police power under a general welfare clause.

Your first question as to the power of a town to parallel the provisions of the Alcoholic Beverage Control Act must be answered in the negative. This has been the consistent ruling of this office and is made quite plain by section 4675(65) of the Code (Michie 1942), reading as follows:

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

The principal exceptions to the prohibitions contained in the quoted language is the authority granted to the localities to prohibit the sale of beer and wine on Sundays (Acts 1940, page 29) and the authority to adopt ordinances (Acts 1940, page 121) punishing drunken driving, although the State law dealing with this offense is not a part of the Alcoholic Beverage Control Act.

It has been suggested that a town may circumvent the prohibition contained in section 4675(65) against ordinances regulating the transportation of alcoholic beverages by adopting an ordinance "regulating the traffic in illegal liquors." Such a contention is wholly untenable. The quoted section expressly prohibits ordinances regulating the *transportation* of alcoholic beverages, and section 4675(2) of the Code defines "alcoholic beverages," such definition embracing both "legal" and "illegal" liquors. Equally untenable is the suggestion that a town may regulate the transportation of alcoholic beverages under its power to regulate traffic granted by section 2154(99) of the Code. The express prohibition against ordinances regulating the transportation of alcoholic beverages contained in section 4675(65) is not to be defeated by such an obvious subterfuge.

Your question as to the authority of a town to parallel the State law for failure of a person to have a State operator's permit or a State license automobile tax must also be answered in the negative. Not only is there no specific statutory authority for such action on the part of a town, but I can conceive of no process of logical reasoning by which it could be said that a town has any such implied authority. The failure to obtain a State license or a State permit cannot possibly be an offense against a town, but is an offense against the State.

You next inquire concerning the power of a town to pass a valid ordinance providing for the punishment of larceny. I assume, of course, you refer to petit larceny, for grand larceny is by State law made a felony. While in most cases the power of a town to parallel State criminal laws turns on the construction of constitutional or statutory provisions, your question raises the interesting problem of the power of a town under the general police power granted by its charter to parallel State criminal laws generally in the absence of specific statutory permission or prohibition. There is considerable conflict of authority on this question, one view being that municipal corporations do have such authority, and the other being that they do not. The Supreme Court of Appeals of Virginia, it might be said, had adopted a middle ground, taking the view that a town council may legislate only concerning its "local and internal affairs" and that such legislation must be confined

"to the ordinary objects and purposes of municipal corporations, and not * * * to comprehend a matter which is common to the State and affects its people at large." See the leading case of *Winchester v. Redmond*, 93 Va. 711. The following quotation from the opinion in this case is illuminating (pp. 715-716):

"Crime is an offence against the State, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the State. The offence is against the sovereign authority, and not against the individual or particular community. All the people of the State are concerned in the punishment and suppression of crime. And the State, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws.

"The State constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform, within the corporate limits, duties not strictly or properly local or municipal in their nature. In the performance of such duties, they exercise State power, and are in that respect State officers. As was said by Judge Staples in *Burch v. Hardwicke*, 30 Gratt. 24, 34: 'When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city, but against the State. When they are detected and arrested, it is by the chief of police and his subordinates, under the authority of the State laws, and as an officer of the State; and when they are tried and convicted, it is by officers representing the State and her sovereign power.'

"Municipal corporations are chartered, as we have seen, to regulate and administer the local and internal concerns of the people of the particular locality which is incorporated. They are not created to execute the criminal laws of the State. That is a matter for which the State has made ample provision by general statutes, and with which the corporation as such has nothing to do, unless expressly authorized by its charter or by statute."

The Virginia doctrine as announced in *Winchester v. Redmond*, *supra*, has been approved in the recent case of *Shaw v. City of Norfolk*, 167 Va. 346, wherein the opinion quotes with approval the following from McQuillin on Municipal Corporations (2d Ed.), section 923:

"Under the usual grant of municipal powers, which, in general terms, includes the authority to enact all necessary ordinances to preserve the peace and advance the local government of the community, the local corporation cannot provide by ordinance for the punishment of an act constituting a misdemeanor or crime by statute. It may only exercise such powers as legitimately belong to the local and internal affairs of the municipality. In the performance of such functions much latitude is often permitted. But it is entirely competent for the legislature to confer in express terms such powers as will enable the local corporations to declare by ordinance any given act an offense against its authority notwithstanding such act has been made by statute a public offense and a crime against the state. And where the regulation of a specific matter has been thus expressly and exclusively given to the local corporation, whether it be intrinsically state or local, the corporation may exercise the power so conferred, unfettered, until such time as it is legitimately withdrawn by the state."

The case of *Judy v. Lashley*, 50 W. Va. 628, wherein the West Virginia court adopts the rule followed in *Winchester v. Redmond*, *supra*, contains an interesting discussion of this question. See also 43 Corpus Juris, Municipal Corporations, section 223; 37 American Jurisprudence, Municipal Corporations, section 166; 17 L. R. A. (N. S.) 49.

In line with what I conceive to be the rule adopted in Virginia, in my opinion, in the absence of express statutory authority, a town may not parallel the State law defining and punishing petit larceny. Larceny is not a peculiar problem of a town and has no specific relation to its "local and internal affairs," but is a crime with which "all the people of the State are concerned." Manifestly a town may adopt an ordinance protecting property of the town or other specifically described property, but, in my opinion, an ordinance punishing the crime of larceny as it is defined in section 4440 of the Code does not come within the scope of the implied powers of a town under the general welfare clause of its charter.

And, finally, your last question as to whether a town may parallel the State law (section 4402 of the Code) punishing shooting, stabbing, cutting, or wounding any person "with intent to maim, disfigure, disable, or kill" must also receive a negative reply. This offense is by statute made a felony and obviously a town may not by town ordinance reduce a felony to a misdemeanor and punish it as such.

From what I have written it will be observed that, where a town in the absence of specific statutory permission parallels a State law defining and punishing crime, each such ordinance must be examined to determine whether or not it comes within the scope of the implied police power of the town under the general welfare clause to regulate its local and internal affairs.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CIVILIAN DEFENSE—Executive Orders Not Retroactive.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 21, 1942.

HONORABLE J. H. WYSE,
Co-ordinator,
Office of Civilian Defense,
1201 East Broad Street,
Richmond, Virginia.

MY DEAR MR. WYSE:

This is in reply to your letter of October 10, reading as follows:

"We have had several inquiries concerning Executive Order No. 89—The Privilege of Supplementing the Office of Price Administration's allocations to the Rationing Boards—wishing to know whether or not this order is retroactive.

"Will you please give me your opinion on this?"

The order to which you refer authorizes local councils of defense to use and expend such funds as may be appropriated by their respective boards of

supervisors to render aid and assistance to county rationing boards of the Office of Price Administration. The order is limited to certain named counties. From a consideration of the order I can find nothing in it which would indicate that it is retroactive, and the general rule is that orders of this character are not to be construed as retroactive unless it is so stated or plainly implied therein. If the Governor intended the order to be retroactive, I should think that it would be more appropriate for a clarifying order to that effect to be promulgated.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CIVILIAN DEFENSE—Authority to Accept and Expend Federal Funds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 11, 1942.*

HONORABLE J. H. WYSE,
*Co-ordinator, Chairman,
State Office of Civilian Defense,
1201 East Broad Street,
Richmond, Virginia.*

MY DEAR MR. WYSE:

You have asked me for an opinion as to whether or not the Virginia Evacuation Authority has the authority to act on behalf of the Federal Government in accepting and expending such Federal funds as are made available to the Authority and to other individual State agencies participating in the planning and operation of the evacuation program.

The State Evacuation Authority was established by the Governor of Virginia on August 12, 1942, by Civilian Defense Executive Order No. 88, the order being entered by virtue of the authority vested in the Governor by Chapter 10 of the Acts of the General Assembly of 1942. The Governor has, as of this date, amended Executive Order No. 88 by the insertion of the following:

"The State Evacuation Authority is hereby clothed with authority to cooperate with the Federal Government and act in its behalf in the expenditure of whatever Federal funds are made available directly to the State Evacuation Authority and directly to the individual State Agencies participating in the planning and operation of the evacuation program."

This amendment, in my opinion, is clearly within the authority of the Governor by virtue of the aforesaid Chapter 10 of the Acts of 1942. The language of the amendment to Executive Order No. 88 is quite plain and, in my opinion, does what it purports to do, namely, clothes the State Evacuation Authority with the power to cooperate with the Federal Government and act in its behalf in expenditure of such Federal funds as are made available directly to the State Evacuation Authority and to other State agencies participating in the planning and operation of the evacuation program.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Authority to Appoint Guardians.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 2, 1943.

HONORABLE E. F. HARGIS,
*Clerk, Circuit Court of Russell County,
Lebanon, Virginia.*

MY DEAR MR. HARGIS:

This will acknowledge receipt of your letter of April 1, from which I quote as follows:

"The question of whether or not the clerk has authority to appoint guardians under section 5316 of the Code, has been brought up by some of the attorneys here.

"In my particular case Judge Carter lives at Gate City, Virginia, and is not here except when trials of cases are actually going on, but leaves his orders open from one term until the next.

"My question is: Do I have authority to appoint guardians under the above named section, since this court keeps orders open from one term until the next?"

Section 5316 of the Code authorizes the circuit court of a county, or the judge or clerk thereof in vacation, to appoint a guardian for a minor. If, however, Judge Carter, as authorized by section 5893 of the Code, continues each term of the circuit court of Russell county to the beginning of the next term, then it appears that your court is never in vacation, and that, therefore, you, as clerk, would not have the authority to appoint a guardian as given by said section 5316.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Recordation of Order of Adoption Should Be in Chancery Order Book.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 24, 1943.

HONORABLE A. H. GOFF,
*Clerk, Circuit Court of Buchanan County,
Grundy, Virginia.*

MY DEAR MR. GOFF:

This will acknowledge receipt of your letter of June 22, in which you inquire as to the proper order book in which the clerk of a circuit court should enter an order of adoption.

The procedure for the adoption of children is prescribed in some detail by chapter 205 of the Acts of 1942, adding sections 5333-a to 5333-l to the Code. Section 5333-b provides that proceedings for the adoption of a minor child shall be by petition to any court of record having chancery jurisdiction

in the county. In view of this provision, it is my opinion that the orders and decrees in adoption proceedings should be entered in the chancery order book of the circuit court of the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Execution of Marginal Release of Deed of Trust.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 25, 1943.*

HONORABLE JOHN H. POWELL,
*Clerk, Circuit Court of Nansemond County,
Suffolk, Virginia.*

MY DEAR MR. POWELL:

This will acknowledge receipt of your letter of March 22, from which I quote as follows:

"Where the 'in trust' clause of a deed of trust recites the following:

"'In trust, to secure to the Farmers Bank of Nansemond the payment of any bond or bonds, note or notes, or any other evidences of debt, due or to become due by the Ramsey Package Corporation to the Farmers Bank of Nansemond, either as maker or endorser, not to exceed the principal sum of \$25,000.00,'

in your opinion can that deed of trust be released on the margin in accordance with section 6456?

"In other words, the 'in trust' clause does not describe any particular note or bond, but the bank holds certain notes and bonds which have been executed by the Ramsey Package Corporation. Upon presentation of those notes which the Bank informs me are covered by this 'in trust' clause, can there be a marginal release or is a deed of release necessary?"

In my opinion, the satisfaction of the debt secured by deed of trust may be evidenced by a marginal release signed by the creditor or his duly authorized agent or attorney in accordance with section 6456 of the Code. Since you cannot tell whether the cancelled notes produced before you are all of the notes secured by the instrument, such notes not being sufficiently described therein, I am of opinion that when the paid notes are produced the creditor should also file an affidavit with you that such cancelled notes are all of the notes so secured and that they have been paid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees for Docketing Instruments.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 24, 1943.*

HONORABLE LEE N. WHITACRE,
*Clerk, Circuit Court of Frederick County,
Winchester, Virginia.*

MY DEAR MR. WHITACRE:

I am in receipt of your letter of February 20, with regard to the State tax to be charged for filing and docketing an instrument in your office under the provisions of section 5202-a of the Code (Michie 1942).

In my opinion, this section only relates to the filing and docketing of such instruments and does not provide for a State tax to be charged therefor, the only expense being a fee of \$1 payable to the clerk. Under this section, I have expressed the opinion on several occasions that it is not necessary that the instrument be recorded in full, but simply that the information listed in the section shall be noted in the miscellaneous lien book and the instrument indexed in the daily index and in the general index of the clerk's office. If, however, the person offering you the instrument about which you write desires to have it recorded as deeds and deeds of trust are recorded, then I am of opinion that the regular recordation tax imposed by section 121 of the Tax Code should be charged, the tax in this case being measured by the amount of the indebtedness secured by the mortgage.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees on Sums Collected on Behalf of Sheriff.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 1, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of recent date, enclosing a communication from Mr. S. L. Farrar, Jr., Clerk of the Circuit Court of Amelia County, in which Mr. Farrar asks if he is entitled to a commission on sheriff's fees which he collects under the Sheriffs' Salary Act and remits to the local treasurer. As you know, two-thirds of these fees are by the local treasurer forwarded to the State treasurer for the Commonwealth and one-third is credited to the general funds of the county.

In my opinion, section 406 of the Tax Code, providing for a commission for the clerk on "all taxes and other money belonging to the Commonwealth collected by him," is broad enough to include these sheriffs' fees. Of course, the clerk would only be entitled to be paid a commission by the State on two-thirds of these fees which belong to the State. His commission on

the other one-third would be payable by the county. In connection with the clerk's commissions on the county's share of these funds, I refer you to my letter to you of January 27, 1942. Since these fees are paid by the clerk, under chapter 386 of the Acts of 1942, into the treasury of the county and not into the State treasury, as provided by section 406 of the Tax Code, I am of opinion that it would be proper for the clerk to deduct his commission before paying such fees into the treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees Where Land is Sold for Delinquent Taxes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 15, 1942.*

HONORABLE LEWIS CRAWLEY,
Clerk,
Cumberland, Virginia.

MY DEAR MR. CRAWLEY:

This is in reply to your letter of December 11, from which I quote as follows:

"With the consent of the Board of Supervisors the Treasurer omitted to sell lands for delinquent taxes for the years 1935-6-7-8-9 and advertised the same for all of years to be sold on the 8th day of December, 1941, that being the second Monday, and at that time the said lands were sold and the most of said tracts were purchased in the name of the Commonwealth. An extract of such advertisement is hereto attached. The lands were offered and sold for the aforesaid years (all that were delinquent for those years) and duly reported to the court and sale confirmed and ordered to be recorded. I have recorded the said sale each year separate, as per copy attached. Should I receive payment of 10 cents for recording each year or should I receive payment of 10 cents for the tract sold for five years? That is, should I receive 50 cents for recording said tract for five years, or should I only receive 10 cents for recording for five years?"

The fee to which you refer is fixed by the last paragraph of section 2489 of the Code and it is therein stated that it shall be 10 cents for all services rendered by the clerk in connection with the sale of delinquent real estate which is purchased in the name of the Commonwealth for the benefit of the county "for each lot, tract, or parcel of land so purchased." Since the section expressly provides that the fee shall be 10 cents for the clerk's services in connection with each lot or tract, I am of the opinion that the clerk's fee is limited to 10 cents in the case of each tract, even though the lot or tract is being sold for delinquent taxes accruing over a period of five years. As you know, section 2460 of the Code authorizes boards of supervisors of counties to postpone the sale of delinquent real estate.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees for Computing Delinquent Taxes and Interest.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 10, 1942.

HONORABLE J. SOL WRENN,
*Clerk, Circuit Court of Greenville County,
Emporia, Virginia.*

MY DEAR MR. WRENN:

This will acknowledge receipt of your letter of August 5, from which I quote as follows:

"Referring to your letter to Mr. McLemore, Clerk of Southampton County, under date of December 23, 1936, construing the above section of the Code of Virginia. See Opinions of the Attorney General and Report to the Governor of Virginia from July 1, 1936, to June 30, 1937, page 86, under the heading, 'Fees—Clerks—Delinquent Tax Collections.'

"I illustrate my construction of this Code section thus (without reference to the recent Act releasing all tax liens prior to 1923): a tract of land is delinquent for the years 1917, 1918, 1919, 1920, 1921 and 1922. The taxes are paid to the clerk December 31, 1934. The clerk is entitled to fifty cents for the years 1917, 1918 and 1919, and thirty cents for the years 1920, 1921 and 1922, that is to say, ten cents for each of the three last mentioned years, making a total of eighty cents. A clerk in one of the nearby counties of the State charges on the statement thus: fifty cents for the years 1917, 1918 and 1919, and ten cents for each intervening year until payment of the taxes on December 31, 1934, that is to say, he charges fifty cents for the first three years and one dollar and fifty cents for the fifteen intervening years, making a total of two dollars. You will note that there are no taxes delinquent on the tract of land after 1922 until the taxes are paid on December 31, 1934."

In my opinion, you have correctly construed section 3484(41) of the Code. This section, dealing with the clerk's fee, is as follows:

"For making statement, calculating interest, receiving payment of taxes on any tract of land returned delinquent for first three years, fifty cents.

"For each additional year, ten cents."

It seems reasonably clear to me that the words "each additional year" mean each year for which taxes are delinquent and not each year for which interest is calculated.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees for Preparing or Checking Poll Tax Lists.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 29, 1942.

HONORABLE E. V. WALKER,
*Attorney for the Commonwealth,
Charlottesville, Virginia.*

MY DEAR MR. WALKER:

This will acknowledge receipt of your letter of July 20, in which you refer to a list of persons who have paid their State capitation taxes, prepared pursuant to section 109 of the Code, and then say:

"Under the county executive form of government which is in effect in Albemarle county, the director of finance performs the duties of the county treasurer and when the voting list is prepared by the director of finance, who is also the county executive, it is delivered to the clerk who certifies that one of the copies is the original and files same in her office as provided for by section 109 of the Michie Code. The clerk does not make the list specified in that section, but it is prepared, mimeographed and bound by the department of finance as is set forth in Mr. Haden's letter. The clerk then certifies a sufficient number of copies for each voting place in the county and the same are posted, etc. In fact, all of the provisions of section 109 are complied with except the one noted above. The same is true of section 111 of the Michie Code.

"You will note that section 112 provides that 'For making and certifying such lists * * * the treasurer shall be allowed 3¢ for each 10 words counting initials as words, and the clerk for copying and certifying the same shall be allowed 2¢ for each 10 words, counting initials as words, for the first copy, and the actual reasonable costs of printing or otherwise making, in the cheapest way obtainable, the other copies he is required to make.'"

You ask if under the facts stated by you the clerk of the court is entitled to compensation of 2 cents for each ten words for the first copy of the list and the reasonable cost of preparing the other copies of the list.

In my opinion the clerk is entitled to this compensation, as provided by section 112 of the Code. It is not the duty of the treasurer to furnish to the clerk but one copy of the list. If he does furnish more than one copy and the clerk chooses to check the other copies against the original list furnished by the treasurer, and adopts such copies as his own and certifies them, I know of no legal reason why he may not do so and be entitled to the compensation provided by the statute. It is my opinion that as a matter of law, when the clerk checks the copies of the list with the original list furnished him by the treasurer and certifies them, such copies become the list which the clerk is required to make. It seems to me that the legal effect of the situation described by you is that someone else has done for the clerk what the clerk otherwise would have had to do for himself, but, if the clerk checks this work and adopts it as his own, I do not see how it could be held that he is not entitled to the compensation provided by the statute.

You inquire as to the possible legal effect in a contested election of what you describe as "the clerk's failure to actually copy the treasurer's list."

Of course, you will understand that this office could not attempt to say what the holding of the court would be in a particular case, but, if my view of the legal effect of the situation that you describe is correct, then I should

not think that the court would hold that the use of such a list would render an election invalid.

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

CLERKS OF COURT—Recordation Fees in Condemnation Proceedings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 28, 1943.*

HONORABLE JAMES ASHBY,
*Clerk, Circuit Court of Stafford County,
Stafford, Virginia.*

MY DEAR MR. ASHBY:

I am in receipt of your letter of June 25, with reference to your fee for recording an order of the United States District Court vesting title in a condemnation proceedings and the plat therewith.

Your fee for recording the plat is covered by subsections (2) and (3) of section 3484 of the Code. I do not think that the fact that you paste the plat in the plat book changes the fee that you may charge as provided in the aforementioned subsections. You state that a great many figures are used. I presume you refer to the order of the court. You desire to know how the figures should be counted in determining your fee of three cents for every twenty words as prescribed in subsection (4) of section 3484. The section does not specify how figures are to be counted in computing the number of words, and so I suggest that you follow the practice that you have followed in the past in recording deeds or other instruments in which figures appear.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH ATTORNEYS—Fee System Abolished.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 6, 1942.*

HONORABLE H. G. GILMER,
*State Comptroller,
Richmond, Virginia.*

MY DEAR MR. GILMER:

Your letter of October 8 with enclosures raises the question of whether or not an attorney for the Commonwealth shall be paid out of the appropriation for criminal charges the fee of \$10 specified in section 1029 of the Code for representing the Commonwealth in opposing a petition for a writ of *habeas corpus* brought by an inmate of one of the State hospitals for the insane.

The section makes it the duty of the attorney for the Commonwealth of the county or city in which the hearing on the petition is had to represent the Commonwealth on request of the superintendent of the institution, and provides for the fee to be paid "out of funds appropriated to pay the criminal expenses of the State."

If it were not for the Compensation Act of 1934 (Acts 1934, page 733), I would say that the Commonwealth's attorney unquestionably would be entitled to this fee. However, the first section of the Compensation Act provides as follows:

"On and after the first day of July, nineteen hundred and thirty-four, the attorney for the Commonwealth for each county and city shall be paid a salary for his services and the fee system as a method of compensating such officers shall be abolished. Every such attorney for the Commonwealth shall, however, on and after the first day of July, nineteen hundred and thirty-four, continue to collect all fees which he may be entitled to receive by or under the laws (other than from the Commonwealth and any political subdivision) and shall dispose of the same as in this act provided. All allowances out of local treasuries to attorneys for the Commonwealth, other than the sums provided for by this act, shall be discontinued as of the said first day of July, nineteen hundred and thirty-four, for services performed on and after the said date. One-half of all fees to which attorneys for the Commonwealth are entitled on and after the first day of July, nineteen hundred and thirty-four, for the performance of official duties or functions, shall be paid by them or such official or officials as may collect the same, not later than the tenth day of the month following their receipt into the treasuries of their respective counties and cities, and the remaining one-half of all such fees shall be paid by such official as may collect the same into the State treasury, not later than the tenth day of the month following their receipt."

The Compensation Act being adopted in 1934 and section 129 of the Code having been last amended in 1920 (Acts 1920, page 240), where the two enactments are in conflict, of course, the Compensation Act controls. The quoted language of the section expressly provides that the fee system of compensating attorneys for the Commonwealth is abolished and that the Commonwealth's attorney shall continue to collect the fees to which he may be entitled *other than those from the Commonwealth and any political subdivision*. These fees shall be paid one-half to the respective counties and cities and the other half to the State. The Act further provides, as you know, for specific salaries to be paid to attorneys for the Commonwealth by the State and its political subdivisions in compensation for the services rendered by such officers.

In view of the provisions of the Compensation Act, in my opinion, it is clear that attorneys for the Commonwealth are no longer entitled to receive out of the State treasury the aforesaid fee of \$10 specified in section 1029 of the Code. It does not seem to me that section 1029 is on any different footing from a number of other sections of the Code specifying specific fees for attorneys for the Commonwealth for performing services which they are required by law to render. This office has consistently expressed the opinion in the past that attorneys for the Commonwealth shall not be paid fees out of the State treasury for carrying out the duties imposed upon them by law.

The enclosures contained in your letter are herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH ATTORNEYS—Fees in A. B. C. Cases Where Appeals Are Had.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 30, 1942.*

HONORABLE L. C. HARRELL, JR.,
*Attorney for the Commonwealth,
Emporia, Virginia.*

MY DEAR MR. HARRELL:

This will acknowledge receipt of your letter of October 28, in which you ask in effect if a fee should be taxed for the Commonwealth's Attorney when prosecuting before the Trial Justice a misdemeanor involving a violation of the Alcoholic Beverage Control Law, and another fee for prosecuting the same case in the Circuit Court where an appeal was taken by the defendant from the decision of the Trial Justice.

The pertinent portion of section 3505 of the Code reads as follows:

"For each person tried for a misdemeanor in his circuit or corporation court five dollars, and for each person prosecuted by him before any court or justice of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, he shall be paid five dollars, unless the costs, including such fee, are paid by the defendant; and in every misdemeanor case so prosecuted the court or justice shall tax in the costs and enter judgment for such misdemeanor fees."

Under the Alcoholic Beverage Control Act, Attorneys for the Commonwealth are required to represent the Commonwealth before a Trial Justice in cases involving violations of the Act. See section 4675(62) of Michie's Code of 1942.

The Commonwealth's Attorney being required to appear before the Trial Justice in the case you mention, it is my opinion that the quoted language of section 3505 makes it plain that a fee of \$5 shall be taxed for prosecuting before the Trial Justice and another fee of \$5 shall be taxed for prosecuting before the Circuit Court. I do not see how any other interpretation can be placed upon the quoted language.

As you point out, this office has heretofore expressed the opinion that where a case is appealed from a justice, the hearing in the Circuit Court is a hearing *de novo* and the judgment entered by the Circuit Court is not a technical judgment of "affirmance" but a new judgment in the said court. See Opinions of Attorney General, 1938-39, at page 53.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSION FOR THE BLIND—Applications of and Payments to Minors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 2, 1942.

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

MY DEAR MR. WALTERS:

This will acknowledge receipt of your letter of June 29, from which I quote as follows:

"Can a minor sign his application for Aid to the Blind and receive a check for Aid to the Blind made out in his name, and if so can he endorse the check and get it cashed?"

While section 41 of the Virginia Public Assistance Act provides that applications for aid to the blind shall be signed by the applicant, it is my opinion that in the case of applications for aid to a minor the better practice would be for the application to be signed in behalf of the applicant by a parent or other person having legal custody of the minor and for the checks representing assistance to the blind to be made payable to the parent or to the person having legal custody of the applicant for the benefit of such applicant. I am further of the opinion that the Commission has power to promulgate a regulation to this effect.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONDEMNATION—Expenses of Commissioners; How Paid.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 30, 1942.

HONORABLE GEORGE R. WALTERS,
*Clerk, Circuit Court of Prince George County,
Prince George, Virginia.*

MY DEAR MR. WALTERS:

I am in receipt of your letter of October 28, in which you ask if a sheriff may be allowed mileage for the necessary use of his automobile in condemnation proceedings by the State Highway Commissioner under Chapter 380 of the Acts of 1940, as amended by Chapter 411 of the Acts of 1942.

While the statute is silent on the subject, it is my opinion that the court may in its discretion allow this mileage as a necessary expense of services performed indirectly for the State Highway Commissioner. You

state that in most cases the sheriff actually transports the Commissioners. This service, as I have said, being actually performed in a sense for the State Highway Commissioner, it is my opinion that the mileage allowance, where the sheriff uses his own car, should not exceed 5 cents per mile, as provided in section 53 of the Appropriation Act of 1942 (Acts 1942, at page 910).

I observe that the court directed the sheriff to provide lunch for the Commissioners. It seems to me that it was within the discretion of the court to hold that this was likewise a necessary expense, and I am of opinion that the sheriff may be reimbursed for this expense.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONSTITUTION OF VIRGINIA—Amendments; Publication of Proposed Amendments.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 11, 1943.*

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

MY DEAR COLONEL DODSON:

I am in receipt of your letter of March 9, submitting for the approval of this office a heading and certificate to follow the text for publication by distribution and in a newspaper of two Senate joint resolutions proposing amendments to sections 134 and 73 of the Constitution of Virginia, agreed to by the General Assembly in 1942 (chapters 486 and 487 of the Acts of 1942).

In my opinion, the heading and certificate contained in your letter comply with the requirements of section 196 of the Constitution and sections 306-312 of the Code. While I do not think it is essential, I suggest for your consideration that a line be inserted in capital letters after "CLERK OF THE HOUSE OF DELEGATES" as follows: "PROPOSED AMENDMENTS TO SECTIONS 134 AND 73 OF THE CONSTITUTION OF VIRGINIA."

As to the times when the proposed amendments shall be published in a newspaper, section 306 of the Code provides that they shall "be published monthly for three consecutive months in one daily newspaper published in the City of Richmond * * *, the first publication to be made at the time fixed by the Constitution for the commencement of the publication * * *," and section 196 of the Constitution provides that they shall be published " * * * for three months previous to the time of such election," referring to the next general election of members of the House of Delegates held after the session of the General Assembly in which the amendments were first proposed. Such next general election for members of the House of Delegates will be held on Tuesday, November 2, of this year. Therefore, applying the constitutional and statutory provisions as to time of publication,

I am of opinion that the first publication in a newspaper should be made on August 1, 1943, the next on September 1, 1943, and the last publication on October 1, 1943.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONVICTS—Right to Sue for Tort.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 11, 1943.

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

DEAR MAJOR YUELL:

Under date of June 4, 1943, you forwarded to me, with the request for an opinion thereon, a communication you received from the Virginia Automobile Rate Administrative Bureau, dated June 1, 1943, in which the following inquiry was made:

"Has a prisoner the right of redress through the courts against the driver of an automobile owned by the Department of Corrections for any injury which the prisoner might sustain as a result of negligence in the operation of such automobiles?"

At common law, conviction of a felony placed the offender in a state of attainder, the consequence of which were forfeiture of estate and an extinction of civil rights. As a result, a convict could not sue.

Most states, including Virginia, have removed these disabilities. Section 4762 of the Code of Virginia provides, "No suicide, nor attainder of felony, shall work a corruption of blood or forfeiture of estate."

Sections 4998 and 4999 of the Code provide for the appointment and duties of committees for convicts, the latter section providing that "Such committee may sue and be sued in respect to *all claims and demands of every nature in favor of or against such convicts.* * * *"

I have been unable to find any case decided by our Supreme Court of Appeals which involves the right of a convict to bring an action in tort. However, from the liberal interpretation of the above statutes with respect to contract cases by our Court, and from the general trend in other jurisdictions where the question has arisen, it is my opinion, in the absence of any authority to the contrary, that a convict, through a committee appointed for him, may institute an action against the driver of an automobile for personal injuries wrongfully inflicted upon him. His right of recovery will of course depend upon the facts in the individual case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CORONERS—Fees for Serving Process.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RITHMOND, VA., *February 15, 1943.*

MR. W. E. CURTIS,
*Sheriff of Stafford County,
207 William Street,
Fredericksburg, Virginia.*

DEAR MR. CURTIS:

I am in receipt of your letter of February 13, in which you ask the following question:

"This question does not affect sheriffs or sergeants directly, but is one I shall appreciate your opinion on. When a coroner has to serve papers in a case where the sheriff has an interest, such as sheriff administrator or his own personal suit against someone, will the coroner be allowed fees as heretofore, or will he be allowed same as deputy sheriffs are now allowed?"

Section 2817 of the Code provides in part that:

" * * * And when for any cause it is unfit for a sheriff or sergeant to serve any process, or to summon a jury, such process may be directed to and served by, and such jury shall be summoned by, a coroner of the county or city."

Chapter 386 of the Acts of 1942, placing sheriffs, sergeants and their deputies on a salary basis, has no bearing on the compensation of coroners. I am of opinion, therefore, that when a coroner acts under the quoted provision of section 2817 of the Code he is entitled to the fees fixed by sections 3487 and 3508 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Condemnation Proceedings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 22, 1942.*

HONORABLE LUCIEN SHRADER,
*Trial Justice,
Amherst, Virginia.*

MY DEAR MR. SHRADER:

Referring to your inquiry over the phone a few moments ago as to the position which this office takes upon the question of the liability of the State for the costs of distributing to the persons entitled thereto the funds paid into court in condemnation proceedings, I beg to advise that I have reached the conclusion that these costs should be paid by the State.

Section 4374 of the Code was amended in 1942 so as to provide for such costs to be taxed as a part of the costs of the proceedings, while section 1969j(2) of Michie's Code provides that all costs of the proceedings in the trial court shall be borne by the petitioner. Reading these two sections together I do not see any escape from the conclusion that this 1942 amendment of section 4374 has the effect of including these costs "as a part of the costs of the proceeding" in the trial court.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—State Agencies Not Required to Pay Costs in Suits Brought by them.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 21, 1943.

HONORABLE K. C. MOORE,
Trial Justice,
Harrisonburg, Virginia.

MY DEAR MR. MOORE:

I am in receipt of your letter of June 19, in which you ask the following question:

"The Virginia Conservation Commission desires to bring a civil suit against a party for fire fighting costs. It does not want to advance the court costs, because the suit is brought for the benefit of the Commonwealth.

"Will you please advise if it is necessary for the Virginia Conservation Commission to advance the costs of this civil suit?"

This office has heretofore expressed the opinion that the Commonwealth or one of its agencies is not required to pay fees of officers for services rendered in civil cases except where the fees belong to the officers rendering the service. The Virginia Conservation Commission is unquestionably a State agency and it is my opinion, therefore, that it should not be required to advance the fees provided for a trial justice or his clerk in the case of a civil suit instituted by the Commission, and for the same reason the Commission should not be required to advance any sheriff's fees. As you know, under section 4987-m(d) of the Code, all fees collected by a trial justice, except fees belonging to officers, are paid into the State treasury and, as a practical matter, if the Commission were required to pay the fees that you mention, such fees would eventually find their way back to the State treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Taxing of Costs Against Prosecutor.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 5, 1943.

HONORABLE ALBERT V. BRYAN,
*Attorney for the Commonwealth,
Alexandria, Virginia.*

MY DEAR MR. BRYAN:

This will acknowledge receipt of your letter of February 3, in which you raise the question of the method of collecting costs in cases of violation of State law where such costs are taxed by the civil and police justice against the prosecutor and not voluntarily paid by such prosecutor.

I quite agree with you and, in fact, have heretofore expressed the opinion that a judgement for costs against a prosecutor is civil in its nature and cannot be enforced by imprisonment. It would appear, therefore, that a civil and police justice or a trial justice might issue an execution on such a judgment for costs just as on any other civil judgment. After considering the applicable statutes, however, I do not think it is contemplated that a civil and police justice or a trial justice shall issue an execution on this class of judgment. Section 2550 of the Code provides for the certification by a justice to the clerk of the circuit or corporation court of fines imposed by him during the preceding month together with the costs. The section further expressly provides that in the certification of costs he shall include a "judgment against the prosecutor for costs." Section 2552 of the Code provides that, if the costs have not been paid, the clerk shall issue an execution therefor, this section plainly referring to the costs which have been reported under section 2550. If both the justice and the clerk issued executions on such a judgment, it would probably frequently happen that two executions on the same judgment would be outstanding at the same time, and I cannot think that this is contemplated. Since section 2550 of the Code and subsequent sections set up a definite procedure for the collection of fine and costs, including such collection by execution, I think the better view is that it is intended that this method is exclusive and that a justice may not issue an execution for costs either where they are taxed against the prosecutor or where they are taxed against the defendant in cases where the defendant is found guilty.

Upon an examination of prior opinions of this office I find that a number of years ago I expressed the opinion that a trial justice (and it would apply equally to a civil and police justice) has no authority to issue an execution on a judgment for a fine, and I at that time gave as a reason for the opinion that the clerk of the court would issue the execution as provided in section 2552 of the Code. It seems to me that on principle the same reasoning is applicable in the case of costs, whether taxed against the defendant or the prosecutor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Mileage Allowances of Sheriff to Be Taxed as Costs Against Defendant in Criminal Case.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 22, 1943.

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

MY DEAR MR. DOWNS:

This is in reply to your verbal inquiry as to whether or not mileage allowances provided by law for a sheriff or sergeant should be taxed as a part of the costs in criminal cases.

In my opinion, such allowances should be taxed as a part of the costs in a criminal case to be paid by the defendant if convicted. In fact, section 1, subsection (b) of Chapter 386 of the Acts of 1942 expressly provides that every sheriff and sergeant and every deputy of either shall continue to collect "fees and mileage allowances provided for services in connection with the prosecution of any criminal matter." It is further my opinion that such mileage allowances taxed as a part of the costs to be collected from the defendant if convicted are the allowances fixed by section 3508 of the Code and when collected should be disposed of as provided in the aforesaid section 1, subsection (b), of Chapter 386.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Sheriff's Mileage Not Taxable as Costs in Civil Case.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 7, 1943.

HONORABLE JNO. C. CALDWELL,
*Trial Justice for Craig County,
New Castle, Virginia.*

MY DEAR MR. CALDWELL:

Replying to your letter of January 6, in which you ask if there may be taxed as a part of the costs in civil cases the mileage which is allowed the sheriff by the State Compensation Board as part of the expenses of his office, I beg to advise that I know of no authority for taxing such expense as a part of such costs.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Taxing Cost of Juror's Attendance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 26, 1943.*

HONORABLE C. W. EASTMAN,
*Clerk of Court of Middlesex County,
Saluda, Virginia.*

MY DEAR MR. EASTMAN:

I have your letter of June 25, from which it appears that the venire of nine jurymen were summoned to attendance in the Circuit Court on June 24 for the trial of a civil case, and that they would have been used on the 25th day of June for the trial of Willie Louden. However, the civil case was not finished until midday on June 25, and Louden pleaded guilty and was sentenced to the penitentiary, having waived the trial by jury.

You inquire whether or not the costs of the seven of the nine jurors who served in the civil case on June 24 and 25 should be taxed against Willie Louden.

It is my opinion that said costs should not be taxed against him, for the reason that the jurors were necessary and actually used in the transaction of other business of the Court on the 25th day of June, and no additional public expense has been incurred by reason of the fact that they might have been used also in the Louden case. These jurors should be paid in exactly the same manner as they would have been paid if there had been no Louden case set for trial.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Board of Prisoner in Jail Not to Be Taxed as Costs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 21, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of January 15, in which you inquire as to the disposition of the sum collected from a prisoner for his board in jail prior to conviction in cases where the sentence is for a fine and costs.

This office has heretofore expressed the opinion that the board of prisoners prior to conviction should be taxed as a part of the costs where the judgment of conviction is for a fine and costs only. When I expressed this opinion I thought, and so stated, that the question was a close one. Furthermore, at the time that the opinion was expressed there were definite amounts provided by statute covering the fees of a jailor for the board of prisoners. However, under the Sheriffs' and Sergeants' Salary Act (Chapter 386 of the Acts of 1942) a new system is set up for the payment of the cost of feeding and clothing prisoners in jail. See sections 8 and 9 of the Act. Under this

system it is not practicable to say at any particular time just what the expense of feeding a particular prisoner has been. I know of no authority for fixing an arbitrary sum to be charged a prisoner for his board in jail.

After careful consideration, therefore, my conclusion is that under the existing law it is not practicable, nor is it contemplated, that the board of a prisoner in jail prior or subsequent to conviction shall be taxed as a part of the costs to be paid by the prisoner.

The committal and release fee when collected from the prisoner, in my opinion, shall be disposed of as other fees of the sheriff, that is, they should be paid into the county treasury to be credited as provided in section 1, subsection (b), of said Chapter 386.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—Board of Prisoner in Jail Not to Be Taxed as Costs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 8, 1943.*

MR. C. C. CURTIS,
*Sheriff of Elizabeth City County,
Hampton, Virginia.*

MY DEAR MR. CURTIS:

I am in receipt of your letter of January 27, in which you refer to my opinion of January 21 given to Honorable L. McCarthy Downs, relating to the taxation of costs in criminal cases, and then ask if the expense of feeding prisoners confined in jail may be taxed as a part of the costs in cases involving violations of city, county or town ordinances.

After careful consideration I have reached the conclusion that such expenses should not be taxed as a part of the costs in cases involving violations of State law, whether accrued prior or subsequent to conviction. On principle I will state unofficially that I should think this would apply also to cases involving violations of city, town and county ordinances, but I am not expressing this as an official opinion for the reason, among others, that the question you raise is a local one and there may be provisions in the charter of any particular city or town which should be considered, in which case the attorney for the locality involved ought to be consulted. I think it proper to say, however, that unless the charter of a city or town expressly permits it this item should not be taxed as a part of the costs.

The taxation of costs in criminal cases presents a mixed question of law and fact and, as a practical matter, I do not see how under Chapter 380 of the Acts of 1942 it can be determined in most cases just what the expense of feeding a particular prisoner has been for any particular time. In the illustration you give in your letter the County of Elizabeth City is charging the City of Hampton and the Town of Phoebus a flat sum per day for prisoners confined in the county jail for violations of city and town ordinances of Hampton and Phoebus. In this particular case, of course, the cost of feeding

of Hampton and Phoebus prisoners can be definitely determined, but, as I have said, where a city or town is operating its own jail, such expenses cannot be actually determined at any particular time and thus, if this is a proper item of costs, we would have the anomalous situation as a practical matter of being able to tax this item in some localities and being unable to do so in other localities.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COUNTY SURVEYOR—Required to Give Bond.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 5, 1943.

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

DEAR JUDGE MEEKS:

This will acknowledge receipt of your letter of December 29, asking my opinion as to whether or not a county surveyor is required to give bond and, if so, how much bond.

Section 2698 of the Code of 1919, as amended, provides:

"Every * * * county surveyor * * * shall, at the time he qualifies, give such bond as is required by section two hundred and seventy-nine. The penalty of the bond of each officer shall be determined by the court, judge, or clerk before whom he qualifies, within the limits hereinafter prescribed; * * * ."

Section 279 of the Code merely prescribes the terms and provisions which shall be included in these official bonds. I am, therefore, of the opinion that the county surveyor is still required by law to give bond.

As your letter indicates, section 2698 of the present Code has as its antecedent section 814 of the Code of 1887. This section provided that the bond of the county surveyor should be not less than \$2,000. By chapter 452 of the Acts of 1922, which was an amendment and re-enactment of section 2698 of the Code of 1919, the last above mentioned provision of the statute was deleted. It, therefore, appears to me that that portion of section 2698 which provides that the bond shall be "within the limits hereinafter prescribed" no longer has any effect as far as county surveyors are concerned, and that the penalty of the bond is a matter resting in the sound judicial discretion of the court, judge or clerk before whom the surveyor qualifies.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

COURTS—Trial Justice and Juvenile and Domestic Relations Courts Are Not Courts of Record.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 8, 1943.

HONORABLE L. BROOKS SMITH,
Trial Justice,
Accomac, Virginia.

MY DEAR MR. SMITH,

This will acknowledge receipt of your letter of April 6, from which I quote as follows:

"It is my understanding that the Trial Justice Courts and the Juvenile and Domestic Relations Courts are not courts of record in the State of Virginia. I would thank you to give me your opinion on this matter at your convenience."

My understanding has always been in accord with yours, namely, that Trial Justice Courts and Juvenile and Domestic Relations Court are not courts of record. However, the line of distinction between courts of record and courts not of record is not at all clearly defined. See 14 Am. Jur., Courts, section 7, and 21 C. J. S., Courts, section 5. Certainly Trial Justices are clothed with many of the powers of a court of record.

I can find no statutory definition of a court of record in Virginia, but in section 4987-f(1) of the Code (Michie 1942), prescribing the jurisdiction of a Trial Justice, the General Assembly evidently did not consider that a Trial Justice was a court of record. This is made quite clear by the last paragraph of section 4987-f(1) providing that "none of the provisions of the section * * * shall affect the right of any person to obtain judgment by a confession in any court of record having jurisdiction thereof, or in the clerk's office of any such court * * *." The quoted language would certainly indicate that the General Assembly considered that the Trial Justice Court is something else than a court of record.

Another indication that Trial Justice Courts and Juvenile and Domestic Relations Courts are not courts of record is to be found in section 4987-a of the Code, which impliedly authorizes a Trial Justice, if a lawyer, to practice law except in certain cases, while section 105 of the Constitution expressly stipulates that "no judge of a court of record shall practice law within or without this State * * *."

From the tokens of intent to be found in the constitutional and statutory provisions I have mentioned my conclusion is that, although there seems to be no statutory definition of a court of record in Virginia, the General Assembly does not consider that either a Trial Justice Court or a Juvenile and Domestic Relations Court is a court of record.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Improper Remarks by the Court in Presence of Jury Constitutes Prejudicial Error.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 18, 1943.

HONORABLE J. HUME TAYLOR,
Commonwealth's Attorney,
Norfolk, Virginia.

DEAR MR. TAYLOR:

Re: Commonwealth v. S. L. Kinsey.

This will acknowledge receipt of your letter of March 16, 1943, in which you request my opinion concerning the validity of the verdict in the above styled case now pending in Corporation Court Number Two of the City of Norfolk. Your letter presents two issues: (1) the admissibility of rebuttal testimony to impeach the credibility of defense witness, Ann Kinsey, mother of the accused; and (2) the effect of the court's instruction to the clerk, in the presence of the jury, that a rule be issued against the said Ann Kinsey to show cause why she should not be punished for contempt, to-wit, for having offered to pay a Commonwealth's witness if he would refrain from identifying the accused.

Both of these questions are matters of law for the court to decide and are in a pending controversy. It is the practice of this office not to express opinions in such situations, but, in view of the fact that this office will be called upon to defend any conviction secured in the Corporation Court in event the same were appealed to the Supreme Court of Appeals, and in view of the fact that in our opinion it is very likely that prejudicial error as characterized by our Supreme Court has occurred, I am replying as follows:

The facts in the case at hand seem to be similar to those in the case of *Dora Pinn v. Commonwealth*, 166 Va. 727, 186 S. E. 169, in which a rule was issued from the bench, in the presence of the jury, against one Harry Pinn, a stepson of the accused, to require him to show cause why he should not be punished for contempt in having intimidated a Commonwealth's witness. Despite an explanation by the court to the jury, the Supreme Court of Appeals held that the incident constituted prejudicial error in that it was "calculated to highly discredit, in the eyes of the jury, the alleged offender, [Harry] Pinn, an important witness for the defense."

In an earlier case, *Hensen v. Commonwealth*, 165 Va. 821, 183 S. E. 435, it is true that the court without assigning reasons came to a different conclusion on a somewhat similar set of facts, but in that case the alleged offender was not a particularly important witness for the defense, the record in the case showing that the alibi relied on by the accused was corroborated by eight witnesses other than Davis and the court in its decision remarked that it "was sustained by other witnesses" than Davis.

Although the Supreme Court failed to assign any reasons in the *Hensen* case for holding that the judge's conduct had not constituted prejudicial error, it is apparent that the extent of error in such cases will depend in large measure upon the materiality and importance of the witness whose credibility has been affected by the trial justice's improper conduct. Therefore, in the instant case, if Ann Kinsey, the mother of the accused, is a principal and important witness in the attempt of the accused to establish an alibi, it is my opinion that the Supreme Court of Appeals would be very likely to hold that the incident amounted to reversible error.

The continued conservative attitude of our Supreme Court of Appeals in such matters is further demonstrated in the case of *Hicks v. Common-*

wealth, 178 Va. 261, 16 S. E. (2d) 639, in which the doctrine of the *Pinn* case is expressly approved and referred to as accurately restating the law in Virginia on the subject; and in *Anthony v. Commonwealth*, 179 Va. 303, 18 S. E. (2d) 897, in which the *Hicks* case itself is cited with approval.

In view of the above opinion, I believe it will be unnecessary for me to comment upon the other issue which you have presented.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Induction Into Armed Forces Excuses Non-Appearance on a Recognizance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 14, 1943.

HONORABLE R. PAGE MORTON,
Commonwealth's Attorney,
Charlotte Court House,
Virginia.

MY DEAR MR. MORTON:

I have your letter of May 13, in which you state that a young man convicted in the Circuit Court of Charlotte County and sentenced to five years in the State Penitentiary noted an appeal, and gave bond with surety for his appearance on June 21, 1943, pending his efforts to secure a writ of error. It seems that, although the draft board had actual knowledge of the conviction, no official notice was given said board and the defendant has been called for induction into the army on the 18th day of May, and will be unable to appear in the Court as required by his bond. You request my advice as to what action you should take in the premises.

In my opinion the Commonwealth's Attorney should notify the appropriate officer in the army as to the fact of said conviction, setting out fully the nature of the crime of which he was convicted. I do not believe that it is the duty of the Commonwealth's Attorney to insist upon a return of the defendant by the army. If under the circumstances, with full knowledge of the facts, the authorities of the army desire the defendant to remain in the service, it is my view that the State authorities should acquiesce in the army's decision on this point.

If after knowledge of the facts the defendant is retained in the army, I do not believe that his bond can be legally forfeited or his surety held liable thereon during such time as he is prevented from appearing in Court by the United States in the exercise of its paramount war power. However, as soon as he is released and is able to appear, it is my view that both he and his surety should be notified and his appearance requested at such time as the Court may designate. In the meantime forfeiture proceedings might be instituted on the bond, and continued from time to time until the defendant is released and has had a reasonable opportunity to appear in the Court.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DEAD BODIES—Disposition of Where Unclaimed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 15, 1942.*

HONORABLE E. V. WALKER,
*Attorney for the Commonwealth,
Charlottesville, Virginia.*

MY DEAR MR. WALKER:

I am in receipt of your letter of October 14, in which you inquire if section 1731 of the Code, dealing with the delivery of certain dead bodies to the State Anatomical Board, applies to counties and county officers.

In my opinion it does not. The section specifically refers to officers and agents of every city and to the public asylums or institutions for the insane in the State. Nowhere in the Act is any duty placed upon county officers, unless it be that there is a public asylum or institution for the insane in a county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DEAD BODIES—Disposition of Where Unclaimed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 31, 1942.*

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

MY DEAR MR. CHELF:

I am in receipt of your letter of October 26, in which you ask if the District Home for the Counties of Smyth, Giles, Craig, Roanoke, Pulaski and Montgomery and the City of Radford established pursuant to the provisions of sections 2812-a-2812-k of the Code (Michie 1942) may deliver to the State Anatomical Board the bodies of paupers who die at the Home, the said bodies to be used by the medical colleges of the State for the advancement of medical science.

I can find no express statutory authority for counties, or for the District Homes of several counties, to so dispose of these dead bodies. However, section 1731 of the Code *requires* such institutions in cities to deliver these bodies to the State Anatomical Board for the advancement of medical science where such bodies are not claimed for burial by one "of kin or related by marriage to the deceased." Thus it would appear that the General Assembly has definitely adopted the policy of using unclaimed bodies of paupers for the advancement of medical science.

It is my opinion, therefore, that the Board of Supervisors of a county or the governing body of a District Home by appropriate ordinance or regulation, as the case may be, may provide for the delivery of these unclaimed dead bodies of paupers to the State Anatomical Board to be dis-

tributed as provided in sections 1729 to 1734 of the Code. I think the ordinance or regulation should have incorporated therein the appropriate provisions of sections 1731 of the Code. Certainly the Board of the District Home should make every effort to get in touch with the kin or persons related by marriage to the deceased, and no body should be delivered to the State Anatomical Board where any claim for burial is made therefor by any person entitled to make such claim. I observe from section 2812-i of the Code that the Board having charge of a District Home may make rules and regulations with respect thereto.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility of Candidates for Office; Filing of Declarations of Candidacy.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 16, 1943.*

MR. D. T. COLLEY,
*Chairman Electoral Board Henrico County,
Richmond, Virginia.*

DEAR MR. COLLEY:

This is in reply to your letter of June 16, which is as follows:

"Would you please advise me whether a Senatorial candidate in the coming August Primary is entitled to have his name printed on the ballot where such candidate only filed his declaration of candidacy with the duly elected chairman of the Senatorial District Committee? Some question has been raised as to whether such candidate should file his declaration with each of the local committees making up the District Committee and I want to be put straight on this so that we will have the right names on our ballot when it is printed.

"The declaration of candidacy, together with the number of names, is in conformity with the statute and the entrance fees have been properly paid."

Section 229 of the Election Laws provides that the name of no candidate for the General Assembly shall be printed upon the official ballot for a primary election unless such candidate file along with his declaration of candidacy a petition therefor signed by fifty qualified voters of his city or county witnessed in the manner prescribed in said section.

Section 230 provides as follows:

"Candidates for nomination shall file their declaration with the chairman or chairmen of the several committees of the respective parties, and it shall be the duty of such chairman or chairmen to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots the names of the candidates to be printed thereon."

The question which has been raised as to whether the declaration of candidacy and petition shall be filed with the chairman of a senatorial district or with the respective chairmen of the several committees composing the District, no doubt arises from the language above quoted from section 230 providing that the declaration shall be filed "with the chairman or chairmen of the several committees of the respective parties."

The Democratic Party Plan provides that the chairmen of the respective county and city committees for the several counties and cities composing any senatorial district, where it consists of more than one city or county, shall constitute the Democratic Senatorial District Committee. The Plan further provides that such district shall organize by the election of one of their respective members as chairman of the district committee.

It will be noted that this provision of the Party Plan, while authorized by statute, is not mandatory and the Democratic Party had the right, if it had so desired, not to provide for any district committee or district committee chairman at all. In such an event, the only chairmen in the senatorial district would have been the several chairmen of the counties or cities composing the district. The use of the words quoted in the statute, therefore, left it optional with each party to provide for such chairmen as it desired and covering such territorial subdivisions as might be deemed desirable.

If no district chairman for the senatorial district had been provided for by the Party Plan, then it would have been necessary under the provisions of section 230 above quoted for a candidate to have filed his declaration of candidacy with the several chairmen of the respective counties in the district. Where, however, the party has provided for the election of a chairman covering the entire senatorial district, it is clear that the provisions of section 230 are complied with by filing the declaration of candidacy and petition with the district chairman.

This construction of the statute and Party Plan is in accordance with the practice which has prevailed in this State for many years. In state-wide elections it has never been the practice for a candidate for a state-wide office to file his declaration of candidacy with the local county and city chairmen throughout the State, nor in congressional district primaries has it been customary for a candidate for the congressional primary nomination in the Democratic party to file his declaration and petition with the various local county or city chairmen.

In the state-wide election the practice has been uniform by filing the declaration and petition with the chairman of the State Democratic Central Committee, who is elected by the Democratic State Convention every four years under the provisions of the Party Plan. The same practice has also been followed on a reduced scale in filing notices of candidacy in legislative and senatorial districts by filing same with the legislative or senatorial district chairmen of the party.

It follows from the foregoing that it is my opinion that it is the duty of the electoral board of Henrico County to print upon the official ballots for the August Primary the names of all candidates who have complied with the requirements of section 229, and have filed their declarations and petitions with the chairman of your senatorial district.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Petition Accompanying Declaration of Candidacy for Board of Supervisors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 10, 1943.

MR. H. THORNTON DAVIES,
*Secretary Prince William County Democratic Committee,
Manassas, Virginia.*

MY DEAR MR. DAVIES:

I am in receipt of your letter of May 6, in which you ask if under section 229 of the Code a candidate for member of the Board of Supervisors is required to accompany his declaration of candidacy with a petition signed by fifty qualified voters of his district, or whether his petition may be signed by fifty qualified voters from the county at large.

In one sense a member of the Board of Supervisors is unquestionably a county officer and, since the statute in question requires only that the signers of the petition be qualified voters of the candidate's county, this office has expressed the opinion on numerous occasions over a period of years that it is not necessary that all of the signers reside in the magisterial district in which the individual is a candidate. I have further expressed the view, however, that this point is not entirely free from doubt, and I have recommended as the better practice that the candidate obtain the signatures of qualified voters in the magisterial district in which he is running for office. This latter procedure, however, might not be possible in the particular situation that you describe.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Fees of Candidates for Office in Primaries.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 25, 1943.

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

MY DEAR MR. McNEIL:

I have your letter of May 24, and beg to advise that there has been considerable confusion for some years with reference to the payment of fees by candidates in primary elections. This has to some extent resulted from the arbitrary section numbers by which the laws are designated in Michie's Code.

If you have available a copy of the official edition of the 1919 Code, you will see that the official section 249 covers substantially the same subject matter as section 24a of the Primary Act of 1914, as amended by chapter 40, page 96, of the Acts of 1918. It is this latter section which is incorporated in the 1936 Michie's Code and designated as section 249a.

Section 24a of the Primary Act, as amended, was not repealed in 1942, but section 249 was repealed. The reason for such repeal was that there were two statutes covering the same subject and to avoid any further confusion in the matter.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility of Candidates for Office; Member of Armed Service.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 25, 1943.*

HONORABLE T. R. JACKSON,
*Treasurer of Westmoreland County,
Montross, Virginia.*

MY DEAR MR. JACKSON:

I am in receipt of your letter of March 23, in which you state that you are faced with induction into the armed forces and you desire my opinion as to whether or not, if you are so inducted, you may be a candidate for re-nomination and re-election as treasurer in the primary and general elections to be held this year.

This office has heretofore expressed the opinion that there is no reason why a member of the armed services of the United States who is in a position to comply with the requirements of the statute applicable to candidates in a primary and general election may not become a candidate for such re-nomination and re-election even though he may be absent from the State and from the United States at the time of the elections.

You next ask:

"And further, should I have opposition and be defeated for my office due to my absence, would I have any claim to the office after my release from the army?"

I have also heretofore expressed the opinion that in such a case, upon the proper qualification of the successful candidate for the office to which he has been elected, the defeated candidate no longer has any claim to such office.

You further ask:

"In the event that I be allowed to be a candidate and am successful in the election and there had been an acting officer, appointed by the Judge of the Circuit Court to fill my unexpired term or vacancy for my absence, who would qualify on January 1, 1944, for the new term of office, the acting officer or myself? I would also like to know if I would be allowed to hold the office by hiring additional help and deputies to carry on the work in my absence."

This inquiry presents a question to which I have given a great deal of consideration, with the result that I do not feel that I can give you an entirely satisfactory answer. Section 2697 of the Code, relating to county officers elected by the people, provides in effect that, if such an officer fails to qualify and give the required bond "on or before the day on which

his term begins, his office shall be deemed vacant." Therefore, if you were elected and were in a position to qualify in person, this, of course, should be done. If you could not qualify as prescribed by the statute, I am unable to say whether or not a court would hold that you could qualify by proxy. I can only say that I am sure that, if a person were elected to an office and could not qualify by reason of being a member of the armed forces, the court would go as far as it felt that the pertinent statute would permit in upholding the title of the elected officer. Of course, if there was no qualification for the new term, the incumbent would hold over, not by virtue of his re-election, but by virtue of section 33 of the Constitution providing that all officers, elective or appointive, shall continue to discharge the duties of their office after their terms of service have expired until their successors have qualified.

In connection with your running for re-election, I call your attention to the enclosed copies of regulations of the War Department dealing with this question.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility of Candidates for Office; Resignation of Former Office.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 27, 1943.

MR. J. IRVINE JONES,
*Chairman of Electoral Board,
Clifton Forge, Virginia.*

MY DEAR MR. JONES:

This will acknowledge receipt of your letter of May 22, from which I quote as follows:

"We would thank you to advise us if a person who has served as registrar to April 23, of this year, would be eligible to offer as a candidate for the November election for the State Senate or House."

This office has previously ruled that, in view of section 97 of the Code, the ineligibility of a registrar to an elective office extends only to the next election to be held after his resignation. In many of the municipalities of the State elections will be held this June. If such an election is to be held this June in Clifton Forge, then it would appear that a registrar who resigned on April 23, of this year, would be eligible to become a candidate in the November election.

The provision in section 98 for the registration on the third Tuesday in May is obviously intended to apply to registration of voters for the June election.

However, if there is no election to be held in Clifton Forge this June, then it would appear that under the provisions of section 97 the registrar

about whom you write would not be eligible to become a candidate in the November election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility of Candidates for Office; Right to Have Name on Ballot.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 7, 1943.

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

MY DEAR MR. BUTLER:

This will acknowledge receipt of your letter of June 1, from which I quote as follows:

"Will you please give me your opinion whether or not a person whose poll taxes for the past three years are paid after May 5, 1943, would be qualified to be a candidate for a county office in the election to be held on November 2, 1943, and in the event that said person should be elected, would he be eligible to hold office."

I call your attention to that part of section 154 of the Code reading as follows:

"No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for such election * * *."

If the individual about whom you write is not qualified to vote in the general election to be held in November, in my opinion, from the language I have quoted, his name should not be printed on the ballots.

You also ask, if the person you describe should be elected, "would he be eligible to hold office."

This office has made it an invariable rule not to attempt to express an opinion on the validity of a title to office. This is a question that can only be determined by a court of competent jurisdiction.

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

ELECTIONS—Eligibility of Candidates for Office; Right to Have Name on Ballot.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 7, 1943.

HONORABLE J. H. IRBY,
*Clerk Circuit Court of Nottoway County,
Nottoway, Virginia.*

MY DEAR MR. IRBY:

I am in receipt of your letter of June 1, from which I quote as follows:

"Please advise if a party coming from an adjoining county and paying a capitation tax for the years 1941 and 1942 has a right to be a candidate for a county office in the August primary.

"I do not think the party I have in mind has lived in Nottoway county but two years."

Without attempting to pass on the facts in any particular case, I beg to advise that under section 32 of the Constitution every resident of Nottoway county qualified to vote is eligible to any county office, unless otherwise especially provided in the case of any particular office. If the person to whom you refer has been a resident of Nottoway county for two years and has paid at the proper time the capitation taxes required to make him eligible to vote, I should think that he may become a candidate for a county office in the August primary, unless there are some facts present in his case concerning which you have not advised me. Of course, if the person to whom you refer was assessable with a State capitation tax for 1940 in the adjoining county, such 1940 capitation tax must have been paid at the proper time in order for his name to be printed on the ballots as a candidate for office, since section 154 of the Code provides that, if a person is not qualified to vote in the election in which he offers as a candidate, his name shall not be printed on the ballots for such election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Form of Registration Books.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 10, 1942.

MR. C. M. BOWMAN,
*General Registrar,
Lynchburg, Virginia.*

MY DEAR MR. BOWMAN:

This will acknowledge receipt of your letter of December 1, in which you ask if, instead of having separate registration books for white and colored voters, it would be permissible to use one book for both classes of voters, using sheets of one color for the white voters and sheets of another color for the colored voters, or whether it would be permissible to carry both

classes of voters in the same book, placing the sheets on which the names of the colored voters appear in the back of the book.

I can find no authority for either procedure suggested by you, and I am of opinion that neither is permissible. Section 25 of the Code provides that "the list of voters, white and colored, shall be kept and arranged in separate books."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Official Registration Day for Voters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 10, 1943.

HONORABLE LLOYD M. ROBINETTE,
Jonesville, Virginia.

MY DEAR SENATOR ROBINETTE:

This will acknowledge receipt of your letter of May 6, in which you ask, referring to section 98 of the Code, "whether or not the registrars in the county and not in the cities and towns have to hold a sitting for registration on the third Tuesday in May, or is this only required in the country precincts to be held thirty days prior to the November election."

Section 98 of the Code 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. * * *"

This office construes the quoted language to mean that each registrar in the cities and towns of the State (but not registrars located outside of the cities and towns) shall sit on the third Tuesday in May for the purpose of registering qualified voters, and that all the registrars of the State, including those located in cities and towns and in the counties shall sit thirty days previous to the November election for the purpose of registering voters. The reason for the difference in the requirements in the counties and the municipalities seems quite obvious. In the former there is no June election, while in the latter municipal officers, mayors and councilmen are elected in June.

In my opinion, there can be no reasonable doubt that the above is the correct interpretation of the quoted language.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Last Registration Day for Varicus Elections.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 31, 1942.

MR. JAMES N. COLASANTO,
Secretary of Electoral Board,
Alexandria, Virginia.

MY DEAR MR. COLASANTO:

This will acknowledge receipt of your letter of July 21, in which you ask the following questions:

"What will be the last date for registration to qualify for voting at the following elections: August, 1942, primary; November, 1942, general election; April, 1943, primary for municipal offices; June, 1943, general election for municipal offices?"

This office has frequently expressed the opinion that, pursuant to section 98 of the Code of Virginia, the registration books are to be closed after the third Tuesday in May and after a day thirty days prior to the November election, and that no person may register between those days and the election. This office has also frequently expressed the opinion that the registration books are not closed either on the day of the April or the August primary, and that a person may register, provided he is otherwise qualified to vote, up to and including the day of the primary.

From the above it follows that the last day the books are open for the registration of voters in the August, 1942, primary is on the day of the primary itself; that the last day the books are open for the registration of voters in the November, 1942, general election is on a day thirty days prior to such election; that the last day the books are open for registration of voters in the April, 1943, primary is the day of the primary itself; that the last day the books are open for the registration of voters in the June, 1943, general election is the third Tuesday in May, 1943.

Your next question is:

"Are otherwise qualified voters, who are voluntarily registered by the registrar after the registration days in May and October, eligible to vote in the next succeeding City or State general election?"

"The situation with respect to this second question is as follows:

"The registrar did, after the third Tuesday in May, 1942, register over 100 persons, who offered themselves to vote at the June 9, 1942, general election for municipal offices. The electoral board, after submitting the proposition to the Commonwealth's attorney, refused to permit these persons to vote. Was the board correct or not in taking this position?"

It has been the uniform practice of this office not to express opinions as to the validity or invalidity of an action by an electoral board of the character described by you. The opinion of this office would not, as a matter of law, either affirm or overrule the action of the electoral board. The validity of such action could only be finally determined by a court in case the election was contested.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration Books Not to Be Closed Prior to Special Election.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 5, 1942.*

HONORABLE W. P. PARSONS,
Commonwealth's Attorney,
Wytheville, Virginia.

DEAR MR. PARSONS:

I am in receipt of your letter of October 2, 1942, from which I quote as follows:

"A special election has been called to be held in the Town of Wytheville on December 8, 1942, to vote on the question of whether the liquor store should be abolished.

"I wish you would please advise the time within which a person has to register in order to vote in this election.

"Are the registration books closed, for persons to register in order to vote in the special election, 30 days prior to the regular election in November, or closed 30 days prior to December 8, 1942, the date of the special election?"

I know of no provision requiring the closing of registration books prior to special elections. As you know, pursuant to section 98 of the Code, this office has frequently expressed the opinion that the registration books shall be closed between the third Tuesday in May and the day of the general election held in June, and also for a period thirty days previous to the November election. Therefore, after the November election, I know of no reason why persons may not register so as to be eligible to vote in the election mentioned by you up to and including the day of election.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration of Persons Becoming of Age.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 4, 1942.*

MR. GLEN PORTER,
Registrar,
Woodlawn, Virginia.

DEAR MR. PORTER:

Replying to your letter of November 24, I am of the opinion that neither of the persons to whom you refer may be registered until after the election to be held on December 29, 1942, assuming that these persons live in a precinct wherein the election of December 29 is to be held.

Section 93 of the Code provides that a person "who shall be twenty-one years of age at the next election" and has complied with the other requirements in the section may register. Neither of the persons you mention, however, will be twenty-one years of age on December 29, 1942. Both may register, in my opinion, after that date.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote; New Residents of Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 3, 1942.

HONORABLE HARRY K. GREEN,
Commissioner of Revenue,
Court House,
Arlington, Virginia.

MY DEAR MR. GREEN:

This is in reply to your letter of July 2, in which you request my opinion upon certain questions raised relative to the eligibility of persons to vote in Virginia under certain conditions and circumstances as to residence and amount of capitation taxes.

The first case you present is that of a person who moved into Virginia and became a resident after January 1, 1941. He was not assessed or assessable with a capitation tax for the year 1941, but has been assessed with such a tax for the year 1942. You inquire whether or not the 1942 capitation tax must be paid in order for such person to be eligible to register and vote in elections held during the year 1942, but held more than one year after he became a resident of Virginia.

Under our Tax Code, capitation taxes, prior to the 1942 amendment of section 22 of said Code (Acts 1942, p. 377), are assessable as of the first day of January of each year, and, therefore, the person to whom you refer not being assessable with a 1941 tax, the first year's tax assessable against him is for the year 1942. Under the provisions of section 21 of the Constitution, and similar provisions contained in the statutes, the prerequisite for voting is prescribed as the payment, at least six months prior to any election, of all "State poll taxes assessed or assessable against him, under this Constitution, during the three years next *preceding* that in which he offers to vote."

I have frequently expressed the opinion that the above mentioned 1942 Act is not retroactive, and does not justify or permit the assessment of a poll tax for the year 1941, or any year prior thereto.

It is quite obvious, therefore, that the person to whom you refer has paid all poll taxes which were assessable against him during the next preceding three years, since in fact no taxes at all for the three preceding years were assessable against him, and, therefore, he is eligible to vote in any election in 1942 held more than twelve months after he first became a resident of Virginia in the year 1941.

The above answer applies to both of the cases you present in your letter,

as in each case the person moved into the State in the year 1941 and the election would be held more than a year after he became a resident.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote; New Residents of Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 18, 1943.*

MR. H. W. JOHNSON,
*Commissioner of the Revenue,
Prince George, Virginia.*

DEAR MR. JOHNSON:

Replying to your letter of June 17, I beg to advise that a person becoming a resident of Virginia in 1943 may not register prior to the November election, for the reason that he will not have been a resident of the State for a year preceding such election. See section 93 of the Code.

The question of the payment of a capitation tax does not enter into such a case, because the person will not have been a resident of Virginia for the requisite time (one year) preceding the election. If, however, such a person desires to register next year, he will have to show the payment of his 1943 State capitation tax six months preceding the election to be held next after his registration. This 1943 capitation tax must be paid in such a case, even though the person did not become a resident of the State until after January 1, 1943, in view of Chapter 229 of the Acts of Assembly of 1942 amending section 22 of the Tax Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Payment of Poll Tax by Members of the Armed Services as Prerequisite to Vote in Federal Elections, Is Excused by Act of Congress.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 17, 1942.*

HONORABLE WILMER L. O'FLAHERTY,
*Secretary, Richmond City Electoral Board,
1134 Mutual Building,
Richmond, Virginia.*

DEAR MR. O'FLAHERTY:

This is in reply to your request for my opinion upon the question raised in your letter of October 7, which I quote in full as follows:

"On September 16th the President of the United States approved Public Law 712 to provide a method of voting in time of war by members of the land and naval forces.

"Under this law members of the land and naval forces are given the right to vote in the coming General Election on November 3, 1942, for a United States Senator and a member of Congress without the payment of poll taxes and registration as required by the Virginia Election Laws.

"There will perhaps be some confusion and doubt on the part of the election officials at our November General Election as to how these ballots should be handled.

"These election officials take an oath to perform their duties according to law. Some officials may feel that this oath would require them to comply with the Virginia Election Laws, which would not permit members of the land and naval forces to vote unless they had complied with the Virginia Election Laws and paid their required poll taxes and registered. This would result in denying a vote to a member of the land and naval forces who had not complied with the Virginia Election Laws as to the payment of poll taxes and registration.

"In order that I may be in a position to advise properly our Richmond Election Officials, I shall appreciate it if you will give me your opinion on these points."

The Federal Act referred to dispenses with the necessity for regulation by those in the Armed Forces in all of the States which require registration as a condition precedent to the right to vote and I am informed that almost every State does have such a requirement. This provision, therefore, affects nearly all the States, including those in the South, while the provision dispensing with the payment of any tax as a prerequisite to vote affects, so far as I know, only the eight Southern States which require payment of the poll tax. If the provision with respect to registration is valid, the other must be likewise so held, since they involve the same constitutional principle, yet I have not heard of the authorities in any State failing or refusing to give effect to the Federal Act in the coming November elections.

It is my opinion that Article I, section 2, and the Tenth Amendment of the Federal Constitution undoubtedly reserve in the States the exclusive power to prescribe the qualifications of voters for these officers *in time of peace*. The reasons for this conclusion I recently stated at length before the Judiciary Sub-committee of the United States Senate in connection with other proposed permanent legislation now pending, which is not restricted to persons in the Armed Forces. The Sub-committee, in its report to the full Committee, has sustained this view. But even though this be true, the Act you refer to raises an entirely new and different question. It is by its terms operative only in time of war and is applicable only to the land and naval forces. The Constitution (Article I, Section 8) confers on Congress the power to "declare war, * * * to raise and support armies, * * * to make Rules for the Government and Regulation of the land and naval forces"; and to "make all laws which shall be necessary and proper for carrying into effect the foregoing Powers."

During the first World War Congress passed what was known as the Soldiers' and Sailors' Civil Relief Act of 1918, providing for the suspension in both State and Federal Courts of legal proceedings against members of the Armed Forces, or their dependents, while engaged in active service. Although this legislation would have been clearly unconstitutional in peacetime, as an invasion of the State's recognized powers to establish its courts and prescribe the proceedings therein, yet it was sustained as a valid exercise of the War Powers by the highest courts of all the States before which it came for consideration and by the United States Circuit Courts of Appeal of several circuits. See annotation to *Morse v. Stober*, 9 A. L. R. 81.

During the present war Congress has passed another similar statute which is much more comprehensive and which protects those in military service by provisions for the postponement of suits, judgments, attachments, garnishments, evictions, mortgages, foreclosures, repossessions, payments under installments purchases and conditional sales, income taxes, real estate taxes, all statutes of limitations, etc. Protection is also extended to life insurance, indorsers, sureties, guarantors, property rights, homesteads, mining claims, mineral leases, etc. The Selective Service Act now in force provides for restoration to selectees of their positions held in private employment. I have not heard of any question being raised as to the validity of any of these provisions as an exercise of the war powers of Congress. The Supreme Court sustained the drafting of civilians into military service under this power. (245 U. S. 366.)

The Act you refer to undertakes to protect those in the Armed Forces from loss of their right to vote for these Federal representatives by reason of failure to comply with registration and poll tax payment requirements while absent in the service.

It is well settled that an Act of Congress, passed in the proper exercise of a power delegated to it by the Constitution is the supreme law of the land and supersedes any State constitutional or statutory provisions in conflict therewith. U. S. Constitution, Article VI, Section 2. See also 11 Am. Jur., p. 649.

It follows, therefore, that if the protection which the Act in question purports to afford to the voting privileges of absentee soldiers and sailors is a valid exercise of the war powers of Congress above referred to, the provisions of the Act eliminating State requirements of registration and poll tax payments are valid and should be given effect by Virginia election officials.

In view of the apparent similarity in the nature of the protection provided for in the Soldiers' and Sailors' Relief Act and in the Act here under consideration, and recognizing the well established rule that every statute is presumed to be constitutional until the courts declare otherwise, I am constrained to the view that in the election to be held on November 3, 1942, the Judges of Election and other State authorities should count as valid votes all ballots cast in accordance with the provisions of the said Act of Congress (Public No. 712).

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ELECTIONS—Payment of Poll Tax by Members of the Armed Services
as Prerequisite to Vote in State Elections, Is Not Excused.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 5, 1943.

MR. S. R. CURTIS,
*Treasurer Warwick County,
Lee Hall, Virginia.*

DEAR MR. CURTIS:

This is in reply to your letter of May 4, in which you request my opinion upon the question whether or not a member of the Army, Navy, or Marine

services who is now serving his country overseas or in the States, who has not paid his capitation tax, should have his name appear upon the list of persons whose taxes have been paid.

The name of such a person should not appear upon the list. While there is an Act of Congress rendering him eligible to vote for members of the House of Representatives and United States Senate, this has no affect upon the eligibility of persons to vote in State or local elections.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote; One Year's Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 26, 1943.*

MR. UPTON H. RICHARDS,
*Secretary Fauquier County Electoral Board,
Warrenton, Virginia.*

MY DEAR MR. RICHARDS:

I am in receipt of your letter of February 3, in which you ask for the opinion of this office on the following question:

"I have had several inquiries with regard to the registering of residents of the State of Virginia who will not be residents for the one year term until next August. I would like to know if they can register now or some time prior to August and be allowed to vote in the general election next November."

Section 26 of the Constitution provides as follows:

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

Section 98 of the Code carries into effect this constitutional provision. Since there is no general election to be held in June of this year, I am of the opinion that your question should be answered in the affirmative.

You next inquire:

"I would like to know if it is permissible for any residents of Virginia to register prior to the general election in November on the theory that they will have been a resident of the State for one year by the time of the November election, but not before, that is, can they register if they have been in the State say ten months in August, but will have been residents for one year in November."

For the reasons given in reply to your first question, I am of opinion that your second question must be answered in the affirmative.

You will understand that my reply to both of your questions is based on the assumption that the individuals desiring to register have paid the required capitation taxes within the time prescribed by statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote; One Year's Residence. Transfer of Residence from One County to Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 24, 1943.*

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

MY DEAR MR. KELLAM:

This will acknowledge receipt of your letter of February 17, in which you ask the questions quoted below:

"The General Assembly of 1942 passed a law, chapter 229, which requires every person to pay \$1.50 poll tax after having been here one year regardless of whether he was a resident the first day of January. Under this law, if a person moved into Virginia in June, 1942, or even as late as October, 1942, they would have established a residence of one year in Virginia prior to the November election, 1943, and as I understand it would be eligible to vote after paying the \$1.50 poll tax and being properly registered. Under this section would this person be permitted to vote without appearing on the treasurer's certified list, which list contains only the ones who have paid six months before the election, or would they be permitted to vote on their tax receipts the same as persons who have just become twenty-one are permitted to do?"

In my opinion, a person moving into Virginia under the circumstances stated by you would be liable for the 1942 capitation tax under section 22 of the Tax Code, as amended by chapter 229 of the Acts of 1942. To be eligible to vote at the November election in 1943, such a person must have paid this 1942 capitation tax at least six months prior to such election. If such a person has paid the 1942 capitation tax, as above indicated, his name should appear on the treasurer's list made up five months before the November election in 1943, as required by section 109 of the Code, and, if his name does not appear on such list, then the list may be corrected as provided by section 110 of the Code. It does not seem to me, therefore, that in the case you put the person should be permitted to vote unless his name is on the treasurer's list made up five months before the election in 1943, or as such list is corrected under section 110 of the Code.

Your second question is:

"I would appreciate it also if you would advise me whether a person moving into Princess Anne County and establishing a six months' residence can have his name placed on the certified list prepared by the

treasurer, if he presents to the Treasurer of Princess Anne County a certificate from the treasurer of the city or county from which he moved showing capitation taxes paid there."

In the above case, in my opinion, the proper procedure is for the voter to secure a transfer as provided in section 100 of the Code. If such transfer is secured, then the person may vote in the county to which he has moved, even though his name does not appear on the treasurer's list, by exhibiting to the judges of election the certificate of the payment of his capitation tax in his former county, secured as provided in section 115 of the Code. In the situation involved in your second question it is not necessary for the name of the person to appear on the treasurer's list of his new county by reason of the provisions of section 115.

However, if the taxpayer desires to have his name on the list, in my opinion it is perfectly proper for the treasurer to place it thereon. In cases where one or more of the last three years' taxes have been paid in some other county and one or more in Princess Anne County, upon presentation to you of the certificates from the treasurer of such other county or counties his name should be placed on your treasurer's list.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote; Change of Residence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 28, 1943.

HONORABLE KERMIT WOOD,
Registrar,
Grundy, Virginia.

MY DEAR MR. WOOD:

I have your letter of May 26, which is as follows:

"On October 2, 1939, Mr. H. D. McCoy and his wife, Valerie M. McCoy were placed on the registration books of Grundy Precinct by a certificate of transfer for each from Wise County, Virginia. They had moved here from Norton, Virginia, and resided here in Grundy until about two years ago when they moved their place of business to Christiansburg, Virginia, and have actually resided there ever since.

"I am enclosing three letters from H. D. McCoy, one dated April 5, 1943, written to and received by Mr. Earl Smith, Treasurer of Buchanan County, and the other two dated April 29, 1943, and May 5, 1943, respectively, and addressed to and received by me as Registrar of Grundy Precinct, which letters are self-explanatory.

"These parties paid 1940 State capitation taxes in Buchanan County and have presented 1942 and 1941 State capitation tax receipts from the Treasurer of Montgomery County showing the assessment and payment of taxes for that year, 1942 and 1941, in Montgomery County.

"In compliance with section 100 of the Election Law I issued the certificates of transfer for Mr. McCoy and his wife, as requested in the letter of April 29th, for both Mr. McCoy and his wife, which certificates

of transfer to Montgomery County were executed and mailed to said parties at Christiansburg by me on April 30, 1943, and the names of said parties erased from the registration books of Grundy Precinct. These certificates of transfer were sent back to me in the letter of May 5th, which certificates I am also enclosing.

"Question has been raised as to whether I should place these parties' names back on the registration list of Grundy Precinct, and as to whether these parties are qualified voters in Buchanan County since they have acknowledged their intention of claiming Montgomery County as their residence and more actually resided there for at least more than six months.

"I have asked for advice from Mr. F. W. Smith, Commonwealth's Attorney, and he advises me to lay the matter before you for your advice since he is a candidate for re-election and H. D. McCoy is a brother of his opponent. Will you, therefore, please advise me what I should do."

The first letter you refer to, signed H. D. McCoy, is dated April 5, 1943, and requests from Mr. Earl Smith, Treasurer of Buchanan County, a certificate showing that both he and his wife had paid certain poll taxes in order that they might transfer their registration to Montgomery County, Mr. McCoy being engaged in the furniture business at Christiansburg.

The second letter is dated April 29, 1943, and is addressed to you as registrar, and requests a transfer of the registration of Mr. McCoy and his wife.

The third letter is dated May 5, 1943, along with which the transfers which you sent to Mr. McCoy for himself and his wife were returned, with the request that the names of himself and his wife be replaced upon the registration books. The reason given for this is that his wife had written and requested the transfers without his consent or knowledge.

Under the Constitution and statutes of Virginia no person is eligible to vote in a county or city unless he or she is a resident of same, and this question is largely one of intention to be determined by the facts and circumstances of each particular case. However, where a person has once established a residence, he cannot change it by intention alone, but must accompany such intention by acquiring a place of abode elsewhere. On the other hand, a person may live in another place and still retain his former residence if it is his or her intention to return there. In the case you present it seems that these parties have a place of abode at Christiansburg, and the only controversy is whether they formed an intention to make Montgomery their permanent residence. If so, they have lost their status as residents of Buchanan County.

If it be true, as stated in the letter of May 5, that Mrs. McCoy in the name of but without authority from Mr. McCoy requested the transfer for both of them, this would seem to be conclusive evidence of her intention to change her voting residence to Montgomery County. It is provided by Acts 1922 at page 462 that "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." It seems clear, therefore, that Mrs. McCoy's name having been removed from the registration books of Buchanan County pursuant to her request, she is now a voting resident of Montgomery County to which a transfer was issued, and is entitled to be registered there.

If Mr. McCoy intended at any time after moving to Christiansburg to establish his residence there, such intention, coupled with his acquiring a place of abode there, would have the legal effect of changing his residence to Montgomery County. Whether he did form such an intention is a question of fact which you, as registrar, must decide under all the circumstances known to you, taking into consideration Mr. McCoy's acts as well as his statements

as to his intention. Relevant facts would seem to be his establishment of the McCoy Furniture Company at Christiansburg; his payment of poll taxes there for the years 1941 and 1942, when the law requires same to be assessed and paid in the county of his residence, and the writing of the letters, to which his name was signed, on his business stationery. Another pertinent fact might consist of what reply Mr. Earl Smith, Treasurer, made to Mr. McCoy in response to the letter dated April 5 requesting the tax certificates and the name of the registrar. I do not feel that as Attorney General I have authority to decide this factual question for you.

I am returning herewith your enclosures.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote When Moving from One Precinct to Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 20, 1943.*

HONORABLE HARRY K. GREEN,
Commissioner of the Revenue,
Arlington, Virginia.

MY DEAR MR. GREEN:

This is in reply to your letter of March 17, in which you request my opinion upon the voting eligibility of persons otherwise qualified to vote who have moved from one precinct in Arlington County to another precinct in said county. This question involves the statutory requirements with respect to the necessity for securing a registration transfer from the old to the new precinct.

The answer to your question may be divided into three classifications as follows:

First, where the voter has not been a resident in the new precinct thirty days. Under these circumstances, he is not eligible to transfer his registration or to vote in the new precinct but remains eligible to vote in the precinct from which he moved. See Code sections 82, 100.

Second, where the voter has been a resident of the new precinct thirty days. In this case the voter is not eligible to vote in his old precinct but must transfer his registration to the precinct of his new residence.

Third, as to the time when the voter may have his transfer of registration entered upon the registration books of the new precinct. The statute provides that such transfer may be effectuated at any time up to and including the day of any election. See Code section 100.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Status of Voters and Registrar Where Precinct Has Been Ceded to United States.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 16, 1943*

FRANK P. MONCURE, ESQ.,
*Secretary Stafford County Electoral Board,
Stafford, Virginia.*

DEAR MR. MONCURE:

I am in receipt of your letter of March 13, in which you advise me that Stafford Store precinct in Rockhill magisterial district of your county has been "completely wiped out" by the acquisition by the Navy Department of several thousand acres of land. In view of this situation you ask the following questions:

"Does the registrar of this precinct automatically go out of office?

"If so, how are former voters at Stafford Store precinct to be transferred to other precincts, and maybe to other counties?

"In event some transfers may not be made for two or three years, or longer, who would make these transfers if the office of registrar is abolished?

"Where will the precinct registration books be lodged for this former precinct?

"At our annual meeting (of the electoral board) in May shall we appoint a registrar for Stafford Store precinct?"

I can find no statute which specifically takes care of the situation you describe. However, I call your attention to section 144 of the Code, dealing with the situation where an election district has been abandoned or abolished by the circuit court, and section 102, prescribing what registrars shall do when boundaries of an election district are changed. I do not presume, however, from what you say that either of these sections is applicable to your case.

While I have no definite knowledge of the facts, it appears very probable that the State of Virginia has ceded to the United States exclusive jurisdiction over all of the lands embraced within the precinct in question. This has been the customary practice and I suppose it has been followed in this case.

Section 86 of the Code provides that registrars shall continue in office until their successors have been duly appointed and qualified. However, the cession of exclusive jurisdiction over these lands would seem to automatically abolish the precinct for all practical purposes and leave the only function of the registrar as that of custodian of the registration books and other election records. As such custodian, however, it seems to me that he would have authority to issue transfers upon request of the voters, although there is no specific statutory provision covering the subject, and it is my opinion that such transfers should be recognized by the registrars of the precinct to which the voter has moved.

It also must be true that the registrar has moved out of his precinct and may not be readily communicated with by the persons who desire transfers, as they may not know his new post office address. This would be particularly true of persons who moved out of the county. In such a case it is my opinion that it would be proper for the voter to register in his new precinct just as though he had never been registered in Virginia.

The situation is one not covered by any specific statutory provisions, but,

as the election laws are to be construed in such manner as to protect rather than defeat the right of suffrage, I am of the opinion that either of these methods might be followed under the circumstances of this very unusual case.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voters in Armed Services.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 18, 1943.

HONORABLE WILMER L. O'FLAHERTY,
*Secretary City Electoral Board,
1134 Mutual Building,
Richmond, Virginia.*

MY DEAR MR. O'FLAHERTY:

This is in reply to your letter of June 17, in which you ask the following questions:

"As Secretary of the Richmond City Electoral Board, I am writing to ask an official opinion as to whether the commanding officer, or some commissioned officer of the army or navy have the right to perform the services required of a notary public or other officer authorized by law to take acknowledgments under section 208 of the Virginia election laws in connection with an absent voter voting by mail where the absent voter is voting in an election to elect State and local officers.

"Please also advise as to whether there is any limitation on the authority of the commanding officer or commissioned officer of the army or navy performing this function where the absent voter is within the jurisdiction of the United States. In other words, does the commanding officer or other commissioned officer have this authority regardless of whether the absent voter is in the United States or whether he is not within the United States.

"Also be good enough to advise whether the same rule of law applies both to primaries and general State elections."

Section 208 of the Code provides the various things that a voter who votes by mail shall do in casting his ballot. These things are to be done "in the presence of a notary public or other officer authorized by law to take acknowledgments to deeds." The section also sets out the duties of the notary public "or other officer authorized by law to take acknowledgments to deeds" in connection with voting by mail.

I call your attention to sections 204 and 209 of the Code, section 204, providing that, when the voter is not within the jurisdiction of the United States, a letter containing his ballot shall be directed to him at the address furnished in his letter of application. Section 209 provides that, where a voter receives his ballot under the provisions of section 204, then an American diplomatic or consular officer or consular agent, or the commanding officer, or some commissioned officer, if the applicant be in the army or navy, shall answer in all respects for and perform all the duties required of a

notary public or other officer mentioned in section 208. It is plain, therefore, that where the person in one of the armed services is not within the jurisdiction of the United States, he may vote by mail, and that he may get a commissioned officer to perform the duties of a notary public or other officer mentioned in section 208.

If a person is in one of the armed services and is within the jurisdiction of the United States, he may also vote by mail, and a commissioned officer of the branch of the service to which he belongs may perform the duties required of a notary public or other officer prescribed by section 208. This is for the reason that chapter 302 of the Acts of 1942 enacts section 5205-a of the Code authorizing a commissioned officer of the army, navy, marine corps or coast guard to take acknowledgments to deeds executed by persons in active service in the armed forces. I call your attention, however, to the fact that section 5205-a of the Code is only in effect until July 1, 1944.

I am further of the opinion that persons in the armed forces may vote by mail, as described above, not only in general elections, but in primaries, since section 224 of the Code, dealing with primary elections, provides that "all the provisions and requirements of the statutes of this State relating to the holding of elections * * * shall apply to all primaries insofar as they are consistent with this chapter."

Since your inquiry is limited to elections or primaries held to elect or nominate State and local officers, this letter is intended to apply only to such elections and primaries.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrar May Act as Precinct Judge.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 14, 1943.

MR. P. B. BECK,
Judge of Election,
Cambria, Route 1, Virginia.

MY DEAR MR. BECK:

Replying to your letter of June 10, I beg to advise that section 86 of the Code expressly provides that a registrar may also act as precinct judge of election. Where a registrar does so act as precinct judge of election he will be entitled to the per diem allowed a precinct judge of election on election day and also be entitled to the compensation provided for a registrar. I do not think that a registrar is entitled to any per diem compensation for his services as registrar on election day, but is entitled to the fees allowed by law for any services as registrar rendered on that day.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—When a Single Ballot May Be Used for Several Elections Held Simultaneously.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 16, 1942.

MR. GEORGE R. HUMRICKHOUSE,
*Secretary Electoral Board of Mecklenburg County,
Boynton, Virginia.*

DEAR MR. HUMRICKHOUSE:

This will acknowledge receipt of your letter of September 14, seeking my opinion concerning certain details of an election for supervisors of the Southside Soil Conservation District to be held on Tuesday, November 3, 1942. You first ask if the names of the nominees for supervisors can be placed on the ballot for the general election or whether or not there must be a separate ballot for this purpose. Your letter makes reference to opinions previously rendered by me to the Honorable J. R. Horsley, Chairman of the Soil Conservation Districts Committee, and the Honorable W. H. Overbey, Trial Justice for Campbell County.

In the letter to Mr. Horsley on October 4, 1939, this is said:

"If an election for district supervisor is held at the time of a general county election, the names of candidates may be printed on the same ballots used for other county officers, or on separate ballots, as the circumstances may require. If separate ballots are used, of course, it will be preferable to use separate ballot boxes." (Report of the Attorney General, 1939-1940, p. 211.)

In the opinion to Mr. Overbey, this is said:

" * * * 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." (Report of the Attorney General, 1940-1941, pp. 62-63.)

Your letter indicates that you doubt the applicability of these opinions to your situation, since incorporated towns are excluded from the Southside Soil Conservation District and, of course, the general election ballot will be used in those towns. I do not believe this would of necessity compel the use of a separate ballot if the Southside Soil Conservation District comprises the whole of the five counties which you have listed rather than selected portions of one or more. With respect to the incorporated towns, my suggestion along this line would be that separate ballots be printed for the general election in the incorporated towns, but that the ballots which are used in the other areas should include the names of the candidates at the regular general election as well as the candidates for the position of District Supervisor.

You next state that it is your impression that separate poll books will be used in connection with the election for the Soil Conservation Supervisors, and you ask whether or not the election officials should be compensated for their labors incident to this additional service.

The law contemplates that these officials shall hold office for one year and shall be compensated on a per diem basis. I take this to mean that this per diem compensation is all that they are entitled to for one day's

service irrespective of the nature of their duties. I, therefore, do not see how this additional compensation can be paid.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Affixing Seal on Ballots.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 7, 1942.*

MR. ROBERT R. M. RAINEY,
*Chairman, Electoral Board for City of Petersburg,
Petersburg, Virginia.*

DEAR MR. RAINEY:

This will acknowledge receipt of your letter of September 28, in which you seek an opinion from this office as to whether or not the official seal of your electoral board can be affixed to the official ballot by the printer at the same time that he prints the ballot and as a part of the same transaction.

Section 158 of the Code, entitled "Duties of electoral boards, seal, etc.," contemplates that, after the ballots are printed, the member of the board who had charge of the printing shall deliver the ballots to the board and certify that the correct number has been printed, whereupon the board shall satisfy itself as to the number of ballots and shall designate one of its members who shall cause the official seal of the board to be affixed to the ballots. In view of this Code provision, I do not believe the seal could be affixed by the printer at the time the ballots are printed. However, the board may, in its discretion, after it has satisfied itself that the correct number of ballots has been printed and delivered to it, employ the printer to affix the official seal in the presence of a member of the electoral board.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Marking of Ballot by Voter—Sole Candidate Become Party Nominee by Declaration.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *May 7, 1943.*

MR. JOHN D. CROWLE, JR.,
*Chairman of the Electoral Board,
Staunton, Virginia.*

MY DEAR MR. CROWLE:

This is in reply to your letter of May 6.

Section 153 of the Code provides that a voter may erase any name on the ballot voted by him and insert another.

Section 162 of the Code also contains a similar provision, which is as follows:

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

These provisions apply to primaries as well as general elections.

The provision last quoted was enacted subsequent to that first referred to, so as to dispense with the erasing of the name—it being only necessary to write the name of the person for whom the voter desires his ballot cast.

Section 246 of the Code contains this provision:

"Whenever within the time prescribed by this chapter there is only one declaration of candidacy in a political party for the nomination for any office, the name of the person filing such declaration shall be declared the nominee of such party for the office for which he has announced his candidacy."

You will note that, since under the circumstances above referred to where only one person qualifies he is already a nominee of the party, the holding of a primary would be inconsistent with that provision.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Local Option Elections in Towns; Expense of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 4, 1943.

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

MY DEAR MR. PARSONS:

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

"I wish you would please advise who should pay the costs of the special election held in Wytheville on December 8, 1942, for the purpose of voting on the liquor question."

Section 170 of the Code provides that the cost of conducting elections "under this chapter shall be paid by the counties and cities respectively." No mention is made of town elections. However, sections 199 and 200 of the Code provide in effect that the compensation of sheriffs, sergeants, judges, clerks, registrars, and commissioners of election shall be paid out of the treasury of the county, city, or town in which the election is held. Therefore, it appears that section 170 is specifically not applicable to towns in the

case of the greater part of the cost of town elections. While the pertinent statutes are not altogether satisfactory in their application to your question, construing the sections I have mentioned together, I am of opinion that the better view is that the cost of conducting a special town election shall be borne by the town in which the election is held.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FEES—Sheriffs' and Commonwealth Attorneys' Fees to Be Collected and Remitted to Treasurer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 1, 1943.*

HONORABLE C. W. TAYLOR,
*Clerk Circuit Court of Hanover County,
Hanover, Virginia.*

MY DEAR MR. TAYLOR:

Replying to your letter of May 29, I beg to advise that, while Sheriffs and Commonwealth's Attorneys are now on a salary basis, the fees and allowances provided by statute for these officers should still be taxed as a part of the costs and collected as in the past, except where such fees and allowances otherwise would be paid by the Commonwealth or the county or city in which the officers were elected. In the case of Sheriffs and their deputies, when such fees and allowances are collected, they should be paid into the treasury of the county, and the Treasurer in turn credits one-third of such amounts to the county and remits two-thirds to the State Treasurer. In the case of Attorneys for the Commonwealth, one-half of such fees and allowances, when collected, should be paid into the treasury of the county and the other half into the State treasury.

I am sending a copy of this letter to Honorable L. McCarthy Downs, Auditor of Public Accounts, with the request that, if he deems it proper, he advise you more fully as to the detail of handling these matters.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FOREST FIRES—Expense of Fire-Fighters Borne by Localities.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 30, 1942.*

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

DEAR MR. SMITH:

This is in reply to your letter of July 28, in which you request my opinion as to the legal right of the State Forester to charge cooperating counties

for the costs of food and transportation for fire fighting crews incurred in connection with the suppression of a forest fire.

Section 541 provides in part as follows:

" * * * When any forest warden shall see or have reported to him a forest fire, it shall be his duty immediately to repair to the scene of the fire and employ such persons and means as in his judgment seem expedient and necessary to extinguish said fire, within the limits of such expense as he may have been authorized to incur in his instruction from the State Forester. He shall keep an itemized account of all expenses thus incurred and send such account verified by affidavit immediately to the State Forester for his examination. Upon approval the State Forester shall send such accounts to the board of supervisors of the County in which the fire occurred, and upon approval by them of the correctness of such accounts it shall then be the duty of the board of supervisors to issue warrants on the county treasurer for the payment of such accounts."

With your letter you inclosed a copy of the State Forester's instructions to all forest wardens from which it appears that forest wardens have been authorized to incur an expense for the use of an automobile at the rate of five cents a mile for the transportation of fire fighters to a fire and that the fire wardens are also authorized, when absolutely necessary, to purchase lunches for fire fighting crews. Since the act authorizes the fire wardens to incur such expenses as may have been authorized by the State Forester, and since the expenses to which you refer have been so authorized by him and appear to be reasonable and necessary, it is my opinion that they are proper charges to make to the counties.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

FOREST FIRES—Civil and Criminal Liability of Mills for Fires Spreading from Premises; Employer and Employee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 29, 1943.*

MR. F. C. PEDERSON,
*State Forester,
University Station,
Charlottesville, Virginia.*

DEAR MR. PEDERSON:

I acknowledge receipt of your letter dated April 27, 1943, in which you set out the facts in detail concerning a serious forest fire occurring in Sussex County which presumably started from an unattended fire in the stove of an employee of a stave company, which burned down the shack of said employee located on the premises of the company, said fire spreading thereafter to adjacent woods. You ask my opinion on several matters in connection with these circumstances and I will take them up separately.

1. "Do the State and Sussex County have an action at law against the stave company for the recovery of costs incurred in suppressing the forest fire?"

It would, of course, be inappropriate for the Attorney General to express an opinion as to the legal liability of persons upon an *ex parte* presentation of facts. The matter of determining legal liability is one for the courts. I presume, therefore, that your question is directed to the law on the subject and in reply thereto I will say it is clear that under appropriate circumstances, as set out later herein, both the State and a county may recover from milling companies their respective costs incurred in suppressing forest fires for which such milling companies are responsible.

2. "If the State and County do have an action, under which section of the Code should the State Forester institute action?"

There are two theories upon which a stave company operating a mill might be held liable in Virginia for forest fires:

(1) Under section 542a of the Code, if they "negligently, carelessly or intentionally without using reasonable care and precaution to prevent its escape, start a fire * * * ;"

(2) Under section 546a of the Code, if they fail to keep adjoining premises clean of debris for a radius of "50 yards in all directions from any fires maintained * * * " or for a radius of "100 feet in all directions from * * * inflammable material which accumulates from the operation of the mill," and " * * * a forest fire originated from a fire maintained in or about such mill * * * ."

In the case you present it would seem that the liability of the stave company under the first alternative would depend upon its responsibility for the fire kept by the employee in his shack. Under the second alternative its liability would appear to be that of an insurer if it has violated section 546a of the Code by failing to keep the adjoining premises clean of debris.

By virtue of sections 542a and 548 of the Code, it is the express duty of the Commonwealth's Attorney to prosecute all actions under this chapter of the Code, and, therefore, it would be inappropriate for the Attorney General to advise which course should be taken. It is the duty of the State Forester to bring the facts to the attention of the Commonwealth's Attorney, who in turn should, if he deems it proper, institute all proceedings, civil and criminal, both on behalf of the State and of the county.

3. "Do the State and County have an action against the employee and, if so, under what section of the Code should the action be instituted?"

The liability of the employee in the facts you relate would arise, if at all, under section 542a of the Code, and it is entirely possible that both the employee and the stave company may be held responsible. Again, this is a matter for the courts to determine in any actions instituted by the Commonwealth's Attorney.

4. "Does the State Forester have an action against the stave company, under Section 546-a. Chap. 28. Code of 1936, for failure to clean the premises of inflammable material for a distance of 100 feet beyond the edge of the staves, piled on the stave yard?"

In addition to making a mill company who failed to clean their premises liable civilly for costs incurred in fighting a fire which has escaped from such premises, section 546a of the Code subjects the said company to a fine of \$10 per day for each day they operate in violation of the restrictions set out in the statute. This would, of course, be a criminal prosecution which could be instituted upon complaint by you, it being the duty of the Commonwealth's Attorney to prosecute the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAMBLING—Code Section 4680 Applies to Private Residences.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 16, 1942.*

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

DEAR MR. DENNIS:

I am in receipt of a request for an opinion from you as to whether or not section 4686 of the Code is broad enough to prevent gambling in a private dwelling in as much as section 4680 of the Code states that a private residence is not within this statute.

You will notice that section 4680 is entitled "What included in preceding section," and that the preceding section is entitled "Betting or playing at faro or at the said games, or at any game except, etc., at a public place, how punished." Plainly, section 4679 of the Code is a statute aimed at preventing gambling in public places, and the section which follows merely provides that a private residence is not a public place within the meaning of the preceding statute. Section 4686 is entirely different. It is as follows:

"Any person who shall bet, wager or play at any game for money, or other thing of value, shall be fined not exceeding one hundred dollars, or confined in jail not exceeding sixty days, or both."

The purpose of this statute is succinctly stated by the Revisors of the Code of 1919 as follows:

"This section is taken from the act of 1916, cited at the end thereof, and is intended to prevent gaming for money, or other thing of value, *at any place, public or private.*" (Italics supplied.)

This appears to be a conclusive answer to your question. I, therefore, think that section 4686 of the Code is broad enough to prevent gambling in a private residence.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAMBLING—Punch-Boards Are Not Slot-Machines.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 20, 1942.

HONORABLE LAWRENCE H. HOOVER,
*Attorney for the Commonwealth,
Harrisonburg, Virginia.*

MY DEAR MR. HOOVER:

This will acknowledge receipt of your letter of July 16, in which you ask the opinion of this office on the following question:

"A question has just arisen in our jurisdiction as to whether or not punch boards are covered by the provisions of section 4694-a, as amended and reenacted by the last Legislature on April 1, 1942 (Acts of Assembly, page 539)."

While you do not describe how the "punch boards" to which you refer are operated, from my understanding of the nature of these devices I am of the opinion that they are not included within the scope of the definition of a "slot machine or device" contained in section 4694-a of the Code, as amended in 1942 (Acts 1942, p. 539). This definition contemplates the insertion in the device of a piece of money or other object, by which insertion the device may be operated. I do not understand that a "punch board" is operated or caused to be operated in this way.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Unlawful to Shoot Wild Birds and Wild Animals, Predatory or Otherwise, on Sunday.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 19, 1943.

HONORABLE E. J. SUTHERLAND,
*Substitute Trial Justice,
Clintwood, Virginia.*

MY DEAR MR. SUTHERLAND:

This will acknowledge receipt of your letter of May 14, from which I quote as follows:

"Is it unlawful to hunt or kill wild birds or animals, including predatory or undesirable species, with a gun or other firearm on Sunday even though it be upon the lands belonging to the hunter?"

"Section 3305(36) makes it unlawful to hunt with firearms on Sunday, but section 3305(37) declares 'There shall be a continuous open season for killing predatory or undesirable species of wild birds and wild animals.' The first section noted above declares Sunday a 'rest day for all species of wild birds and wild animal life.'"

Section 3305(36) of the Code (Michie 1942) provides in part that it is unlawful "to hunt or kill any wild bird or wild animal, *including any predatory or undesirable species*, with a gun or other firearm on Sunday * * * ." In view of this statutory provision, in my opinion, it is plain that no predatory or undesirable species of wild birds or wild animal may be killed with a gun or other firearm on Sunday.

While it is true that section 3305(37) of the Code (Michie 1942) provides that there shall be a continuous open season for killing predatory or undesirable species of wild birds and wild animals, this provision should be read together with section 3305(36), which expressly prohibits the killing of such birds and animals on Sunday.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Lawful to Shoot Predatory Animals on Sunday if in Defense of Property.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 24, 1943.

HONORABLE E. J. SUTHERLAND,
Substitute Trial Justice,
Clintwood, Virginia.

MY DEAR MR. SUTHERLAND:

In connection with my letter to you of May 19, relating to hunting or killing predatory or undesirable species of wild birds or animals on Sunday, my attention has been called by Mr. Claude F. Beverly, Game Warden, to the fact that your letter to me also made inquiry as to the right of a person to hunt or kill such wild birds or animals on Sunday *upon lands belonging to the hunter*.

Insofar as the hunting of such wild birds or animals on Sunday is concerned, I think it is clear that the opinion of May 19 applies to such hunting even on lands belonging to the hunter. However, a well recognized exception to the statute forbidding the killing of birds or animals under penalty is that such a statute does not apply to a killing which is necessary for the defense of person or property. See 24 American Jurisprudence, Game and Game Laws, section 12.

I am of opinion, therefore, in reply to that portion of your inquiry dealing with the right of a person to kill predatory or undesirable species of wild birds or animals on his own lands on Sunday, that such birds or animals may be killed where the killing is necessary for the defense of person or property. Whether or not such a killing is actually in defense of person or property is a question which will have to be decided by the facts existing in any particular case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Shooting of Ring-Necked Pheasants at Field Trial; Sunday Law.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 18, 1942.*

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

MY DEAR MR. HICKMAN:

This is in reply to your letter of September 9, in which you request my opinion upon the question whether or not it will constitute a violation of section 3305(36) by holding a Field Trial in Bath County on Sunday. It appears from your letter that it is proposed to shoot and kill in connection with the trial ring-necked pheasants that have been raised in captivity.

I am advised by Mr. Nolting, of the Game and Inland Fisheries Commission, that for several years permits have been granted to the holders of these field trials to sell for food purposes ring-necked pheasants killed at such trials which have been raised in captivity. Section 3305(36) makes it unlawful to hunt or kill any wild bird with a gun or other firearm on Sunday. Section 3305(37) provides that it is unlawful to kill any ring-necked pheasant outside of the open season prescribed by law.

It seems to me, therefore, that the whole question depends upon whether or not the ring-necked pheasants which will be used at the field trials are "wild birds" within the meaning of the statute. Since the Commission has no authority to permit the sale of wild birds, the fact that the sale of the pheasants killed at these trials has been permitted would seem to be an act on the part of the Commission classifying said pheasants as not wild within the meaning of the statute. If the pheasants are in fact wild birds, I do not believe it would be lawful to shoot them either on Sunday or any other day except during the open season. If they are not wild, it does not seem to me that they would come within the prohibitions of the two sections of the statute above referred to.

It does not seem to me, therefore, that the use of these birds raised in captivity, the sale of which for food purposes is permitted by the Game Commission, can be said to violate the Game, Inland Fish, and Dog Statutes which relate only to wild birds. I have been unable to find any provision in the statute which would serve to define wild birds, but section 3305(33) provides for the issuance of a permit to breed pheasants for sale, while the regulations of the Game Commission provide for the issuance of permits for the sale of ring-necked pheasants for food purposes to be issued by the chairman of the Commission authorizing such sales.

Whether any labor is employed in connection with the field trials which would render the laborers guilty of a violation of section 4570 of the Code is a question of fact, depending upon the nature of the work done, and all of the circumstances of the case, and the necessity for such work under such circumstances. I do not feel that I could undertake to advise you on this question, as I am not in possession of sufficient facts or sufficiently familiar with the transactions involved to hazard an opinion.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Bag Limit on Game Fish Applicable to Scott County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 26, 1942.

COMMISSION OF GAME AND INLAND FISHERIES,
305 Travelers Building,
Richmond, Virginia.

Attention: Mr. M. D. Hart, Executive Secretary.

GENTLEMEN:

This is in reply to your letter of August 25, in which you request my opinion upon the question of whether or not section 2, of chapter 183, of the Acts of 1942, appearing at page 240 of said Acts, has the effect of removing or abolishing the existing bag limit applicable to the catching of *game* fish in the streams in Scott County, Virginia.

Section 2 of the said Act is as follows:

"It shall not be lawful for any person to sell any kind of non-game fish, caught in any of the streams in Scott county, otherwise in violation of the preceding section, and as to such other kinds of fish, there shall be no bag limit."

In my opinion, the provision that "there shall be no bag limit" refers to the words "any kind of nongame fish," and the words "other kinds of fish" has reference to nongame fish caught "otherwise than in violation of the preceding section," that is, by shooting in the shoals of streams. Section 1 of said Act makes it unlawful for any person in said county to shoot any kind of fish while in the shoals of any streams therein.

It is my opinion, therefore, that it was not the intention of the Legislature to abolish or remove the existing bag limit applicable to *game* fish in the streams of Scott county.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—License to Shoot Waterfowl.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 13, 1943.

MR. T. E. CLARKE,
Executive Director,
Commission of Game and Inland Fisheries,
305 Travelers Building,
Richmond, Virginia.

DEAR MR. CLARKE:

You seek my opinion as to whether or not waterfowl may be hunted by a non-resident on a two-day license in Accomack, Northampton and

Princess Anne Counties in view of the applicable provisions of chapter 209 of the Acts of 1936 and chapter 108 of the Acts of 1938.

As you have pointed out, a portion of the 1936 Act is to this effect:

"It shall be unlawful to hunt migratory waterfowl in the public waters of this State and the shores thereof from unlicensed blinds, whether stationary or floating and any person hunting waterfowl shall also have a season license to hunt."

The same Act contains this further provision:

"The provisions of this act shall not apply to the shores and public waters and marshes of Accomac, Northampton and Princess Anne Counties."

The 1938 statute to which you have referred merely provides for a non-resident two-day license to hunt. Since the only statute requiring a season license to hunt waterfowl is the 1936 Act, from which Accomack, Northampton and Princess Anne Counties have been expressly excluded, it does not appear to me that a season license is necessary to hunt waterfowl in those counties. From this it would naturally follow that waterfowl in those counties may be hunted by a non-resident on a two-day license.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Who May Be Appointed Game Warden.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 5, 1943.

HONORABLE T. E. CLARKE,
*Executive Director,
Commission of Game and Inland Fisheries,
305 Travelers Building,
Richmond, Virginia.*

MY DEAR MR. CLARKE:

This will acknowledge receipt of your letter of December 29, in which you ask the following question:

"The City of Portsmouth has proposed that one of its officers take over dog law enforcement in that city. It is our belief that no arrangement may legally be made by us for the dog law to be enforced by any person other than a regularly appointed game warden on a compensation basis and your opinion of this matter is, therefore, requested."

By Section 3305(15) of the Code (Michie 1942) all policemen and other peace officers of the State are made ex-officio game gardens. While I do not know what you mean by "arrangement," in view of the statutory provision to which I have referred I see no reason why a policeman or other police officer of Portsmouth may not be especially designated by the appropriate

local authority, if it considers it to be to the best interest of the city, to devote his time to enforcing the dog laws in the City of Portsmouth. Of course, I do not mean by this that the duly appointed game warden of Portsmouth, if one has been appointed, is ousted of his jurisdiction.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Salaries of Game Warden.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 5, 1943.*

HONORABLE T. E. CLARKE,
Executive Director,
Commission of Game and Inland Fisheries,
305 Travelers Building,
Richmond, Virginia.

DEAR MR. CLARKE:

This office has for consideration your letter of December 29, in which you quote section 17 of chapter 247 of the Acts of 1930 (section 3305(17) of Michie's 1942 Code):

"Game wardens shall not be entitled to receive arrest or witness' fees or fees of any other kind for prosecuting violations of the hunting, trapping, inland fish and dog laws. They shall be employed for such time and receive such salary, allowances, wages and expenses as the commission may authorize."

You ask if under that section, in addition to the basic salary fixed for a game warden, the Commission may also make an additional allowance based on a square mile cost of the game warden's bailiwick.

It is my opinion that under this section the Commission has wide latitude in fixing the salaries, allowances, wages and expenses of the various game wardens. In so doing they may take into consideration the volume of work for each warden as well as the size of the territory which has been assigned to him for patrol.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME AND INLAND FISH—Payment for Sheep Killed by Dogs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 17, 1942.

MR. O. G. JACKSON,
*Secretary-Treasurer,
The State Advisory Council,
Commission of Game and Inland Fisheries,
Hot Springs, Virginia.*

MY DEAR MR. JACKSON:

Your letter of the 10th has been received.

You say that you are a resident of Bath county and have had sheep killed by dogs in Alleghany county, and have asked my opinion as to which county should pay you for your sheep, which were regularly assessed in Bath county.

The authority of counties and cities to compensate owners of livestock or poultry for damages done to such stock or poultry by dogs is governed by sections 74-80 of the Game, Inland Fish and Dog Code.

These sections provide for setting up in each county or city, out of funds collected through sales of dog licenses, a local "dog fund" from which, after deduction of certain expenses, such compensation is to be paid. The statutes contain no express provision as to what county or city shall make such payments in any particular case; section 74 simply requires that the claimant must make proof of his loss to "the board of supervisors of the county or council," etc., "of any city within ninety days after sustaining such damage." Section 80 authorizes disbursements for such purpose out of the dog fund "of the county or city."

These sections can hardly be construed to mean that such claims are payable by more than one county or city in a given case. Taking the statutes as a whole, it is my opinion that "the county" or "the city" referred to in the statute—the county or city from whose dog fund compensation should be made, and to whose governing body the owner's claim should be presented, is the county in which the damage is done.

It is my opinion, therefore, that the Board of Supervisors of Alleghany County should pay your claim on the basis of the assessed value of your sheep in Bath county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HAMPTON ROADS SANITATION DISTRICT—When Collection of Fees Authorized.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 17, 1942.

VICE ADMIRAL J. K. TAUSSIG,
*Chairman Hampton Roads Sanitation District Commission,
322 Flatiron Building,
Norfolk, Virginia.*

MY DEAR ADMIRAL TAUSSIG:

This will acknowledge receipt of your letter in which you refer to section 7 of chapter 351 of the Acts of 1940, dealing with the powers of a

sanitation commission to charge and collect fees, etc., for the use and services of the sewage disposal system, and then ask the following questions:

"When any part of the sewage disposal system constructed in accordance with the approved master plan of the Hampton Roads Sanitation District Commission is used for the discharge of sewage from real estate (houses, industrial plants, etc.), can the Commission charge and collect fees for the use and services of these parts of the system?

"It seems to me that this question depends on (1) whether, before fees can be charged, the entire system in any specific area of community within the District must be in operation; and (2) whether it is permissible, on account of the requirement that charges for services shall be uniform throughout the District, such charges can be levied in only specific parts of the District."

It is my opinion that the Hampton Roads Sanitation District Commission can charge and collect fees for the use and services of the parts of the system that have been completed and are actually being used. I see nothing in the section to which you refer which can reasonably be constructed to intend that the whole system shall be completed before any fees may be charged and collected. Where the section provides that the charges for services shall be uniform throughout the District, I should say that this means that the charges shall be uniform taking into consideration the service rendered.

However, inasmuch as the question you raise might have some effect on the bonds to be subsequently issued, I suggest that you take the matter up with Mr. Russell and obtain his views.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—Authority and Procedure for Commitment of Insane and Feeble-minded Persons.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., August 20, 1942.

HONORABLE FRANK NAT WATKINS,
Commonwealth's Attorney,
Farmville, Virginia.

MY DEAR MR. WATKINS:

This is in reply to your letter of August 19, in which you request my opinion upon the following questions:

"Can a local lunacy commission commit a person to the hospital for criminal insane if they think he can be best treated at such hospital other than to Staunton (nearest to Prince Edward)."

In my opinion, under the provisions of section 1004 of the Code a lunacy commission may commit to the departments of the criminal insane, as established at the State Hospitals at Marion and Petersburg, persons charged

with a misdemeanor for proper care and observation pending trial where the commission finds such persons insane. However, if the commission finds such persons not to be insane but to be feeble-minded, they may not be received into such criminal departments unless they are charged with a felony.

You further inquire whether I am still of the same opinion as that expressed in a letter to Dr. H. C. Henry, Director of State Hospitals, dated March 13, 1939, and appearing in the annual report of opinions of this office at page 284, to the effect that the trial justice may not commit to such hospitals for observation a person whose trial is pending before him on a charge of a misdemeanor.

I am of opinion that the view expressed at that time is correct, and that, in order for such persons to be committed for observation to said criminal departments for observation, they must first be adjudicated insane by a lunacy commission which may be called by the trial justice if he thinks proper.

Your third question is whether or not a circuit court may commit a person, whose trial is on a misdemeanor which is pending before it, to such a criminal department for care and observation under section 4909.

In my opinion, the circuit court does possess this authority and, where the court itself does not determine that the person is feeble-minded, the person may be committed to such a criminal department for care and observation. However, should the hospital authorities after examination be of opinion that the person so committed for observation is feeble-minded and not insane, the appropriate procedure would be for the hospital authorities to have a lunacy commission pass upon his feeble-mindedness, and, if he is committed as feeble-minded, the lunacy commission should determine the appropriate hospital to which he should be committed.

The foregoing answers also serve as a reply to your fourth question.

It seems to me that the most expeditious way to handle the case to which you refer in your letter is to have a lunacy commission pass upon the mental condition of the accused, and, if he is found to be feeble-minded, he should not be sent to the criminal department of the hospital but should be committed just as any feeble-minded person who is not accused of crime. If, however, he is found to be insane and the commission feels that he should be committed to the criminal department of the Southwestern State Hospital, in my opinion the commission would have authority to so commit the accused.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—Insanity Commission; Expenses of; How Paid.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
FARMVILLE, VA., March 17, 1943.

MR. TAYLOR MCCOY,
*Justice of the Peace,
Staunton, Virginia.*

MY DEAR MR. MCCOY:

I have your letter of March 16, in which you inquire as to the liability for

the payment of the expenses incurred in connection with proceedings before a commission to ascertain insanity.

Your question is answered by section 1021 of the Code, which provides that such expenses shall be paid "by the county * * * of which such person was a legal resident at the time of such commitment * * *." While this office cannot attempt to pass on the liability of any county to pay this expense where the county denies such liability, for the reason that I do not have the opportunity of hearing a presentation of the facts from the standpoint of both sides to the controversy, I may say that the statute is very plain in providing that the county of the legal residence of the person committed shall bear the expense of such commitment. The section further provides that the county may recover from the estate of the person committed the expenses of such commitment that it has been called upon to pay.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

INSANE, EPILEPTICS, ETC.—Where Commitment Papers to Be Filed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 22, 1943.

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

MY DEAR DR. DEJARNETTE:

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

"We have had a discussion in my office this morning in regard to what to do with commitment papers of patients who are committed to State hospitals.

"For example, if a man lives in Richmond, and is committed here in Staunton as insane or an inebriate, where should Part I be sent to be recorded? Should it be kept here where the patient is committed or sent to Richmond where the patient resided at the time of commitment?"

The first paragraph of section 1019 of the Code reads as follows:

"That part of the record of proceedings under this chapter for the commitment of insane, epileptic, inebriate and feeble-minded persons, consisting of the warrant of arrest and application therefor, the medical certificate and the order of commitment shall be made in duplicate, one copy of which shall be transmitted by the judge or justice to the superintendent of the hospital or colony to which admission is sought, and the other copy filed in the office of the clerk of the circuit court of the county or the clerk of the corporation court of the city who shall record the same in a book to be kept for the purpose either by copying into such book the principal facts of such records of proceedings including the name of the person committed, the names of the members of the commission, the findings of the commission, the disposition of the case, and the date thereto or by inserting the papers themselves in a properly pre-

pared loose leaf binder book. Such book shall be supplied by the county or city, shall be kept properly indexed by the clerk and shall be known as the 'record book of insane, epileptic, inebriate and feeble-minded persons.'

This paragraph, as I understand it, embraces what you term as "Part I" of the commitment proceedings. It seems to me to be entirely plain that under the quoted language the judge or justice sitting on the commission files a copy of "Part I" in the office of the clerk of the circuit court of the county or corporation court of the city from which the person is committed. In other words, in the case you put, if the commission is brought together under section 1017 of the Code by a judge or justice of the city of Staunton and the person is committed by such commission in Staunton, then a copy of "Part I" of the record proceedings should be lodged in the office of the clerk of the corporation court of Staunton, even though the patient may be a resident of Richmond.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—Expense of Transporting Patient in Criminal Case.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 17, 1942.

MR. JOHN A. CLARK,
*Sheriff of Prince Edward County,
Farmville, Virginia.*

DEAR MR. CLARK:

This is in reply to your letter of September 3, in which you state that you were directed by the Judge of the Circuit Court of Prince Edward County to take one Joseph William Hobbs to the Southwestern State Hospital for the Criminal Insane, at Marion, Virginia, for observation, the order to you being under the authority of section 4909 of the Code. It seems that this man was charged with aggravated assault and, the question of his sanity having been raised, the order sending him to Marion was entered prior to the trial. You desire to know whether the State or the County of Prince Edward should bear the cost of transporting this prisoner to Marion.

Inasmuch as these costs were incurred in a criminal case, it is my opinion that they should be borne by the State and that the allowance should be made by the judge of the court entering the order under the authority of section 4960 of the Code. You will observe that the amount of compensation is within the discretion of the court and that not more than 8 cents per mile shall be allowed the officer for using his automobile for travel.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—What Class of Patients May Be Sterilized.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 16, 1943.*

DR. H. C. HENRY,
*Commissioner Department of Mental Hygiene and Hospitals,
309 North Twelfth Street,
Richmond, Virginia.*

MY DEAR DR. HENRY:

This will acknowledge receipt of your two letters of March 15, in which you ask if a voluntary patient at one of the State hospitals or a patient sent to the hospital for observation pursuant to section 4909 of the Code may be sexually sterilized.

I find that this office expressed an opinion on these two sections in a letter to you under date of June 29, 1942, to which I now refer you.

You also ask if a person "committed by court order under section 4910" of the Code may be sexually sterilized.

Section 4910 of the Code reads in part as follows:

"If, after conviction and before sentence of any person, the court see reasonable ground to doubt his sanity or mentality, it may empanel a jury or appoint a commission of insanity to inquire into the fact as to his sanity or mentality, and sentence him, or commit him to jail or to a hospital for the insane, according as the jury or commission may find him to be sane or insane or feeble-minded. If any person, after conviction of any crime, or while serving sentence in the State penitentiary, or any other penal institution, or in any reformatory or elsewhere, is declared by a jury or commission of insanity to be insane or feeble-minded, he shall be committed by the court to the department for the criminal insane at the proper hospital, and there kept until he is restored to sanity; and the time such person is confined in the department for the criminal insane at the proper hospital shall be deducted from the term for which he was sentenced to such penal institution, reformatory or elsewhere."

I am of opinion, therefore, if a person under the circumstances set out in the quoted language is actually found to be insane or feeble-minded by a commission appointed by the court or a jury empanelled for the purpose of examining into his sanity, that the court may commit such person to a hospital for the insane and that such person so committed and admitted to a State hospital becomes an "inmate" of the hospital within the meaning of section 1095-h of the Code (Michie 1942) and may be sexually sterilized in accordance with the statutory procedure provided therefor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—Recommitment of Persons on Furlough.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 23, 1943.

DR. H. C. HENRY,
*Commissioner Department of Mental Hygiene and Hospitals,
309 North 12th Street,
Richmond, Virginia.*

MY DEAR DR. HENRY:

I am in receipt of your letter of June 23, enclosing one from Trial Justice Albert G. Peery, of Tazewell, in which is raised the question as to how insane and epileptic persons delivered to their friends or relatives under section 1040 of the Code, or furloughed under section 1041, shall be carried back to the institution from which they were released in cases where the necessity therefor arises.

It appears to me that this inquiry presents more of a practical administrative question than one of law. Where a patient has been delivered to friends or relatives who are unable or unwilling to return him to the hospital where such return is necessary, the superintendent of the hospital would unquestionably have the authority to send for such patient. Where a bond has been given and a condition of the bond is that the friends or relatives shall return the patient where the necessity therefor arises, then unquestionably the expense of such return could be collected under the bond; but, independent of the question of who is financially responsible for the expenses of such return, I am of opinion that the superintendent of the hospital clearly has the authority to send for a patient who should be returned to his institution, the important thing being, in the interest of the patient and of the public, to get the patient back to the institution.

I return the letter written you by Trial Justice Peery.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTIC, ETC.—Extradition of Escaped Insane Person.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 12, 1943.

DR. M. S. BRENT,
*Superintendent Central State Hospital,
Petersburg, Virginia.*

MY DEAR DR. BRENT:

This will acknowledge receipt of your letter of May 10, from which I quote as follows:

"On September 1, Howard Sharpe, an inmate of the Virginia State Penitentiary, was ordered by the Governor's Advisory Board on Mental Hygiene transferred from the Virginia State Penitentiary to the Central State Hospital at Petersburg because of his mental condition. The transfer was made September 4, 1936.

"On December 9, 1941, Howard Sharpe escaped from the Criminal Department of the Central State Hospital. I am now advised that this man is in the custody of the New York City Police Department and does not waive extradition.

"His prison sentence expired August 4, 1938; therefore, the Penitentiary has no interest in his return. The Central State Hospital has none unless it has the responsibility of making every possible effort to effect the return of any escaped patient.

"Will you kindly advise whether or not you think it is incumbent on the Central State Hospital to apply for extradition papers to secure his return to the Central State Hospital?"

While there is a statute providing for the extradition of insane persons (sections 1095-b to 1095-g of Michie's Code of 1942), it does not make it incumbent upon the authorities of the hospitals for the insane to apply for extradition papers in any case of an insane person who has escaped. They need not apply for such papers unless in their judgment there is some good reason why they should do so.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSURANCE—Two or More Licensed Virginia Agents May Countersign Policy for Non-Resident Broker and Divide Countersignature Commission.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 1, 1942.*

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

MY DEAR MR. BOWLES:

I am in receipt of your letter of September 26, in which you enclose a copy of a communication from Mr. R. J. Scofield, of Washington, in which he raises the following question:

"I will appreciate getting a ruling from you as to whether two or more licensed Virginia agents can countersign a policy for a non-resident broker, and in turn divide among themselves that portion of the countersignature commission which ordinarily would go to one Virginia countersigning agent.

"Upon reviewing the Virginia Insurance Law, I fail to find any statement therein which says that this cannot be done. Furthermore, I have discussed it with Mr. C. B. Coulbourn, your actuary, and he agreed with me that such an agreement would not be contrary to the intent of the law."

You desire the opinion of this office on the question raised by Mr. Scofield in view of section 4226-a of the Code (1940 Supplement to Michie's Code of 1936).

I have considered the matter and am of the opinion that there is nothing in the section to prohibit two or more licensed Virginia agents from countersigning a policy for a non-resident broker and dividing among themselves the commission which would otherwise go to one Virginia countersigning agent.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Operation and Supervision; Prior Laws Repealed in 1942.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 20, 1943.

MAJOR R. M. YOELL,
Commissioner of Corrections,
Richmond, Virginia.

MY DEAR MAJOR YOELL:

This will acknowledge receipt of your letter of January 14, from which I quote as follows:

"You will find enclosed a copy of a letter which I received from Mr. R. W. B. Hart, City Manager of the City of Lynchburg, Virginia, from which I quote as follows:

"In view of the fact that Lynchburg is one of two cities of the State which, prior to the enactment of the general law, has been proceeding under a special Act in the matter of jail operation, the various matters to which you have called attention may not necessarily affect this city to a great extent, if at all."

"Is not the Act referred to by Mr. Hart repealed by Chapter 386 of the 1942 Acts of Assembly?"

Chapter 386 of the Acts of 1942, placing sheriffs and sergeants on a salary basis and providing for the payment of the cost of the feeding and clothing of, and medical attention for, persons confined in jails and on jail farms, provides among other things that "all acts, general, special, private and local, inconsistent with the provisions of this act are hereby repealed to the extent of such inconsistency." While you do not state the particular problem that confronts you in connection with the Lynchburg jail, I beg to advise that, in my opinion, the repealing clause of Chapter 386 of the Acts of 1942 speaks for itself and that any part of any special Act inconsistent with the said chapter 386 is repealed to the extent of such inconsistency.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Operation and Supervision; Prior Laws Repealed in 1942.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 18, 1942.*

HONORABLE W. L. PRIEUR, JR.,
Clerk of Courts,
Norfolk, Virginia.

MY DEAR MR. PRIEUR:

This will acknowledge receipt of your letter of September 17, from which I quote as follows:

"Judge Spindle has requested me to secure for him from you your opinion as to whether or not section 2863—inspection of jails—is or is not inferentially repealed by chapter 217 of the Code of Virginia, Acts of 1942, page 297, sub-section 11.

"He is specifically interested in the fact of knowing whether, in your opinion, it will be necessary for him to continue the committee of three discreet freeholders to make periodical inspection of the Norfolk City jail."

I have carefully considered chapter 217 of the Acts of 1942 establishing a State Department of Corrections and providing for the administration, control and supervision of the penal system of the Commonwealth and of the political subdivisions thereof, and especially section 11 of the Act. This section authorizes and directs the State Board of Corrections "to prescribe minimum standards for the construction and equipment of local jails, jail farms and lock-ups, herein referred to as local penal institutions, whether heretofore or hereafter established, and minimum requirements for the feeding, clothing, medical attention, attendance, care, segregation and treatment of all prisoners confined in such jails and lock-ups and at such jail farms." The section further authorizes the Board to prohibit the confinement of prisoners in any jail or lock-up or at any city farm "which is not constructed, equipped, maintained and operated" so as to comply with the minimum standards prescribed by the Board. In short, the section, in my opinion, gives to the Board complete supervision over the construction, equipment, maintenance and operation of jails, jail farms and lock-ups maintained and operated by a county, city, or town.

In my opinion, the powers given to the State Board of Corrections over local penal institutions, as briefly set out above and in more detail prescribed in the Act, are inconsistent with the provisions of section 2863 of the Code relating to the inspection of jails. It is further my opinion that the provision in section 2863 relating to the appointment by the Judge of the Corporation or Hustings Court of a city of three freeholders for the purpose of inspecting the jail of the city has been in effect repealed by the Act establishing the Department of Corrections. You will observe that the said Act (Acts 1942, at page 303) expressly repeals "all Acts or parts of Acts inconsistent with this Act * * * to the extent of such inconsistency."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JAILS AND PRISONERS—Duties and Liabilities of State and Localities
Respectively for Conditions and Operation of.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 23, 1943.

HONORABLE E. GLENN JORDAN,
*Grace-American Building,
Richmond, Virginia.*

MY DEAR SENATOR JORDAN:

This will acknowledge receipt of your letter of April 19, in which you ask the following questions relative to the Richmond City Jail:

"Is the State of Virginia responsible for any part of the cost for repairs, improvements or equipment necessary for its operation? Is the State of Virginia responsible for the quantity or quality of food served prisoners or for seeing that the jail is kept in a safe and sanitary condition?"

Section 2854 of the Code of Virginia (Michie 1942) provides in part that:

"There shall be provided by * * * the council for every city * * * jail, the cost thereof and of the land on which they (it) may be, and of keeping the same in good order, shall be chargeable to the * * * city; * * *."

It follows, therefore, that the City of Richmond and not the State of Virginia is responsible for the cost of the jail and for such structural repairs, improvements, and equipment as may be necessary for its operation as a jail.

In connection with the construction and equipment of the jail, I call your attention to Chapter 217 of the Acts of the General Assembly of 1942, establishing a State Board of Corrections. Section 11 of this Chapter provides that the State Board of Corrections "is authorized and directed to prescribe minimum standards for the construction and equipment of local jails, jail farms and lock-ups, * * * whether heretofore or hereafter established * * *." The Richmond City Jail, insofar as the materials and equipment are available, should meet these "minimum standards."

Your second question is:

"Is the State of Virginia responsible for the quantity or quality of food served prisoners or for seeing that the jail is kept in a safe and sanitary condition?"

Under sections 8 and 9 of Chapter 386 of the Acts of the General Assembly of 1942, the Sergeant of the City of Richmond, who is by virtue of his office the keeper of the jail (section 2868 of the Code of Virginia), purchases "all foodstuffs and other provisions used in the feeding of jail prisoners, and such clothing and medicine as may be necessary, * * *." The Sergeant is directed to secure invoices or itemized statements of account covering his purchases and to submit such invoices and itemized statements of account to the City Council, whose duty it is, or its "duly authorized representative," to examine all such statements of accounts and invoices "covering purchases of foodstuffs, provisions, clothing and medicine for jail prisoners and, after satisfying themselves that the said statements and invoices are cor-

rect, to cause warrants to be issued on the * * * city treasurer, or other disbursing officer, for the payment of such accounts and invoices."

Section 11 of Chapter 217 of the Acts of 1942, to which I have already referred, likewise authorizes and directs the State Board of Corrections to prescribe "minimum requirements for the feeding, clothing, medical attention, attendance, care, segregation and treatment of all prisoners confined in" local jails.

It is plain, therefore, that the Sergeant of the City of Richmond, as the keeper of the jail, is responsible for the quantity and quality of food served prisoners in the City jail, subject to the "minimum requirements" fixed by the State Board of Corrections, and that the City Council should cause the invoices and statements of account for such food to be paid out of City funds.

As to responsibility for keeping the jail in a "safe condition," this responsibility, from a structural standpoint, is, pursuant to section 2854 of the Code, upon the City Council, although it would manifestly be the duty of the Sergeant to report to the Council when repairs or improvements are necessary to make the jail safe and to request funds for this purpose.

Concerning the actual operation of the jail from the standpoint of sanitation, this, of course, is the responsibility of the City Sergeant as Jailor, subject to the standards and requirements fixed by the State Board of Corrections.

While you do not inquire concerning the State's share of the cost of feeding prisoners and of such supplies as may be necessary to maintain them, I call your attention to the fact that section 9 of Chapter 386 of the Acts of the General Assembly of 1942 provides that the State shall reimburse the City for "such proportionate part of the reasonable cost of food, (other than the cost of preparing and serving the same, which shall be included as a part of the expenses of the sheriff or sergeant pursuant to section four of this Act) and of the clothing, medicines, lights, water, heat, disinfectants, bedding and other necessary supplies required for the prisoners confined in" the jail "as the aggregate number of days spent in such jail by prisoners accused or convicted of violations of the laws of the Commonwealth * * * bears to the total aggregate number of days spent in such jail by all prisoners confined therein; * * *."

Summing up, it is my opinion that the applicable statutes contemplate that the City of Richmond is responsible for the cost of its jail and for necessary repairs and equipment, and that the actual operation of the jail, including the proper care and feeding of the prisoners confined therein, is the responsibility of the City Sergeant as Jailor, the cost of such operation to be borne in the first instance by the City. It is the responsibility of the State, on the other hand, through its State Board of Corrections, to prescribe minimum standards and requirements for the construction, equipment and operation of the jail, including the feeding and care of the prisoners, and, if these standards and requirements are not complied with by the responsible officers of the City, the Board may order that no more prisoners, State or local, be confined therein, and that those so confined be transferred to some other jail or jail farm. Likewise, it is the responsibility of the State to reimburse the City for the cost of feeding and caring for State prisoners confined in the City jail, and to pay two-thirds of the salary and expense allowances of the City Sergeant and his full-time deputies as approved by the State Compensation Board.

What I have written with reference to the Richmond City Jail is, generally speaking, equally applicable to the other city jails of the State and to the county jails.

There are many details of the statutes relating to jails and their operation

which I have not attempted to discuss, believing that you desire my opinion only on the broad general principles involved.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—State and Locality Expense in Caring for Prisoners Working on Jail Farms and Chain Gangs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 15, 1943.

MAJOR R. M. YOEUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YOEUELL:

I am in receipt of your letter of June 12, in which you state that:

"The City of Petersburg owns approximately 600 acres of land outside the city limits. At the present time they are sending inmates from the city jail to this piece of land each morning and returning them to the jail at night for the purpose of producing vegetables. In the cultivation of this land the City of Petersburg is using its own animals and equipment. However, the City would like to know if it would be proper for the State to share in the expense of purchasing seeds, fertilizer, etc."

You then ask in effect if this piece of land on which the City is conducting farming operations may be considered as a jail farm within the meaning of section 11(a) of Chapter 386 of the Acts of 1942, insofar as the payment of the expenses of State prisoners working on this project is concerned.

I take it from your letter that there are no buildings on the piece of land being farmed and that no prisoners are confined there, the only activity conducted being the growing of vegetables.

From the manner in which this project is operated, I do not think that it can be said to be in any sense a jail farm. The statute relating to the operation of jail farms by counties and cities plainly contemplates that prisoners shall be confined at the farm. See sections 2880-a to 2880-j of Michie's Code of 1942.

You also state that:

"If the farm is to be considered solely as a farm operation of the City of Petersburg and not as a jail farm, it would appear that prisoners serving sentences for violations of the laws of the Commonwealth should be considered as working on chain gangs as referred to in section 9, subsection (b), Chapter 386, and the City should pay the entire cost of feeding and caring for said prisoners."

Section 9(b) of Chapter 386 of the Acts of 1942, setting up the method by which the Commonwealth reimburses counties and cities operating jails for the cost of State prisoners confined in such jails, contains the proviso:

"However, the counties and cities working prisoners on chain gangs shall pay the entire costs for feeding and caring for said prisoners even though said prisoners are sentenced for violations of the laws of the Commonwealth."

In commenting on your statement quoted above, I might say that insofar as State prisoners are concerned, if such prisoners are working on this project as "chain gangs," then unquestionably the entire costs of feeding and caring for the prisoners shall be borne by the City. However, you do not advise me the authority under which the State prisoners are doing this work, but, if there is any doubt in your mind as to how the costs of feeding and caring for these prisoners should be paid, I presume you will take the matter up with me further.

I might add that, since the land that is being cultivated does not constitute a jail farm, the State should not bear any of the expense of this project.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Combined City and County Jail; Operation of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 23, 1943.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

I am in receipt of your letter of March 18, reading as follows:

"You will find enclosed a copy of an agreement entered into between the city of Winchester and the County of Frederick.

"This agreement is dated March 9, 1934, and became effective March 1, 1935.

"You will note from this agreement that the jail is owned jointly by the county and city and is to be operated by the city. While the jail has been operated by the city for the purpose of handling the expenditures for the jail, the jail has been under the control and supervision of the sheriff of Frederick County. The jail has been operated under the terms of this agreement since the date it became effective; and the operation insofar as we know has been satisfactory to both the city and the county. However, chapter 386, section 10, subsection (b) of the 1942 Acts of Assembly provides that:

"The provisions of this act shall apply in every respect to each city which operates a jail, and to the sergeant thereof. In every case the sergeant shall have supervision and control of the jail and the custody of all prisoners confined therein, any other provision of law, general, special or local, to the contrary notwithstanding."

"Section 2868 of the 1942 Code of Virginia provides that:

“ * * * the jail and the jailor of the county of Frederick shall also be the jail and jailor of the city of Winchester * * * .”

“Do the provisions of the statutes quoted above in any way affect the arrangements between the City of Winchester and the County of Frederick as to the operation of the jail?”

“Is it possible for the jail referred to above to continue to be under the control and supervision of the sheriff of Frederick County?”

You have further advised me over the telephone that your only interest in the matter is whether in dealing with the sheriff of Frederick county, who by section 2868 of the Code is the jailor of the Winchester jail, you are dealing with the proper officer.

In my opinion, it is entirely proper for you to continue to deal with the sheriff of Frederick county in connection with the operation of the Winchester jail. The language which you quote from section 10 of chapter 386 of the Acts of 1942, it seems to me, applies to cities which operate their own jails, and does not necessarily apply where a jail is operated jointly by a county and city, as is the case in Winchester, and, I am informed, in several other smaller cities.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Prisoners of One Locality Confined in Jail of Another; Apportionment of Expense.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 18, 1943.

MAJOR R. M. YOEUELL,
Commissioner of Corrections,
Richmond, Virginia.

MY DEAR MAJOR YOEUELL:

I am in receipt of your letter of May 13, which for purposes of reply I quote in full:

“It has been found that it is desirable for the State Board of Corrections under the authority provided for in Chapter 217 of the 1942 Acts of Assembly to designate the local penal institution of certain counties, cities, and towns as places of confinement for prisoners committed by courts and other authorities of other counties, cities, and towns.

“Before finally designating a local penal institution as a place of confinement for prisoners of other counties, cities, or towns, it is felt that the governing bodies of the units of government involved should be informed as to how the cost of maintaining and operating such institution should be apportioned.

“In some instances additional personnel and equipment will be required and improvements made necessary by reason of the local penal institution being used by several units of government. In most instances, savings in certain direct costs, such as salaries of the jailer and his

assistants and cost of equipping the penal institution will be effected by the counties, cities, and towns whose prisoners are to be confined in the penal institution of some other unit of government.

"Chapter 217, Section 12, of the 1942 Acts of Assembly sets forth the manner in which costs incurred for local penal institutions used by several units of government shall be apportioned. However, it is not clear to us as to whether or not the salaries of the jailer and his assistants should be apportioned in the manner set forth in the aforesaid Act. We would like to have your opinion on this matter.

"If the salaries of the jailer and his assistants are not to be apportioned in the manner referred to above, would it be legal for a county, city, or town whose prisoners are to be confined in the local penal institution of another unit of government to participate in the expenditures for salaries paid to the jailer and his assistants of that unit of government?"

In my opinion, section 12 of chapter 217 of the Acts of 1942 deals only with repairs, improvements and additions to the jail of a county which is designated to be used by another county, and the "maintenance" of such jail is used in the sense of keeping such jail and its equipment in proper physical condition. I do not think that this section has anything to do with the expense of caring for and feeding prisoners.

In my opinion, the amount that a county should pay to the other county whose jail has been designated should be agreed upon between the two counties, as provided by section 9(c) of chapter 386 of the Acts of 1942, or, if the two counties do not or cannot agree upon such amount, then it shall be determined by the State Board of Corrections. In reaching such agreement the two counties may take into consideration the amount of compensation paid the jailer and his assistants by the county whose jail is being used, just as the State Board of Corrections may take this item into consideration in determining the amount which the one county shall pay to the other.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Expense of Operation of Temporary Lockup.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 1, 1943.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

This is in reply to your letter of February 27, in which you request my opinion upon the question whether or not under the provisions of chapter 386, section 9, subsections (a) and (b), there is any authority for the payment by the Commonwealth of any of the costs of maintaining a lockup or place of temporary detention of prisoners prior to their commitment to jail or

into the custody of the sheriff. You state that these lockups are operated solely by the municipalities and are not under the control or supervision of the city sergeants.

You state that it is your interpretation of the statute that the Commonwealth is without authority to reimburse the cities for the cost of feeding and caring for prisoners confined in these lockups, and that the Commonwealth is authorized to share only in the costs of feeding and caring for prisoners confined in jails that are under the supervision and control of sergeants and sheriffs.

After carefully reading the statute referred to, I beg to advise that I concur in the views which you have expressed as above set out.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JAILS AND PRISONERS—Allowance to Sheriff for "Necessary Supplies"
Used in Feeding Prisoners.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 3, 1942.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

In your letter of November 18, you inquire whether or not, in my opinion, subsections (a) and (b), of section 9 of Chapter 386 of the Acts of 1942, provide for the Commonwealth to reimburse counties and cities for a proportionate part of expenditures for cook stoves, pots, pans, cutlery, and other utensils and equipment to be used in preparing and serving food for prisoners confined in jail.

Subsection (b) of section 9, above referred to, provides for such proportionate reimbursement by the Commonwealth for moneys expended for "clothing, medicines, lights, water, heat, disinfectants, bedding, and other necessary supplies required for the prisoners * * * ." In my opinion, the item about which you inquire may very properly be classified as "other necessary supplies," inasmuch as it is necessary to have these cooking utensils in order to care for the prisoners as contemplated by law.

I am of opinion, therefore, that the cost of said articles should be construed as being embraced within the provisions of subsection (b) of section 9 of said Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Expense of Operation; Electric Refrigerator.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 8, 1943.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

I am in receipt of your letter of February 6, in which you request my opinion on the question of whether or not the Department of Corrections, in reimbursing the City of Richmond for the cost of feeding State prisoners in the city jail, should take into consideration the cost of an electric refrigerator which the Sergeant of the City of Richmond says should be purchased for the use of the jail.

I do not think this office should attempt to express an opinion on such a question, for the reason that it is more a question of fact than of law. Section 9 of chapter 386 of the Acts of 1942 provides that the Commonwealth shall reimburse a locality for its proportionate part of the reasonable cost of food of prisoners in jail and of the clothing, medicine and other necessary supplies required for the prisoners. It may be that by the use of a refrigerator the cost of feeding prisoners can be reduced and, even if this is a fact, it may be that a suitable refrigerator could be purchased at a cost less than that which it is proposed to pay for the refrigerator in question. After all, the question of what is a "reasonable cost" of feeding prisoners is a matter to be determined by the State Board of Corrections in the light of all the facts.

I also call your attention to the fact that, as an original proposition, an item of this character is purchased by the City and not by the State. It would appear, therefore, that, if the Sergeant of the City of Richmond desires to purchase an electric refrigerator, the question should first be taken up with the city authorities.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

JAILS AND PRISONERS—Contracts for and Expense of Feeding Prisoners; Chain Gangs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 25, 1943.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

DEAR MAJOR YUELL:

This will acknowledge receipt of your letter of September 22, in which you ask the opinion of this office on two questions. You first state that:

"The first question on which the Board would like to be advised is as to whether or not it has the authority to contract with a sheriff to feed prisoners other than by purchasing foodstuffs and having them prepared into meals. The need for this advice is created by the conditions which exist in some of the smaller counties of the State. These conditions are as follows:

"The number of prisoners in jail usually ranges from none to three;

"The sheriff, or jailer, and his family frequently make their home in the jail building;

"The cooking equipment is owned by the sheriff or jailer;

"It has been customary for prisoners to be given part of the same food prepared for the family of the sheriff or jailer;

"In some instances the person in charge does not maintain a residence at or near the jail;

"Meals for prisoners are prepared at the home of the sheriff and delivered from there to the jail;

"Meals for prisoners are purchased from restaurants and delivered to the jail."

I am of opinion that the State Board of Corrections does not have authority to make such a contract as you describe. Sections 8 and 9 of Chapter 386 of the Acts of 1942 prescribe in detail the duties of sheriffs and sergeants in feeding and caring for jail prisoners and how the costs of feeding such prisoners shall be paid. Among other things, the sections expressly require that the sheriff shall purchase all foodstuffs and other provisions used in the feeding of jail prisoners and that invoices or itemized statements of account from each vendor of such foodstuffs shall be by the sheriff or sergeant submitted to the Board of Supervisors of the county, and it is prescribed how these invoices shall be paid by the Board of Supervisors and how these expenses shall be apportioned between the State and the political subdivisions.

It is my opinion that the provisions of these two sections are entirely inconsistent with and preclude the making of a contract as you describe with the sheriff of a county to feed prisoners confined in the jail of his county. There are other provisions of these sections which are also inconsistent with such a contract, but it is not necessary to mention them here.

You next say:

"The second question on which the Board would like to be advised is the interpretation of the last clause of subsection b, section 9 of Chapter 386. This clause reads as follows: 'provided, however, that the counties and cities working prisoners on chain gangs shall pay the entire cost of feeding and caring for said prisoners even though said prisoners are serving sentences for violation of the laws of the Commonwealth.'

"Does this mean that the cost of feeding and caring for any prisoners working on streets, or working on any county or city property as provided for in the second paragraph of the preceding section, shall be paid by the county, city or town using the prisoners to work?"

The "second paragraph of the preceding section," to which you refer, reads as follows:

"The judge of the circuit or corporation court of any county or city may, by order entered of record, allow men confined in the jail of such county or city who are serving sentences imposed for misdemeanors to

work on the county poor farm or other county or city property on a voluntary basis, such prisoners to receive such credit on their respective sentences for the work done as the court may in said order prescribe. In case some person other than the sheriff or sergeant is designated by the court to have charge of such prisoners while so working, the court shall require a bond of such person, in an amount to be fixed by the court, conditioned upon the faithful performance of his duties, and the sheriff or sergeant shall not be held responsible for any acts of omission or commission on the part of such person."

It does not appear necessary in answering your question to define the precise meaning of "chain gang" as that term is used in subsection b of section 9 of the Act. Certainly it contemplates prisoners who are *required* to work as distinguished from those who are working on a *voluntary* basis, this being the type of work as described in the paragraph from section 8 of the Act quoted above.

It is my opinion, therefore, that the prisoners working on chain gangs mentioned in subsection b of section 9 of the Act do not include the prisoners working "on a voluntary basis" mentioned in the quoted paragraph from section 8 of the Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Cooked Meals from Restaurants May Be Served Prisoners.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 13, 1942.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

This will acknowledge receipt of your letter of October 6, from which I quote as follows:

"I understand that it is customary for some of the sheriffs and city sergeants to feed prisoners while confined in jail by purchasing meals from restaurants and other establishments which conduct the business of selling meals.

"Would it be consistent with the provisions of section 8 of chapter 386 of the 1942 Acts of Assembly, after the Act becomes effective, for sheriffs and city sergeants to use the above mentioned method of providing food for prisoners while confined in jail?"

Section 8 of chapter 386 of the Acts of 1942, placing sheriffs and sergeants and the deputies of each on a salary basis, provides that sheriffs and sergeants shall continue to perform all the duties required of them by law with reference to feeding and caring for prisoners in jail. Subsection (b) of the section provides that the officer shall purchase "all foodstuffs and other pro-

visions used in the feeding of jail prisoners" and submit itemized invoices of such purchases to the board of supervisors or the city council. The board of supervisors and the city council then, under section 9 of the Act, pass on the accounts and invoices submitted to them covering among other things "purchases of foodstuffs" and order such invoices to be paid, if they are found correct, out of the county or city funds. Subsection (b) of section 9 then provides to what extent the Commonwealth shall reimburse the counties and cities.

I can find nothing in the Act which requires the sheriffs and sergeants to purchase foodstuffs and then have them cooked. It seems to me that the language of the two sections is broad enough to permit the sheriffs and sergeants to feed the prisoners in jail by meals purchased from restaurants and other establishments which conduct the business of selling meals, provided this can be done economically. You advise me that in some counties the number of prisoners is so small that it would probably be cheaper to purchase for the prisoners meals already prepared rather than to operate a kitchen in the jail. In my opinion, this method of feeding the prisoners may be used under the provisions of the Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JAILS AND PRISONERS—Cooked Meals Prepared by Individuals May
Be Served Prisoners.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 10, 1942.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

This will acknowledge receipt of your letter of December 8, in which you refer to my letter to you of October 13, in which I advised you that under Chapter 386 of the Acts of 1942 sheriffs and sergeants might provide food for prisoners while confined in jail by purchasing such food in the form of cooked meals from restaurants and other establishments which conduct the business of selling meals. You then ask the following question:

"Since I received your letter of October 13, several sheriffs and sergeants have claimed that it would be more convenient to purchase meals for prisoners confined in jail from individuals than it would be to purchase such meals from restaurants and other establishments which conduct the business of selling meals. Would it be consistent with the provisions of Chapter 386 of the 1942 Acts for sheriffs and sergeants to purchase meals for prisoners confined in jail from individuals?"

I see no reason why the meals in question may not be purchased from individuals as well as from restaurants, provided this can be done just as economically. I might add that neither the sheriff nor sergeant nor any

member of his family should be directly or indirectly interested financially in furnishing these cooked meals.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Compensation of Jail Physician.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 11, 1943.*

HONORABLE E. R. COMBS,
Chairman State Compensation Board,
Richmond, Virginia..

DEAR MR. COMBS:

I am in receipt of your letter of January 23, in which you call attention to the following provisions of the Appropriation Act of 1942 (Acts of 1942, at page 290) relating to compensation of jail physicians:

“ * * * provided, however, that all jail physicians be paid at the rate provided by law, but not more than five hundred dollars per calendar year shall be paid the jail physician or physicians for any city or county, the population of which is less than 100,000, and not more than one thousand dollars per calendar year shall be paid the jail physician or physicians of any city or county, the population of which is 100,000 or over, * * * ”.

You also direct my attention to that part of 386 of the Acts of 1942 (the Sheriffs' and Sergeants' Act) dealing with the compensation of jail physicians, which reads as follows:

“If the board of supervisors of a county or the council of a city shall elect to employ a jail physician at a definite monthly compensation to care for the prisoners in the jail who are in need of medical attention, it shall have the power to do so, but the amount of compensation for each physician shall be approved by the Compensation Board in advance. If the approval of the Compensation Board is not given, or if the board of supervisors or city council does not elect to appoint a regular jail physician at a definite monthly compensation, the rate established by law for the payment of physicians for caring for the sick in jails shall continue to be in effect. In either event the Commonwealth shall reimburse the county or city by two-thirds of the amounts expended for medical care by such county or city.”

You then ask the following question:

“It will be appreciated if you will advise us whether or not under the provisions of the law mentioned above the compensation of a jail physician or physicians in cities and counties with a population under 100,000 is limited to five hundred dollars or is the proportionate part payable by the State limited to five hundred dollars.”

In my opinion, the conflict between the quoted provisions is more apparent than real. If the board of supervisors of a county or the council of a city, under the authority of said chapter 386 of the Acts of 1942, elects to employ a jail physician at a definite monthly compensation, such compensation to be approved by the State Compensation Board in advance, then I am of opinion that the limitation fixed by the Appropriation Act is not applicable. On the other hand, if the local governing body does not elect to employ a jail physician at a definite monthly compensation, then the existing provisions of law as to the compensation of such jail physician are applicable (that is, section 4956 of the Code) and the limitation to which you refer in the Appropriation Act is likewise applicable. In either event, the Commonwealth reimburses the locality for two-thirds of the amount expended for medical care.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JAILS AND PRISONERS—Compensation to Doctors Who Treat Inmates:
How Paid.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 12, 1943*

MAJOR R. M. YOEUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

DEAR MAJOR YOEUELL:

This will acknowledge receipt of your letter of March 3, in which you raise the following question:

"Several questions have been presented to us in regard to the interpretation of chapter 386, section 9, subsection (d), 1942 Acts of Assembly, on which we would appreciate your advising us.

"Prior to January 1, 1943, payments to doctors for the care of prisoners confined in jails were made by the Commonwealth direct to such doctors.

"Under provisions of the portion of chapter 386 referred to above, are payments now to doctors and dentists for the care of prisoners confined in jails to be made by the cities and counties, as the case may be, direct to such doctors and dentists; and should the Commonwealth then, in turn, reimburse the city or county for two-thirds of the amounts so expended?

"It is our understanding of the law that all expenses for medical and dental care of the prisoners confined in local jails should be paid by the cities and counties and reimbursement of two-thirds of the amounts so expended made by the Commonwealth on vouchers approved by the State Board of Corrections."

Subsection (d) of section 9 of chapter 386 of the Acts of 1942 reads as follows:

"If the board of supervisors of a county or the council of a city shall elect to employ a jail physician at a definite monthly compensation to

care for the prisoners in the jail who are in need of medical attention, it shall have the power to do so, but the amount of compensation for each physician shall be approved by the Compensation Board in advance. If the approval of the Compensation Board is not given, or if the board of supervisors or city council does not elect to appoint a regular jail physician at a definite monthly compensation, the rate established by law for the payment of physicians for caring for the sick in jails shall continue to be in effect. In either event the Commonwealth shall reimburse the county or city by two-thirds of the amount expended for medical care by such county or city."

I call your particular attention to the last sentence of the quoted language, providing that "In either event the Commonwealth shall reimburse the county or city by two-thirds of the amount expended for medical care by such county or city." It is perfectly plain from this language that whether or not the jail physician is paid a salary, or is compensated at "the rate established by law," all compensation to such jail physician is paid, in the first instance, by the county or city, as the case may be, and the Commonwealth in turn reimburses such county or city by two-thirds of the amount paid to such physician.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Dental Care; Expense of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 24, 1943.

HONORABLE RICHARD T. WILSON,
*Judge Hustings Court City of Petersburg,
Petersburg, Virginia.*

MY DEAR JUDGE WILSON:

Your letter of February 17 addressed to Major Rice M. Youell, Commissioner of Corrections, concerning the compensation of a dentist where his services are necessary in the case of a prisoner in jail, has been referred to this office for reply.

Your question arises under chapter 386 of the Acts of 1942, placing sheriffs and sergeants and their full-time deputies on a salary basis, and also, among other things, making certain changes with reference to the manner of apportioning the expense as between the State and locality of supplying "medical care" to jail prisoners. Section 9 of chapter 386 provides that "the Commonwealth shall reimburse the county or city by two-thirds of the amount expended for medical care by such county or city."

I concur in your view that, when that portion of chapter 386 dealing generally with the care of jail prisoners is considered in its entirety, it is reasonably plain that the phrase "medical care" is broad enough to include the services of a dentist. I feel, however, that you in turn will agree with me that it is not the sense of the statute that jail prisoners be supplied with routine care of the teeth by a dentist, but that the State and the locality should only pay for the services of a dentist when the emergency is such that

these services are required as a medical necessity, so to speak. I should also think that the better practice would be that the necessity for dental services be passed upon by the jail physician before the services are rendered.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Power of Board of Corrections to Transfer Prisoners from One Jail to Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 23, 1943.

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

I am in receipt of your letter of June 18, in which you ask, if the Board of Corrections finds it necessary to prohibit the confinement of prisoners in any jail, as provided in section 11(b) of chapter 217 of the Acts of 1942, and designates some other jail for the confinement of the prisoners who would otherwise be confined in the closed jail, whether it is mandatory upon the jail designated to comply with the order of the Board.

In my opinion, in view of the provisions of section 11(b), it is quite plain that your question must be answered in the affirmative, and that it is not necessary (although it may be advisable) to obtain the consent of the county or city operating the designated jail. If the order of the Board is warranted by the facts, under section 11(c), such order may be enforced by the prescribed proceedings in the court of record having general chancery jurisdiction in the county or city of the designated jail.

The division of the cost of repairs, improvements, or additions to and maintenance of the designated jail is to be determined by the State Board of Corrections under section 12 of chapter 217 of the Acts of 1942, while the division of the cost of feeding and caring for the prisoners is to be determined under the provisions of section 9(c) of chapter 386 of the Acts of 1942.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Violators of Local Ordinances Not Eligible for Confinement at State Farm for Defective Misdemeanants.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 17, 1943.

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YUELL:

I am in receipt of your letter of June 8, in which you ask how the Commonwealth is to be reimbursed for prisoners committed to the State Farm for Defective Misdemeanants who have been convicted of violating local ordinances in cities, towns and counties. You also ask if such prisoners may be sentenced by the trial officer to the State Farm for Defective Misdemeanants.

I have examined the statutes relating to the State Farm for Defective Misdemeanants (section 5058(1), *et seq.*, of Michie's Code of 1942) and I can find no authority therein, nor anywhere else, for a trial officer to sentence persons convicted of violations of local ordinances to serve their term in this institution. The statute contemplates that this is an institution in which shall be confined only defective misdemeanants convicted of violations of State laws. There being no authority for sentencing local prisoners to the State Farm for Defective Misdemeanants, naturally there is no provision for compensating the Commonwealth for local prisoners so sentenced.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Disposition of Tubercular Inmate in Jail.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 17, 1942

HONORABLE J. MELVIN LOVELACE,
*Commonwealth's Attorney,
Suffolk, Virginia.*

DEAR MR. LOVELACE:

This is in reply to your letter of September eleventh in which you ask if a person serving a ninety day jail sentence as a misdemeanor who has a positive case of tuberculosis may be sent to the State Farm under Section 1516 or other section of the Code.

Section 1516 authorizes Circuit and Corporation Court, upon finding that a person suffering from tuberculosis is a menace to the health of the public or is unnecessarily exposing other persons to infection, to order such person to be restrained and detained for a period of twelve months in some suitable place or be required to give bond conditioned upon a cessation of the practices complained of. This section does not declare any actions of the tubercular person to be a crime and, in my opinion, is not a criminal statute providing for the punishment of the individual, but is a statute designed to

protect the public from infection by restraining the tubercular person.

In my opinion the "suitable place" referred to is a tuberculosis sanatorium such as is mentioned in Sections 1507, *et seq.*, of the Code or some hospital or other place for the reception of infected persons. I do not think that a court acting under Section 1516 could send the tubercular person to the State Farm, for the State Farm was established as a penal institution for the reception of defective persons convicted of crime.

However, since the State Farm was established for the detention and care of defective misdemeanants, "including the tuberculosis" (see Section 5058 (1) of Michie's Code of Virginia), it is my opinion that the person in the case to which you refer may be sent to the State Farm for the balance of his ninety day sentence. For the procedure see Section 5058 (8) of Michie's Code of Virginia.

For an additional method of handling persons infected with contagious or infectious diseases dangerous to the public health see Sections 1559 and 1519 of the Code.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Qualifications of Jailer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 9, 1942.

MR. E. E. MARLOW,
*Sheriff of Warren County,
Front Royal, Virginia.*

DEAR MR. MARLOW:

I am in receipt of your letter of September 4, from which I quote as follows:

"Will you please give me a ruling on the following questions: Can a woman be appointed jailer? Does the jailer have to be a deputy sheriff? Does the jailer have to be twenty-one years of age?"

By section 2868 of the Code the sheriff of a county is the "keeper of the jail thereof." By section 2701 of the Code a sheriff, with the consent of the court, may appoint one or more deputies, who may discharge any of the official duties of the sheriff's office. I am of opinion, therefore, that the sheriff may designate a deputy as the keeper of the jail, but, this being one of the official duties of the sheriff's office, I am of opinion that he may designate no person other than a deputy to be such keeper of the jail. See also *Watts v. Commonwealth*, 99 Va. 872. I know of no reason why a woman may not be appointed a deputy sheriff.

In view of section 32 of the Constitution of Virginia, and of the fact that a deputy sheriff is an officer, I am of the opinion that a person under twenty-one years of age may not be appointed and act as such officer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Prisoners Awaiting Trial May Be Required to Deposit Personal Effects with Jailer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 24, 1943.

MAJOR R. M. YOEUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

MY DEAR MAJOR YOEUELL:

I am in receipt of your letter of May 19, from which I quote as follows:

"Recently a prisoner was arrested in one of the counties and brought to the county jail by the arresting officer. This particular prisoner had on his person approximately \$150 in money, which he refused to turn in to the jailer to be kept during his incarceration. It is the custom, of course, in accordance with the regulations for prisoners to turn in money on entering jail to be kept in security for them and to be returned to them upon release. The legality of the jailer having authority to require the man to turn in his money was questioned by the prisoner, his contention being that he did not have to abide by the rules and regulations because he had not been convicted.

"In formulating the rules and regulations for the government of the jails, this office made a study of the regulations used by the Federal government and several other States, and found that it is the uniform practice not to permit prisoners to have in their possession any money while incarcerated in jail. There are many good reasons for the advantage of this regulation. It aids in escapes, tends to bring about gambling in jails and other reasons.

"We would appreciate it if you would advise this office as to the legality of the rule with reference to requiring all prisoners incarcerated in jails to surrender money and any other article that the jailer might feel would render the institution less secure regardless of the reason that a prisoner is being confined in jail."

It is well settled that the authority in charge of a penal institution may make necessary rules for the care and safekeeping of those lawfully confined therein. Such rules are applicable to those prisoners being held awaiting trial as well as to those prisoners who have been sentenced. Chapter 217 of the Acts of 1942 gives express authority to the State Board of Corrections to prescribe requirements for the care and treatment of prisoners confined in jails. You state that the rule that prisoners should not be permitted to have money in their possession while in jail has many good reasons for its adoption, two of them being that the possession of money "aids in escapes, (and) tends to bring about gambling in jails." I am of opinion, therefore, that this rule may be enforced against the prisoner who has questioned it. While it is true that a prisoner awaiting trial may not be required to perform labor where such labor is a part of the punishment for crime, there can be no question about the fact that such a prisoner may be required to abide by the rules adopted for the care and safekeeping of prisoners generally.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—When Escaping Prisoner May Be Shot to Prevent Escape.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 2, 1942.

MAJOR R. M. YOEUELL,
Commissioner of Corrections,
Richmond, Virginia.

DEAR MAJOR YOEUELL:

This will acknowledge receipt of a request from you for an opinion concerning the right of guards to use firearms to prevent (1) felons escaping from the State Convict Road Force, (2) misdemeanants escaping from the State Convict Road Force, and (3) misdemeanants or felons escaping from the State Farm for Defective Misdemeanants. This subject, to my mind, is not at all free from difficulty, and there are a number of statutes dealing generally with the subject.

The common law appears to be thus:

" * * * It is the generally accepted rule that an officer is not justified in killing a mere misdemeanor in order to effectuate his arrest where he merely fails to submit to, or attempts to escape from, arrest. * * * ." (26 Am. Jur. 315, "Homicide," section 231.)

"It is outside of the point involved in this case to discuss the rights of an officer seeking to arrest one who is simply fleeing from arrest for a misdemeanor, but we so frequently read in the press of acts of violence by officers in such cases that it is deemed proper to say that such officers have no right to inflict serious bodily harm upon one who is simply fleeing arrest for a misdemeanor." (*Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242, 40 A. L. R. 54, 58 (1924).)

With respect to felonies, the rule seems to be that an officer may use force reasonably necessary under the circumstances to effect the arrest or prevent the escape of the felon, and that, if the reasonable use of such force results in the death of the felon, the officer may not be held criminally liable therefor. *Stinnett v. Commonwealth of Virginia*, 4 Cir., 55 F. 2d 644 (1932).

With respect to (1) above, section 5049 of the Code, contained in the chapter dealing with crimes of convicts, provides as follows:

"A convict confined in the penitentiary, or in custody of an officer thereof, shall be deemed guilty of felony if he * * * escape from the penitentiary or such custody; * * * ."

Section 5040 of the Code, a portion of the chapter dealing with the organization, government and discipline of the penitentiary, is to this effect:

" * * * It shall be lawful for any officer or guard to carry sufficient weapons to prevent escapes, suppress rebellion, and for self-defense, and to use the same against any convict for such purpose. * * * ."

Reading these statutes in connection with the common law principles above quoted, I believe that a guard has a right to use firearms to prevent felons escaping from the State Convict Road Force since such conduct on the part of a felon amounts to a distinct felony in itself.

Section 2079 of the Code deals with jail prisoners on the State Convict Road Force. It is thus:

"Whenever any jail prisoner shall escape from the convict road force and be recaptured, he shall be taken by the officer having him in custody before some magistrate in the county where such escape was made, who shall, after a trial and upon conviction of such escape, sentence him to the State convict road force for a term not less than thirty days nor more than six months, and in addition thereto, sentence him to labor in the State convict road force, for such time, calculated at the rate of fifty cents per day, as shall be sufficient to cover the expense of recapture; such additional time, however, not to exceed one year in any case."

From the punishment prescribed it necessarily follows that this offense is only a misdemeanor. That being true, in view of the authorities quoted above, I do not believe that the taking of human life can be justified to prevent such a minor offense. I am not unmindful of the provisions of section 2078 of the Code:

"All provisions of chapter two hundred of this Code, except sections five thousand and nine and five thousand and ten, and all rules and regulations made by the board of directors of the penitentiary, *governing the prisoners in the penitentiary*, shall be applicable to the State convict road force and to the prisoners comprising the same, unless, in the judgment of the State Highway Commissioner, it is necessary to change, alter or amend said rules and regulations in order to make same applicable to the efficient and economical use of the State convict road force in the construction of roads under this chapter, in which case the State Highway Commissioner may so change, alter or amend such rules and regulations as to make same so applicable for their said use." (Italics supplied.)

It is my opinion, however, that section 5040 of the Code is not a statute "governing the prisoners in the penitentiary," and I cannot believe that the firmly embedded principles of common law should be overborne by a statute on the subject unless such statute is explicit and express. A presumption to change the common law cannot be inferred unless it is plain and unmistakable in the statute. I, therefore, do not believe that the use of firearms can be allowed by guards merely to prevent the escape of misdemeanants from the State Convict Road Force.

The statutes dealing with the State Farm are collated in chapter 202A of the Code. Section 5058(14) deals with the subject of escape:

" * * * Any prisoner who shall escape from the said State farm for defective misdemeanants, or other farm or farms, shall be guilty of a misdemeanor and may be sentenced by a justice of the peace, or court, upon conviction therefor, for an additional period of not less than thirty days nor more than six months. * * * "

The offense being a misdemeanor, in line with my prior conclusions I do not believe the use of firearms is proper. However, as to felons who might be confined at the State Farm, I do not believe the above statute is applicable and guards might use firearms to prevent their escape.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Payments by Highway Department to Wife of Prisoners Working on Convict Road Force.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 18, 1943.

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

MY DEAR MR. WILSON:

This will acknowledge receipt of your letter of May 14, from which I quote as follows:

"A jailman under conviction for non-support by the Trial Justice Court of Fluvanna County escaped from the convict road force in Albemarle county and was tried for the latter offense in the Trial Justice Court of Albemarle County and convicted. Under the non-support conviction in Fluvanna the State Highway Department is making payments in accordance with section 1936 of the Code for the benefit of this man's family. I request that you advise me whether these payments will continue during the service of the 'good time' this man lost on his original conviction on account of the escape and also whether upon the imposition of sentence by the Trial Justice Court of Albemarle County for the escape, the Highway Department may be required by order of the latter court to continue the payments for the support of this man's family during the time he is serving the escape sentence."

Section 1936 of the Code provides in effect that, where a husband is sentenced to the State convict road force on a charge of desertion of wife or children, the amounts prescribed in the section to be paid for the work of such husband shall be paid by the State Highway Commissioner for the support of the wife or children. The section further provides that when such a person is released from the road force he shall be returned to the justice having exercised original jurisdiction in the case and be by said justice placed on probation upon prescribed terms and conditions. While the additional sentence that this man has received for his escape may have been imposed for what is technically a new offense, yet, when the spirit and real intent of section 1936 is taken into consideration, I think it is reasonable to say that the second sentence grew out of and is directly connected with the first sentence. I, therefore, think that the better view is that the original order of the Trial Justice of Fluvanna County continues in effect so long as this man is on the State convict road force, including the "good time" that he lost as well as the sentence imposed upon him on account of the escape. This opinion is strengthened, I think, by the provision in the section that the man shall be returned to the trial justice having exercised *original jurisdiction* when he is released from the convict road force.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGES—Expenses of When Designated to Hear Cases in Another Circuit.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 26, 1943.

HONORABLE E. O. RUSSELL,
Clerk of Loudoun County,
Leesburg, Virginia.

MY DEAR MR. RUSSELL:

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

"1. Should 'A,' a judge designated by the Court of Appeals to sit at the trial of a case, be paid for his mileage and other expenses under section 5898 by the State or by the county?

"2. If he uses his own automobile for traveling, at what rate per mile should he be paid?

"3. If he travels other than in his own automobile, at what rate per mile should he be paid?"

The answer to your first question is contained in the next to the last paragraph of section 5898 of the Code, which provision that the "actual expenses" of a judge designated under the provisions of the section shall be paid "out of the treasury of the county or city in which said court is held." The section does not attempt to define what are "actual expenses" or what mileage shall be allowed if the visiting judge uses his own automobile. This is a question of fact, upon which this office cannot attempt to pass.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Affidavit Required by Soldiers' and Sailors' Relief Act Applies to Confession of Judgments.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 13, 1943.

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

DEAR MR. POWELL:

My office has for attention your letter of January 12, containing the following inquiry:

"In cases of confession of judgments, in your opinion is it necessary that an affidavit pursuant to Soldiers' and Sailors' Relief Act of 1940, showing the non-military status of the defendant, be filed at the time of the confession of judgment?"

A portion of the Federal statute is to this effect:

" * * * If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. * * * ." 50 U. S. C. A., section 520.)

It is my opinion that the broad language above quoted is sufficient to include judgments by confession. This is in harmony with the views heretofore expressed by me on this subject. See Annual Report of the Attorney General of Virginia, 1940-1941, pages 75-76.

Very truly yours,

ABRAM F. STAPLES,
Attorney General.

JUDGMENTS—Vacation of After Term; Writ of Coram Nobis.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 20, 1943.

MR. CHARLES B. GODWIN, JR.,
Commonwealth's Attorney,
National Bank of Suffolk Building,
Suffolk, Virginia.

DEAR MR. GODWIN:

I acknowledge receipt of your communication of April 8, 1943, in which you enclose a copy of the bill in equity in the suit styled *Fannie Brown v. Commonwealth of Virginia*, instituted in the Circuit Court of the City of Suffolk. This is a bill seeking to have a conviction for murder vacated on the grounds that a witness for the Commonwealth is alleged to have given false testimony in the criminal prosecution. You have asked my opinion in the premises, and I am replying as follows:

In my opinion the bill cannot be maintained and should fail on demurrer, for several reasons:

1. The Commonwealth cannot be sued without its consent, and it has never given its consent to any such prohibitory process as is contemplated in the present bill.
2. Suit against the Commonwealth, where it has given its consent to be sued, must be brought in the Circuit Court of the City of Richmond.
3. Injunction suits do not lie to vacate judgment obtained on false testimony. See generally 34 C. J. §744; 31 Am. Jur. §662-669; and *McClung v. Folks*, 126 Va. 259 at 268-274.

In my further opinion, the petitioner has mistaken her remedy, if any she has. Her appropriate remedy, if any, is to seek a writ *coram nobis* in the

Circuit Court of the City of Suffolk. In so far as I have been able to learn, there are no adjudications in the State of Virginia concerning the use of this ancient common law writ. See generally on the question, 24 C. J. S. §1606, particularly footnotes 46 and 47 on page 149; also 31 Am. Jur. §798-812.

By virtue of section 374a-(6), the Attorney General has no authority to participate in the proceeding in the Circuit Court of the City of Suffolk, and it is my opinion, in view of the fact that the proceeding grows out of the former prosecution there, that it is appropriate for the Commonwealth's Attorney to defend the said proceeding.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Garnishments: Items and Costs Which May Be Included.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 19, 1943.

HONORABLE JAMES H. BARGER,
Trial Justice,
Clifton Forge, Virginia.

MY DEAR MR. BARGER:

I am in receipt of your letter of May 14, in which you ask the following question:

"When I issue garnishees on judgments in my court, am I supposed to add a 10 per cent collection fee on the principal account, or am I supposed to add a 5 per cent collection fee?"

I assume that you refer to a case where a trial justice has issued a summons in garnishment at the suggestion of a judgment creditor, and after such summons, either on the appearance or non-appearance of the person so summoned (the garnishee), a judgment has been given against him pursuant to section 6510 and 6511 of the Code. This judgment against the garnishee, in my opinion, should only include the amount due on the original judgment together with the costs taxed in the original suit plus the costs that have accrued up to the time of the judgment against the garnishee. I do not think that the commission due the sheriff for making the collection from the garnishee should be included in the judgment against the garnishee, for the sheriff may not make the collection; but I do not think that the amount of the sheriff's commission should be included in an execution issued on the judgment against the garnishee, for otherwise the garnishee might contend that he only has authority to turn over to the officer out of funds in his hands belonging to the original judgment debtor such amount as the execution expressly calls for. Furthermore, if on account of a settlement between the parties or for other cause the sheriff does not make the collection, then he is not entitled to a commission and none should be collected for him.

The amount of commission to which an officer is entitled for making a collection on an execution against a garnishee is prescribed by section

3487 of the Code, such commission being 10 per cent of the first \$100 collected, 5 per cent of the next \$400 and 2 per cent on the residue.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Crimes Committed by U. S. Soldiers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 27, 1942.

HONORABLE W. B. F. COLE,
Commonwealth's Attorney,
Fredericksburg, Virginia.

DEAR MR. COLE:

This will acknowledge receipt of your letter under date of November 21, in which you seek my opinion on the following proposition:

"In time of war a soldier, on liberty and not in the discharge of any military duty, commits a felony in State jurisdiction and is arrested and held by civil authorities.

"Upon demand by the proper military authorities, can civil authorities be compelled to surrender the soldier to the military authorities?"

From an examination of the authorities it is my opinion that the military authorities can compel the surrender of a soldier under the circumstances which you have narrated above. The general rule of law seems to be that in time of war civil and military courts have concurrent jurisdiction to try persons for offenses committed outside of military zones. *Caldwell v. Parker*, 252 U. S. 376, 40 Sup. Ct. 388, 64 L. Ed. 621 (1920). However, the military authorities seem to have a preferential right of trial over such offenses in time of war if they choose to exert such right. *Ex parte King* (D. C. Ky.), 246 F. 868 (1917); *Funk v. State*, 84 Tex. Cr. Rep. 402, 208 S. W. 509 (1919). This latter conclusion would appear to me to govern the question put by you. On this general subject see also annotation in 135 A. L. R. 10.

The above cases seem to have been decided on the basis of the Articles of War as they existed in World War I. However, it does not appear that these statutes have been materially changed.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—State Jurisdiction over Federal Instrumentalities; Use of Highways.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 11, 1943.

MAJOR C. W. WOODSON, JR.,
Superintendent of State Police,
Richmond, Virginia.

DEAR MAJOR WOODSON:

This is in reply to your request for my opinion of the right of J. B. Daily to continue to operate a motor vehicle, owned by the United States, while engaged in his official duties as an employee of the War Department.

In this case J. B. Daily, an employee of the Federal Government, to-wit: a Senior Procurement Specialist in the purchase of canned goods for the United States Government, appointed under the authority of the Secretary of War, was arrested on a charge of driving an automobile while intoxicated, in violation of section 4722-a of Michie's Code of Virginia. Trial was had before the trial justice of Bedford County, who found the accused guilty, and further found that he was not about Federal business at the time.

The question arose: Does this conviction of itself operate to deprive the said J. B. Daily of the right to operate an automobile in this State for a period of one year, while engaged in the discharge of his official duties above referred to.

The State in the exercise of its police power may enact reasonable regulations concerning the use of its highways. These regulations are valid and operative against Federal employees whenever:

(1) They are not inconsistent with Federal regulations on the subject, *e. g.*, speeding, where a mail schedule did not require such speeding, *Hall v. Commonwealth*, 129 Va. 751, 105 S. E. 551, and

(2) They affect Federal instrumentalities and service only in an incidental manner, *e. g.*, requiring vehicles to keep to the right, *Commonwealth v. Clossen*, 229 Mass. 329, 118 N. E. 653.

On the other hand, if such regulations prohibit, interfere with or place an unreasonable burden on Federal instrumentalities or service, they are to such extent invalid and inoperative. The leading authority on this question, insofar as it pertains to the operation of vehicles by Federal employees, is *Johnson v. State of Maryland*, 254 U. S. 51, 41 S. Ct. 16, in which the driver of a mail truck was operating the same without a state driver's license. The court, in holding the state statute inoperative, said:

" * * * Such a requirement does not merely touch the Government servants remotely by a general rule of a conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed." (41 S. Ct. 17.)

It seems clear that the right of a Federal employee to operate a Government car over State highways on official business is derived from the United States, and not from the State. This being true the State is without power to prohibit the exercise of said right.

The Johnson case has been cited in scores of cases involving such problems as the power of the State to tax Federal instrumentalities, to prohibit the erection of a dam, to mandamus a census official, to convict a Federal Marshal of murder, and others of a similar nature in which it was held that the State was without power to thus interfere with the particular Federal service.

It must be borne in mind also that the country is at war. Under such circumstances certain relatively insignificant peacetime activities of the Federal Government take on a new meaning, and Federal services related directly to the prosecution of the war effort become imperative. In *State v. Burton*, 41 R. I. 303, 103 Atl. 962, a case involving the power of the state to prosecute a member of the United States Naval Reserve for speeding, the court said:

" * * * Are the rules established by the General Assembly regulating the use of the highways of the state subordinate to the exigencies of military operations by the federal government in time of war? In our opinion they are. Under the Constitution of the United States, the conduct of the war now existing between this country and Germany vests wholly in the federal government. Any state law, the operation of which will hinder that government in carrying out such constitutional power, is, during the exercise of the power, suspended as regards the national government and its officers, who are charged with the duty of prosecuting the war. The principle is well established that in respect to the powers and duties exclusively conferred and imposed upon the federal government by the Constitution of the United States the several states have subordinated their sovereignty to that of the nation. * * * (103 Atl. 963.)

The purchase of canned foodstuffs by the Federal Government during the time of war is obviously a major consideration in the matter of supplying its armed forces with food. The defendant, J. B. Daily, is engaged in this essential work in the capacity of Senior Procurement Specialist, not as an independent contractor (see *Blackwood v. Welch*, 18 S. W. (2d) 1023), but as an employee and instrumentality of the Federal Government. In light of the foregoing, it is my opinion that the portion of section 4722-a of the Code which purports to automatically exclude the defendant from using the State highways is inoperative insofar as it applies to his driving an automobile while in the discharge of said Federal duties. To hold otherwise would be not only to interfere with but to totally prohibit the government from utilizing him as its agency for carrying on this important war service.

The conviction for driving while drunk is, of course, valid and the defendant is thereby automatically barred from the use of the State highways for personal or pleasure driving for a period of one year—but, as indicated above, he is not barred from their use while in the *bona fide* discharge of said Federal duties.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Authority to Make Arrests.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 23, 1942.

MR. J. C. ADKERSON,
*Justice of the Peace,
Dry Fork, Virginia.*

DEAR MR. ADKERSON:

This will acknowledge receipt of your recent letter, which I quote as follows:

"I am a justice of the peace. Please advise me whether or not I have the authority to arrest a person charged with a misdemeanor or a felony. If I do, do I have the authority to issue the warrant and make the arrest on the warrant that I have issued?"

Generally speaking, a justice of the peace is not an arrest officer. However, in my opinion, he unquestionably would have the authority to arrest for a misdemeanor committed in his presence or for a felony. I have never heard of a justice of the peace issuing a warrant directing himself to make an arrest. In my opinion, such a warrant should not be issued, but it should be directed to an officer whose duty it is to make arrests.

For your information I will also state that even where a justice of the peace makes an arrest for a misdemeanor committed in his presence, or for a felony, I am of opinion that he is entitled to no fee therefor, as I know of no statute providing for a fee to a justice of the peace for making an arrest.

In connection with arrest fees and for your information, I enclose copy of a letter which I wrote to Governor Darden under date of November 1, 1942, in which I expressed the opinion that no officer is allowed to accept a fee for the arrest of anyone charged with violating the motor vehicle laws of this State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Must Give Bond in Order to Receive Cash Deposits on Recognizances.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 25, 1942.

MAJOR C. W. WOODSON, JR.,
*Superintendent Virginia State Police,
Richmond, Virginia.*

DEAR MAJOR WOODSON:

With reference to a telephone communication from your office concerning the right of justices of the peace to accept cash deposits in lieu of recognizances with surety in criminal cases, the statute (Chapter 335, Acts of 1940, pages

557, 558) is in part as follows:

" * * * provided, however, that no justice of the peace shall receive any such cash deposit unless and until he shall have given bond before the clerk of the circuit court of his county in the penalty of \$500, with approved security, and conditioned for the faithful performance of his duties and the proper accounting of all money that may come into his hands."

This office has heretofore ruled that all justices of the peace must give this bond and thus prepare themselves to accept cash deposits when the accused so elects. No cash deposit can be legally received by them unless they have first qualified as provided above.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JUSTICES OF THE PEACE—Bail and Recognizance to Appear in Another County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 8, 1942

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

DEAR MR. DOWNS:

This office is in receipt of your letter of October 6, a portion of which I shall quote:

" * * * In connection with an audit I am making the question has arisen as to whether or not a justice of the peace in Henrico County may accept a cash bond for appearance of a person in another county. Both the Commonwealth's attorney and the trial justice were undecided on this point and they suggested that I request your views."

Section 4828 of the Code of 1919, as amended by chapter 394 of the Acts of 1942, deals with bail by justices of the peace, and contemplates that justices of the peace may admit to bail persons charged with misdemeanors and to be tried before the trial justice of the county wherein the justice of the peace resides and persons accused of felonies, where authorized to do so by the trial justice or judge of a court of record.

Section 4837 of the Code deals with bail for persons arrested out of the county in which the offense was committed. It is to this effect:

"A person charged with a misdemeanor, and to be carried to another county or corporation, shall, if he request it in the county or corporation wherein he is arrested, be brought before a court, judge, or justice thereof. In such case, if he desire it, such court, judge, or justice before whom he is brought, may, without trial or examination, let him to bail, upon taking a recognizance for his appearance before the court or justice having cognizance of the case; * * *."

In my opinion, the above statute is the only instance in which a justice of the peace may bail an accused person to appear in another county from that in which the justice resides.

Chapter 335 of the Acts of 1940, dealing with cash deposits in lieu of recognizances with surety in criminal cases, provides:

"When a person charged with a criminal offense is admitted to bail by a court or an officer authorized by law so to do, for his appearance before a court or justice having jurisdiction of the case, for a hearing thereon, he may, instead of entering into a recognizance with surety, give his personal recognizance and deposit, or cause to be deposited for him, in cash, the amount of bail he is required to furnish, with such court or officer, who shall give him an official receipt therefor."

I am, therefore, of the opinion that the only instance in which a justice of the peace of Henrico County may accept a cash deposit in lieu of a recognizance with surety for the appearance of a person in another county is where such person is arrested in Henrico County for a misdemeanor and is to be carried for trial back to the county or corporation wherein the offense was committed.

In reaching the above conclusion, I presume that the justice of the peace in the instant case has given the bond required by the 1940 Act above cited and has thus qualified himself to accept cash deposits in lieu of recognizances with surety.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Jurisdiction of Court Over Custody of Minors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 21, 1943.*

HONORABLE CHARLES W. DAVIS,
*Trial Justice Southampton County,
Courtland, Virginia.*

DEAR MR. DAVIS:

This is in reply to your letter of April 20, 1943, from which I quote as follows:

"I will appreciate it if you will advise me if there is any provision of the Statutory Laws under which a Juvenile and Domestic Relations Court as now established in the counties can take jurisdiction over the matter of the simple question of the custody of minors, as distinguished from delinquent, dependent or destitute children."

The jurisdiction of Juvenile and Domestic Relations Court over children is set forth in Chapter 78 of the Code of Virginia, and is limited to

"delinquent, dependent, and neglected children" as defined in section 1906 of the Code. This section is broad in its scope, but if the particular case does not fall within the purview of the statute, I know of no authority whereby the judge of such Juvenile and Domestic Relations Court can exercise jurisdiction to determine the custody of such children.

The father and mother, if living together, are, by virtue of section 5320 of the Code, "the joint natural guardians" of the child and as such may provide for the maintenance of such child in any lawful manner. If the parents separate, but are not divorced, the primary duty of support and maintenance rest upon the father, and he acquires the primary right to the custody of his children. Pursuant to section 5327 of the Code, the mother may, by petition to the Circuit Court, have the custody of such children awarded to her, if such change in custody will best promote the welfare of such children.

From the foregoing, it is my opinion, therefore, that the judge of the Juvenile and Domestic Relations Court has no jurisdiction in such cases.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LICENSES—Auto Trailer Camps.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 2, 1943.*

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

MY DEAR MR. BROWN:

I am in receipt of your letter of January 28, in which you refer to Chapters 256 and 443 of the Acts of 1942, authorizing the imposition by certain counties of a license tax on trailer camps and trailer parks. You desire my opinion as to whether or not under either of these Acts a county may, in addition to imposing a license tax on the camp or park, impose a license tax on each trailer owner.

It is plain, in my opinion, that each of the two Acts merely authorizes the imposition of a county license on trailer camps and trailer parks, and does not authorize the imposition of a county license upon the owner of the trailer, nor do I know of any statute authorizing the county to impose a license tax on the owners of trailers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LICENSES—Junk Dealer Cannot Deal in Second-hand Paper Without Second-hand Paper Dealer's License.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 18, 1942.

MR. L. C. WOMACK,
*Commissioner of the Revenue,
Chatham, Virginia.*

DEAR MR. WOMACK:

I am in receipt of your letter of August 12, in which you ask if a person with a junk dealer's license secured under section 182 of the Tax Code can deal in second-hand paper without the license required therefor by section 182-a of the Tax Code.

In my opinion, if a person desires to carry on the business of a dealer in second-hand paper as defined in section 182-a of the Tax Code, he must secure the license provided for by that section, it being immaterial whether or not he has already secured a license as a junk dealer. You will observe from section 182 that a junk dealer may deal in various second-hand articles "except paper."

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Applications for Marriage License; Acknowledgments.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 4, 1943.

HONORABLE LEAMAN LEDMAN,
*Clerk Circuit Court of Prince William County,
Manassas, Virginia.*

MY DEAR MR. LEDMAN:

This will acknowledge receipt of your letter of December 30, from which I quote as follows:

"I am herewith enclosing an application for a marriage license, asking whether it is possible for the clerk to send it out of his office to be filled in by the applicants and be signed and sworn to before a notary public or other officer and returned to his office and the marriage license issued on the affidavit of such notary public or other officer.

"Or could the application be sent out of the clerk's office and one of the applicants sign the affidavit before a notary public, or other officer, and return that affidavit to the clerk's office by the other applicant and that applicant sign his (or her) affidavit before the clerk and a license be issued by the clerk in his office on the two affidavits."

In my opinion, unless the clerk desires to satisfy himself as to some particular fact in an application for a marriage license, either one of the pro-

cedures mentioned by you is permissible. Section 5074 of the Code does not require the actual presence before the clerk of the applicants for a marriage license. The reason I say unless the clerk desires to satisfy himself as to some particular fact is that there may be a fact stated in the application which is contrary to the clerk's own knowledge or, for example, the clerk might want to ascertain for obvious reasons the date of a divorce decree, or he might not be satisfied as to the age or residence of either one or both of the parties. However, in the normal case I see no reason why the clerk may not follow the procedure outlined by you.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Issuance of License Where Female is Non-Resident.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 2, 1943.*

HONORABLE CHARLES L. HUTCHINS,
*Clerk Circuit Court of the City of Suffolk,
Suffolk, Virginia.*

DEAR MR. HUTCHINS:

This will acknowledge receipt of your letter of January 27, asking whether or not you may issue a marriage license to a couple when the female is a non-resident of Virginia and comes into the State to marry someone who is temporarily stationed here in military or naval service.

Section 5072 of the Code provides:

*"Every license for a marriage shall be issued by the clerk of the circuit court of the county, or of the corporation court of the city in which the female to be married usually resides, or his deputy; and in case she is not a resident of the State, then by the clerk of the circuit court of the county or of the corporation court of the city in which the marriage is to be solemnized, or his deputy; * * * ."* (Italics supplied.)

Therefore, it naturally follows that you may issue a marriage license under the circumstances above described only when the couple plan to have the ceremony solemnized within the City of Suffolk.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—When Consent of Commissioner of Public Welfare Necessary Where One Party is Under Board's Custody.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 9, 1942.

DR. WILLIAM H. STAUFFER,
*Commissioner of Public Welfare,
Richmond, Virginia.*

MY DEAR DR. STAUFFER:

This will acknowledge receipt of your letter of November 28, from which I quote as follows:

"Your opinion is respectfully requested on a construction of the provisions of sections 5078 and 5090 of the Code of Virginia (Michie) as to the authority of the Commissioner of Public Welfare to consent to the marriage of a juvenile girl delinquent under sixteen (16) years of age, who has been committed to the State Board of Public Welfare, and who is not now pregnant."

You further advise me that the other party to the proposed marriage is a man now under indictment in the Circuit Court of Shenandoah County on a charge of statutory rape, the girl in question being the prosecutrix.

Section 5078 of the Code requires that the consent of the parent or guardian be given for the marriage of any person under twenty-one years of age, and further requires that, if a minor shall have been committed to the State Board of Public Welfare as a delinquent, dependent, or neglected child, the consent to marriage of said minor shall be given by the Commissioner of Public Welfare or by some person authorized by him so to do.

Section 5090 of the Code prescribes the minimum age at which minors may marry with the consent of the parent or guardian, or in appropriate cases by the Commissioner of Public Welfare, the age in cases of males being eighteen years and in cases of females being sixteen years. The section also provides how consent may be given for the marriage of a female under sixteen years of age who is pregnant. The section then includes this provision:

"Nothing herein contained shall be construed to prevent clerks from issuing a marriage license under circumstances mentioned in section forty-four hundred and fourteen of the Code of Virginia, or to prevent persons under circumstances mentioned therein from marrying."

Section 4414 of the Code deals with rape, but is pertinent here only insofar as it deals with statutory rape. The section provides that, if the female is between the ages of fourteen and sixteen years, subsequent marriage with the accused may be pleaded to an indictment found against such accused. The section goes on to provide what the court shall do upon proof of such marriage.

The quoted provision from section 5090 of the Code does not say that clerks may issue a marriage license under circumstances mentioned in section 4414 of the Code without consent of the appropriate person or official required by section 5078 of the Code. Construing sections 5090 and 4414 together, it is my view that the real intent of the quoted provision of section 5090 was to authorize clerks to issue a marriage license to a female under the minimum age at which she may otherwise marry where the circumstances set out in section 4414 are present. In other words, the last para-

graph of section 5090 simply does away with the minimum age requirement under the prescribed circumstances, but does not do away with the consent of the appropriate person or official as prescribed in section 5078.

My conclusion is that, the female in question having been committed to the Department of Public Welfare, the consent of the Commissioner of Public Welfare, or of someone designated by him for the purpose, is necessary before she may marry.

The question is not free from doubt, but I am convinced that the view I am expressing herein is the better one. Certainly there is no express provision of statute which permits this girl to be married without the consent of the person authorized to give such consent, and I do not think this construction should be read into the last paragraph of section 5090 by implication.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—License for Re-Marriage.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 5, 1943.*

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

DEAR MR. WHALEN:

This will acknowledge receipt of your letter of December 28, a portion of which I shall quote:

“ * * * I request your opinion as to whether or not we may issue a license for the marriage of persons who have gone through a ceremony which they may regard as of doubtful validity and who desire to marry again under a new license.”

It is my opinion that under such circumstances you may issue a new license. It is true that section 5074 of the Code requires the applicants to state, under oath, their “condition before marriage (whether single, widowed or divorced),” and further provides that a false statement of such fact would constitute a material matter necessary to support a prosecution for perjury. However, it is my opinion that the reason for indicating the prior status of the parties is to prevent bigamous cohabitation. Here, if the parties were married before and it was to each other, there would be no person to complain of any violation of marital rights. The present and prior spouse would be the same person.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Ceremony by Telephone Invalid.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *November 17, 1942.*

CHAPLAIN 1ST LIEUT. J. A. HOWARD, AUS,
Camp McQuaide, California.

DEAR SIR:

Your letter of November 11 addressed to the Governor of Virginia, concerning the legality of telephone marriages in Virginia, has been referred to me. I shall not attempt to restate the facts of the instant case as detailed in your letter.

At common law one of the essentials of a valid marriage was that the parties must be in the presence of each other. Cf. 18 R. C. L., pp. 391-2. The common law of England has been adopted in Virginia except so far as it is inconsistent with our Constitution or legislative enactments. Sec. 2, Va. Code of 1919. The Legislature of Virginia has seen fit to change the common law of marriage in certain particulars such as the requirement of a license, the necessity of a ceremony, etc., but has not, to my knowledge, seen fit to change the requirement of physical presence of the parties.

It is, therefore, my opinion that a marriage performed when one party is at a distant point from the place of ceremony and consents by telephone would not be a valid marriage in Virginia.

The situation described in your letter is quite distressing, but I do not see how it can be alleviated by Virginia law. In my opinion only an Act of the Legislature could remedy the situation, and the Virginia Legislature does not convene again in regular session until January, 1944.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Service of Summons in Divorce Suits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 26, 1943.*

MR. E. J. RITCHIE,
*Deputy Sheriff of Elizabeth City County,
Hampton, Virginia.*

DEAR MR. RITCHIE:

In your letter of March 24, which has been received, you ask:

"Is personal service *required* in the service of a summons in chancery in divorce matters?"

Code sections 5106 and 6042 require that summonses in divorce cases shall be served by officers duly qualified to serve the same. A summons

may not be served by any other person, but the method of service is not different in divorce cases from that in any other case, so that the service may be in any one of the methods prescribed by section 6041 of the Code.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MERIT SYSTEM—Not Applicable to Employees of State Corporation Commission.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 11, 1943.

HONORABLE COLGATE W. DARDEN, JR.,
*Governor of Virginia,
Richmond, Virginia.*

DEAR GOVERNOR DARDEN:

This is in reply to your request for my opinion upon the question whether the employees of the State Corporation Commission are exempted or excepted from the provisions of the Virginia Personnel Act (Chapter 370 of the Acts of 1942), or whether such employees are within the scope of said Act and the Rules for its Administration promulgated as therein provided.

Section 6 of the Personnel Act contains this language: "The provisions of this Act shall not apply to: (1) Officers and employees for whom the Constitution specifically directs the manner of selection." The inquiry, therefore, arises as to whether the Constitution specifically directs the manner of selection of the employees of the State Corporation Commission. Turning then to the Constitution we find this language in section 155: "The commission * * * shall have one clerk, and such other clerks, officers, assistants and subordinates as may be provided by law, *all of whom shall be appointed* * * * by the commission." It seems clear to me that this constitutes a positive direction of the manner in which the employees of the Commission shall be selected; i. e., by appointment by the Commission. This being true it follows that I am of opinion that the Virginia Personnel Act does not apply to the Clerk and other employees of the State Corporation Commission.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—No Arrest Fee Nor Mileage Allowed to Sheriffs Making Arrests Without Warrant.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 16, 1942.

MR. W. N. WILLIAMS, JR.,
*Sheriff of Rockbridge County,
Lexington, Virginia.*

DEAR MR. WILLIAMS:

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

"Does a county sheriff or a deputy sheriff whose only compensation is from fees in criminal cases have the right to charge an arrest fee and mileage from the point within the county where the arrest is made to the trial justice court for violations of speeding on the highway?"

I quote below for your information section 8 of the Motor Vehicle Code of Virginia as amended by the last General Assembly (Acts 1942, page 207):

"Every county, city, town or other political subdivision 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 arrest or conviction of an offender against any provision of this act or of the motor vehicle laws of the State of Virginia."

You will observe that no officer making an arrest incident to the enforcement of the motor vehicle laws of the State shall accept the benefit of any fine or fee resulting from the arrest or conviction of an offender against such laws. It is, therefore, my opinion that neither a sheriff nor a deputy sheriff may receive the arrest fee mentioned by you.

As to mileage, I presume that arrests such as you describe are made without a warrant. In such case, I am of opinion that the sheriff or deputy is not entitled to the mileage mentioned by you. Section 3508, providing for mileage for carrying a prisoner to jail, only covers the case where the prisoner is carried under an "order of a justice," and there being no warrant, the mileage cannot be allowed. If the arrest is made under a warrant of a justice, then I am of opinion that the mileage is allowable as in other criminal cases.

The views I am expressing may seem to work a hardship in the case of fee officers, but it seems to have been contemplated by the General Assembly that officers shall be paid fixed salaries for enforcing the motor vehicle laws of the State in lieu of fees, and where a particular political subdivision of the State does not pay the salary to the sheriff or his deputy for enforcing such laws, there does not seem to be any other way of compensating such an officer.

In case the arrest mentioned by you took place prior to June 27, 1942 (the effective date of the 1942 Acts), I am enclosing for your information a copy of a letter written by me some time ago dealing with section 8 of the Motor Vehicle Code as it formerly read.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Taxing of Arrest Fee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 28, 1942.

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

MY DEAR MR. HOGG:

This will acknowledge receipt of your letter of November 19, from which I quote as follows:

"Chapter 164, Acts 1942, page 207, amends section 8 of the Motor Vehicle Code so that the arresting officer is not entitled to any fee for the arrest of an offender against any provision of the motor vehicle laws of the State of Virginia. There is no provision in the Act for the assessment of officers' fees; and now that this Act has been brought to my attention I would like to have your opinion as to whether I should assess officers' fees for arresting officers and if so what disposition I should make of such fees?"

As to sheriffs, sergeants, and their deputies, I am of opinion that up to January 1, 1943, this fee should not be taxed, since these officers for whose benefit the fees would otherwise be taxed cannot accept such fees. After January 1, 1943, I am of opinion, this arrest fee should be taxed as a part of the costs and when collected disposed of as provided in section 1, subsection (b) of chapter 386 of the Acts of 1942.

In the case of arrests made by State motor vehicle officers, I am of the opinion that the arrest fee should not be taxed at all. See Opinions of the Attorney General, 1938-39, at page 49. I enclose a copy of the opinion to which I refer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Civilian War Workers Not Immune from Revocation of Driving Permit for Driving While Drunk.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 23, 1943.

HONORABLE W. L. CARLETON,
*Attorney for the Commonwealth,
Newport News, Virginia.*

MY DEAR MR. CARLETON:

This will acknowledge receipt of your letter of April 21, from which I quote as follows:

"During the past few months there have been several convictions and charges of driving while drunk against drivers and workers engaged in very essential war work, including the Newport News Shipbuilding and Dry Dock Company. Such convictions, of course, carry with it revocation of his driving permit, which has prevented the driver and his passengers in some cases from going to work. In several instances it has necessitated giving up their jobs and leaving the State. As you know, workers in war industries are rather scarce and they are desirous of holding on to as many good men as possible; therefore, I am writing to inquire from you whether or not any exceptions have heretofore been made under the circumstances or whether you think it will be possible for exceptions to be made to permit such person to operate his vehicle in a limited way, viz; to issue a temporary permit for him to drive to and from work-only."

As you state, the "driving while drunk" statute (section 4722-a of Michie's Code of 1942) provides that the judgment of conviction for this offense "shall of itself" deprive the person convicted of the right to operate an automobile in this State for a period of one year. The statute is mandatory and the person that you describe being a civilian not employed by the United States or engaged in the business of that government, I know of no authority for making an exception nor to grant a limited license. I realize, as you state, that there may be cases which will result in unusual hardship, but I am able to point you to no authority for ignoring the mandatory provisions of this statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Farm Laborers Occasionally Operating Truck for Employer Not Chauffeurs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, September 28, 1942.

HONORABLE W. FRANCIS BINFORD,
*Trial Justice, Prince George County,
Prince George, Virginia.*

MY DEAR MR. BINFORD:

This will acknowledge receipt of your letter of September 22, with refer-

ence to the definition of a chauffeur as contained in Chapter 385 of the Acts of 1932 in its application to a farm hand who may occasionally operate a truck for his farmer employer.

I quote below from the statement received from the Division of Motor Vehicles with reference to the administrative practice of the Division in such cases:

"We have never considered that persons owning and operating their own trucks and hauling their own produce are classed as chauffeurs as defined under section 1(a), Chapter 385, Acts of 1932, as amended. They are not employed for the principal purpose of operating a motor vehicle nor are they driving a vehicle while in use as a public or common carrier of persons or property. Further, we have always felt that it was rather doubtful if a person employed primarily as a farm hand or in any other capacity who occasionally operates a truck for his employer as an incidental part of his duties is required to have a chauffeur's license, and that has been the basis of our administrative practice in regard to issuance of chauffeur's licenses."

In my opinion, the practice of the Motor Vehicle Division is in line with the real meaning of the statutory definition of a chauffeur. Manifestly the facts in each case would have to be considered to determine whether or not the employee of the farmer was driving the truck as a mere incident to his primary duties as a farm hand or whether the driving of the truck was the principal purpose of the employment.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

**MOTOR VEHICLE CODE—Certain Provisions Not Applicable to U. S.
Government Vehicles During Wartime.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 11, 1942.

JUDGE W. E. EDWARDS,
*Trial Justice of Frederick County,
Winchester, Virginia.*

MY DEAR JUDGE EDWARDS:

This is in reply to your letter of July 6, with reference to the enforcement of penalties for violation of weight and load limits by trucks engaged in interstate commerce over the Virginia highways.

You do not go into any detail as to which particular provisions of the weight and size regulations have been violated. I am enclosing herewith a copy of a proclamation issued by the Governor of Virginia under date of May 29, 1942, which, in my opinion, supersedes any State statutes in conflict therewith. You will notice that the weight and size limits permitted by the proclamation are in some instances more liberal than the statutory requirements.

You also inquire whether or not a load limit or size permitted by O. D. T. No. 5, issued by the Director of Transportation, which are in excess of

the prescribed Virginia limit should be deemed to be a violation of the State laws.

In my opinion, while the Federal Government is engaged in the exercise of the war power conferred on it by the Constitution of the United States, any State laws which obstruct the proper exercise of that power are not enforceable and should be deemed to be suspended by the exercise of the paramount power of the National Government. Unquestionably, the transportation, both of war material and material necessary for the welfare of the general population, must be considered as vitally connected with the war activities and as being embraced within the regulatory power of the Federal Government.

The Director of Defense Transportation has been appointed and is exercising his power pursuant to authority of Congress, and, in my opinion, regulations issued by him prescribing the sizes and weights of vehicles, as well as the loads carried by them to the extent that said regulations conflict with any Virginia State laws, must be deemed to supersede the State laws to the extent of such inconsistency.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—U. S. Naval Vehicles Not Subject to State Inspection.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 18, 1942.*

HONORABLE HERMAN WHITE,
Trial Justice,
South Norfolk, Virginia.

DEAR MR. WHITE:

This is in reply to your letter of September eleventh, requesting my opinion upon whether Section 109 of the Motor Vehicle Code of Virginia (Michie's Code of Virginia, Section 2154 (156)) requires a truck owned by the United States Navy to be submitted to an inspection before being operated over the highways of the State.

While the statute does not in express terms exempt vehicles owned by the Federal Government, it is my opinion that such vehicles are not subject to its provisions. In the performance of functions delegated to it, the Federal Government is supreme and is not subject to regulation by the states.

I call your attention to the case of *Johnson v. State of Maryland*, 254 U. S. 51, in which the court held that the State cannot require the driver of a government motor truck carrying the mails to procure a license after satisfying its officials of his competence and paying a fee therefor, since the requirement of a license is an attempt to regulate the doing of the act he was employed by the government to do, which is beyond the power of the state.

In his opinion Mr. Justice Holmes stated:

" * * * Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in

their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. * * *."

The same reasoning is quite applicable to the case you put and for this reason it is my opinion that an employee of the United States charged with the operation of a truck owned by the United States Navy is not subject to prosecution if he operates such truck on the highways of this State without having the same inspected under the State law.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Licenses and Inspection Tags on Agricultural Equipment.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 9, 1942.

HONORABLE J. SLOAN KUYKENDALL,
*Attorney for the Commonwealth,
Winchester, Virginia.*

DEAR MR. KUYKENDALL:

I have your letter of July 7, in which you ask my opinion as to construction of certain provisions of chapter 315 of Acts of General Assembly of 1942.

Your first question propounded is whether the provision that a registration certificate and license plate shall not be required for a truck upon which a machine is attached for spraying fruit trees and plants where it is moved along a highway for a distance of more than one mile, and whether this limitation which applies to other motor vehicles, trailers and semi-trailers is likewise applicable to said spraying truck.

It seems clear to me that the one mile limitation does not apply to the spraying truck because, if the Legislature had so intended, it would not have referred specifically to such type of truck, since same would have been included within the general language contained in the Act "any motor vehicle, trailer or semi-trailer * * * which is used exclusively for agricultural or horticultural purposes, etc." The additional designation of the particular type of spraying truck in connection with the general context of the language used leads me to the opinion that the one mile limitation does not apply to that vehicle.

Your second inquiry is as to whether or not the vehicles exempted by the provisions of section 1 of said Act are required to be inspected and carry an inspection tag before being operated in the limited manner therein provided on the State highways.

In my opinion, the general inspection provisions of our laws do not apply to vehicles using the highways intermittently, and which are not required to have license plates. I am informed that the Division of Motor Vehicles, in its periodic inspections as to mechanism and equipment, does

not include vehicles not registered and licensed. In my opinion, this practice of the Division of Motor Vehicles is in conformity with our statutory provisions.

You next inquire as to the degree of repair that would be required of the owners of this class of vehicles in the event that periodic inspections are not made by the Division of Motor Vehicles.

It is hard to give a categorical answer to this question. If inspections are not made by the Division of Motor Vehicles, only self-interest in preventing accidents and avoiding liability will prompt the owners to keep vehicles in proper repair. No responsible owner would care to incur the risk of operating a vehicle in poor repair or improperly equipped.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**MOTOR VEHICLE CODE—Weighing Fees Transmitted Directly from
Trial Justice to State Treasurer.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 12, 1942.*

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of August 10, in which you state:

"Recently we received a check in the amount of \$160.00 from the trial justice of Prince William County covering weighing fees collected under section 116 of the Motor Vehicle Code of Virginia, Acts of Assembly of 1942, page 692. We returned this check to him with the request that he pay the money to the clerk of the circuit court of his county for transmission to the State treasurer in accordance with the procedure now in effect for handling all other funds collected by the courts and paid into the State treasury.

* * * * *

"For a long time the statutes have required that all moneys payable by the courts into the State treasury be handled by the clerk of the court. This procedure has simplified the handling of these funds and has made it unnecessary for the Comptroller to open up a large number of accounts in the names of the several local officers who collect moneys and transmit them to the clerk for payment into the State treasury.

"Since section 116, as amended by the Acts of Assembly of 1942, does not prescribe the manner or the procedure for paying the money into the State treasury, it would appear to us, and we hope you will so find, that the weighing fees collected by the trial justice court can be handled in the same manner as are all funds now collected for the Commonwealth and handled by the clerk of the court."

I quite agree with you that as a practical matter it will be much better for these fees to go through the clerk, as is the case with most other fees belonging to the State. However, the section in question provides for the court to collect these weighing fees and then says that it "shall forward all such fees to the State treasurer." In view of the use of the word "forward," I see no escape from the conclusion that the quoted language means that the court collecting the fees shall send them directly to the State treasurer without their passing through the hands of the clerk.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Rendering Reports on Sale of Motor Fuel.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 11, 1943.*

HONORABLE C. F. JOYNER, JR.,
*Commissioner, Division of Motor Vehicles,
Richmond, Virginia.*

MY DEAR MR. JOYNER:

This will acknowledge receipt of your letter of February 1, in which you call my attention to the provisions of the Motor Fuel Tax Act (sections 2154 (213) and 2154 (217) of Michie's Code of 1942) requiring certain reports of dealers in motor fuel in connection with the payment of the motor fuel tax "on or before the twentieth day of each calendar month" and imposing certain penalties for failure to render such reports and pay the tax "on or before the twentieth day of each calendar month." You then ask the following questions:

"(1) Whether when the 20th of the month comes on Sunday or a holiday, the return of a report and payment of the tax on the following day is in time to escape the imposition of the penalty.

"(2) Whether the penalty should be imposed if the report is made out, notarized and mailed with accompanying remittance such a length of time before the 20th of a month that it would in the ordinary course of the delivery of mail reach this office on or before the 20th of the month on which the report and payment were due."

In my opinion, in answer to your first question, you would be justified in following the principle established by the rule of construction contained in section 5, subsection 9, of the Code. This would mean that, where the twentieth day of the month falls on a Sunday or a legal holiday, the report and the payment of the tax may be accepted by you without the imposition of a penalty on the day following. My information is that this practice is well recognized and followed generally with respect to the payment of other State taxes.

In response to your second question, it might be argued that, literally construing the pertinent statutory provisions, if the report and payment of the tax reached the Division after the twentieth of the month, no matter when placed in the mails, the penalty should be assessed. However, the use of the word "rendered" in section 2154(213) somewhat weakens this argument. Furthermore, my information is that in the payment of other State taxes and

the filing of State tax returns the well recognized practice has been generally adopted of accepting such taxes and returns without the imposition of penalties prescribed for dilatory payment or filing where the envelope containing the payment or return indicates that it was mailed on or before the last day fixed for such payment or filing. This is likewise the practice in this State in the case of Federal income tax returns and payment of the tax. In consideration of the above, I am of opinion that you would be justified in accepting the report and payment of motor fuel tax, without penalty, if the envelope in which such report and payment are enclosed bears a post-mark showing that it was mailed on or before the twentieth day of the month in which such report and payment should be made.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—State Trooper Not Required to Pay Premium on Insurance Bond.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 26, 1942.

HONORABLE H. G. GILMER,
*State Comptroller,
Finance Building,
Richmond, Virginia.*

MY DEAR MR. GILMER:

This is in reply to your letter of August 25, in which you request my opinion upon the question whether or not, under the facts and circumstances set forth in a memorandum thereto attached signed by C. F. Joyner, Commissioner of the Division of Motor Vehicles, a letter signed by C. W. Woodson, Superintendent of the Department of State Police, a memorandum signed by Edwin H. Gibson, together with a letter addressed to Superintendent Woodson by Corporal J. B. Fugate, the said J. B. Fugate, who is a corporal in the Department of State Police, is entitled to be repaid certain premiums for liability insurance as a State Trooper, which insurance was furnished pursuant to the provisions of chapter 302, page 473, of the Acts of 1940.

It appears from said attached papers that the bond required by said Act was duly executed and the premium thereon paid by the Division of Motor Vehicles, and that, in addition thereto, Mr. Fugate was required to furnish a liability insurance policy covering the discharge of his duties as a State Trooper, and was required to pay the premium thereon. It further appears from the said papers which you enclose with your letter, and which I herewith return, that Mr. Fugate was not allowed to exercise any choice in the matter at all, but was required by the former Commissioner of Motor Vehicles to provide said liability insurance and pay the premium thereon.

The Act above referred to confers upon any officer the privilege of furnishing an adequate liability insurance policy, conditioned as therein set forth, in lieu of the required bond. The Act also provides that the premiums on any such bonds or any such policies shall be paid out of the funds appropriated for the enforcement of the laws concerning motor vehicles.

In view of these statutory provisions and the facts above set forth, it

is my opinion that the officer is entitled to have refunded to him the insurance premiums which he was required to pay.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Transfer of Automobile to State Agency.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 14, 1942.

MR. S. F. GRUBBS,
*Secretary Virginia Crop Improvement Association, Inc.,
Blacksburg, Virginia.*

MY DEAR MR. GRUBBS:

This will acknowledge receipt of your letter of July 13, from which I quote as follows:

"At a meeting of the board of directors of the Virginia Crop Improvement Association held at Blacksburg, July 6, at 2:00 P. M., they voted to turn two 1941 Plymouth 2-door sedans owned by the Crop Improvement Association over to the State Certified Seed Commission, either outright or for a nominal sum not to exceed \$1. The language of the minutes of the meeting is as follows: 'Mr. T. T. Curtis offered a motion that the automobiles of the Virginia Crop Improvement Association be turned over to the State Certified Seed Commission, subject to the approval of the Attorney General, on such terms as might be stipulated by the Attorney General. If a cash consideration was required the purchase price of the automobiles was not to exceed \$1, if permissible. Mr. J. D. Gibson offered a second to the motion and it carried with no dissenting vote.'

"The directors of the Virginia Crop Improvement Association instructed me as secretary of the Association to effect the transfer of titles on these two cars from the Association to the State Certified Seed Commission, after having ascertained if it could be legally done. Naturally I would not want to take this step without being advised as to its legality by you.

"If the cars may be disposed of by the directors of the Association, either as a gift or for a nominal sum, would the motion I have quoted give me authority to make the transfer?

"I would also like to know, if the cars are transferred from the Virginia Crop Improvement Association to the State Certified Seed Commission, whether or not they would be eligible for public use licenses."

Assuming that the board of directors of the Virginia Crop Improvement Association has authority to dispose of the automobiles mentioned by you, I am of opinion that the resolution from which you quote is sufficient to authorize you in behalf of the Association to transfer such automobiles to the State Certified Seed Commission. The State Seed Commission as created by the last General Assembly (Acts 1942, p. 313) being clearly a State agency, in my opinion the automobiles owned by the Commission may be

licensed as "public use" automobiles pursuant to section 2154(60) of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NAMES—Change in Name.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 4, 1943.

DR. W. A. PLECKER,
*State Registrar,
Bureau of Vital Statistics,
Richmond, Virginia.*

DEAR DR. PLECKER:

I am in receipt of your letter of March 2, in which you state:

"Many men with Polish, Russian and other foreign names are having their own names changed by order of the court. In some instances the names of their children are mentioned but not always. This omission may be due to an oversight. We desire to know whether, when the father's surname is changed by order of the court, the wife's and children's names are also automatically changed. * * * ."

At common law a person was at liberty to change his name whenever he saw fit, and there was no restriction except when such change was being made with a fraudulent purpose. Persons may change their names in Virginia in the same way, but we have a statute which permits the making of an application to a court to change a name and the court may enter such an order if it deems it proper to do so. This is Code section 5983.

The matter of choosing a name, as well as that of the adoption of the husband's name by the wife and of the children taking the family name of the husband, is altogether a matter of custom. When a divorce is granted the court may enter an order permitting the wife to resume her maiden name, but she might do so without having any such order entered.

For all practical and legal purposes, a man's name is the designation by which he is known and called in the community in which he lives and is best known, hence the wife and any infant children who are associated with the household, no doubt, will come to be known in the community by the new name taken by the father, and by custom their names will change.

All doubts in the matter may be clarified, however, by the father proceeding under Code section 5983 to have the names of his wife and infant children changed. As stated to you on the phone, I think it would be appropriate and proper to attach a rider to the certificate of the children of the person whose name has been changed calling attention to that fact and giving the changed name.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NEGRO MEMORIAL COMMISSION—Expenses of Commission; How Paid.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 1, 1943.

HONORABLE WM. A. WRIGHT,
*Chairman Virginia Conservation Commission,
Richmond, Virginia.*

DEAR MR. WRIGHT:

This is in reply to your letter of May 27, in which you request my opinion upon the question whether or not the expenses of members of the Negro Memorial Commission created by chapter 332 of the Acts of 1942 may properly be paid out of the appropriation of seven hundred and fifty dollars which was made for the purpose of carrying out the provisions of the Act.

The Act imposes upon the Commission the duty of studying and investigating all pertinent facts, and preparing and presenting to the Governor plans for the erection of a permanent and suitable memorial of the landing of the first permanent group of African Negroes at or near Jamestown in the year sixteen hundred and nineteen. The Act further provides that, upon approval of such plan by the Governor, the said Commission shall proceed, with all reasonable dispatch, to cause such memorial to be erected.

It is my opinion that expenses incurred by members of the Commission in the discharge of their duties, among which, of course, is attendance at necessary meetings, may properly be paid out of said appropriation pursuant to a resolution of the Commission so providing. If the Commission approves the payment of said expenses incurred in attending meetings, then the Act provides that vouchers in payment of same shall be signed by the Chairman of the Commission, or such other person or persons as shall be designated by the Commission.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES PUBLIC—Authority to Act on Federal Property Located Within Virginia.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 14, 1942.

MAJOR HAROLD SHEPHERD,
*Office of the Chief of Ordnance,
War Department,
Pentagon Building,
Washington, D. C.*

Re: 00 No. 013/12
Attn: SPOGL

MY DEAR MAJOR SHEPHERD:

This is in reply to your letter of July 9, 1942, relating to the question

of the authority of notaries public appointed by the Governor of Virginia for the county of Arlington to act as notaries for the purpose of taking and certifying acknowledgments, or other usual notarial functions, in the Pentagon Building, which is located on a government reservation in the county of Arlington. The State of Virginia has ceded exclusive jurisdiction to the United States over the lands upon which said building is situated.

Generally speaking, the United States has exclusive jurisdiction over this government reservation, and all buildings situated thereon, and it is optional with the United States, in my opinion, whether the Virginia laws relating to notaries public and the exercise of their functions which were in effect at the time of the cession of exclusive jurisdiction by the State shall continue to be operative in said area after such cession. This conclusion, I think, is clearly justified by the opinion of the Supreme Court of the United States in the case of *James Stewart & Co. v. Sadrakula*, 309 U. S. 94. In its opinion in that case, the Court said:

"* * * The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights. * * *."

You state in your letter that the United States Government desires the Virginia statutes conferring authority upon its notaries in Arlington County to continue to be operative so as to authorize such notaries to act in connection with the war activities of the Government.

Under these circumstances, it is my opinion that such an exercise of their functions by Arlington County notaries public is in no way incompatible with or in violation of Virginia laws. If the United States Government desires to recognize the validity of such notarial acts, I can see no objection thereto on the part of the Commonwealth of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NURSES—Registration of Under Reciprocity Rule.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 11, 1943.

MISS JOSEPHINE MCLEOD, R. N.,
Secretary-Treasurer the Virginia State Board of Nurse Examiners,
812 Grace-American Building,
Richmond, Virginia.

MY DEAR MISS MCLEOD:

This is in reply to your letter of June 10, from which I quote as follows:

"Mrs. Florence Imler Jefferies, of Alexandria, Virginia, made application for registration in this State by reciprocity from Pennsylvania as a graduate nurse. This application stated that Mrs. Jefferies had been graduated in 1911 from the Mason Hospital, Roaring Springs, Pennsylvania. It also stated that such an application could not be filled out as

to the amount of theory and practice that the applicant had had because of lost records.

"The Secretary of the State of Pennsylvania, with whom I have communicated, informed me that Mrs. Jefferies was registered in the State of Pennsylvania at the time of her graduation, but she had been registered under the Waiver, and not by Examination. According to our Rulings, as interpreted at that time by my Board, we were not able to issue her a certificate of registration without examination.

"Mrs. Jefferies appeared before the Board in March with a second request that she be registered, but it was explained to her again why we could not do it. Our law is several years older than the law of Pennsylvania which governs registration.

"It seems a great pity that Mrs. Jefferies should be in any such position, as she is living in an area that is very hard pressed for nursing service. I am, indeed, very glad to request your opinion on this matter as it may be of interest to others in similar situations in our State."

The section of the Virginia Code (1714) prescribing how graduate nurses registered in other States may be registered in this State without examination reads as follows:

"The board of examiners upon written application, together with such references and proof of identification as the board may by rule prescribe, may issue a certificate without examination to any person who shall have been registered as a registered nurse under the laws of any other State, *the professional requirements of which for securing such registration were at the time of issuance thereof equivalent to the professional requirements prescribed by this chapter, and which gives the same privilege to registered nurses of this State.*" (Italics supplied.)

You will observe that the two tests prescribed are (a) that the professional requirements for registration in the other State shall as of the time of the registration in such other State be equivalent to the professional requirements of Virginia at the time application for registration in Virginia is made, and (b) that the other State shall have the same reciprocity provision as Virginia.

Pennsylvania has a reciprocity provision similar to that of Virginia, so that requirement (b) mentioned above is complied with. See 63 Purdon's Pennsylvania Statutes Annotated, section 202.

The professional requirements established by Virginia law are contained in section 1707 of the Code, reading as follows:

"The applicant who desires to practice professional nursing shall furnish satisfactory evidence that she or he is more than twenty-one years of age, is of good moral character, has received sufficient preliminary education as may be determined by the board, and has graduated from a training school of a hospital giving practice in medical, surgical, and obstetrical nursing, either through and under the hospital organizations, or by affiliation, and maintaining the standards required by the board, and where at least two years' training in the hospital and systematic courses of instruction are given, provided that the applicant shall have attended for at least eighteen months the said training school from which she graduated."

The professional requirements of Pennsylvania at the time Mrs. Jefferies registered in that State in 1911 are to be found in the Laws of Pennsylvania of 1909, at page 323. They are as follows:

"Section 7. NO application for registration shall be considered unless accompanied by a fee of five dollars. Every applicant to be eligible

for examination must furnish evidence, satisfactory to the board, that he or she is twenty-one years of age or over, is of good moral character, and has graduated from a training school for nurses which gives at least a two years' course of instruction, or has received instruction in different training schools or hospitals for periods of time amounting to at least a two years' course, as aforesaid, and then graduated, and that such applicant, during said period of at least two years, has received practical and theoretical training in surgical and medical nursing.

"Section 8. Any person, with the above qualifications regarding age and character, applying for registration before June one, one thousand nine hundred and twelve, who shall show to the satisfaction of the board that he or she has graduated from a reputable hospital or sanitarium or training school, where a systematic course of practical instruction in nursing has been given, or that he or she was, at the passage of this act, a student in such an institution, and afterwards graduated therefrom, shall be entitled to registration without examination, upon payment of the fee of five dollars."

My information is that Mrs. Jefferies registered in Pennsylvania under the provisions of section 8 of the Pennsylvania law quoted above.

From a consideration of the statutory provisions I have quoted, it is my opinion that the test of whether or not Mrs. Jefferies may now register in Virginia as a registered nurse is whether or not the professional requirements set out in section 8 of the Pennsylvania law quoted above are "equivalent" to the professional requirements contained in section 1707 of the Code of Virginia, also quoted above. This presents more a question of fact than of law and, in my opinion, it can best be determined by your Board after a consideration of the professional requirements set out in the respective statutes. I may add that I do not think that whether an examination was or was not taken by Mrs. Jefferies in Pennsylvania is controlling, the sole test being (in cases where, as here, reciprocity is invoked) whether the professional requirements of the two States are equivalent.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Interpretation of Parole Act of 1942.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 21, 1942.*

HONORABLE WILLIAM S. MEACHAM,
*Director of Parole,
Richmond, Virginia.*

MY DEAR MR. MEACHAM:

This will acknowledge receipt of your letter of October 15, in which you ask several questions relating to the interpretation of certain provisions of Chapter 218 of the Acts of 1942 providing for and making effective a system of probation and parole in Virginia.

First, you refer to section 4(b) of the Act concerning the appointment of probation and parole officers, and state that you are planning to establish the first parole district (section 4(a)) in the City of Richmond. You further state that in connection with the appointment of a parole officer in this dis-

strict you have consulted the judges of the corporation or hustings courts of the City of Richmond, but have not conferred with the judge of the circuit court of the City of Richmond, and have submitted to said judges a list of two names of eligible probation and parole officers, one of whom is acceptable to the judges for appointment. You desire to know if this procedure is correct. In my opinion it is. The section in question expressly provides that where a parole district lies wholly within a city the appointment of the parole officer shall be made by the judge or judges of the corporation or hustings courts of the city. The circuit court of the City of Richmond is neither a corporation nor hustings court. Furthermore, in my opinion, within the meaning of the section, and in view of the fact that the judges are agreed on an appointee, the list of two names, both of the persons being residents of the City of Richmond, is sufficient.

You next refer to section 4(f) of the Act, reading as follows:

"Upon request of the governing body of a county, city or town the probation and parole officer shall perform the same duties and have the same powers as to persons convicted for violations of ordinances of such county, city or town as he has as to persons violating laws of the State, but the county, city or town so using the services of such probation and parole officer shall pay a pro rata part of his expenses to be arrived at by mutual agreement between such local governing body and the Parole Board."

And to section 5 of the Act prescribing the powers and duties of probation and parole officers, subsection (4) reading as follows:

"Investigate the prison and criminal record, the physical and mental condition, and the social background and environment of every person convicted of a misdemeanor and sentenced for a term of more than thirty days, and recommend to the court the release of any such prisoner whose release, as shown by the said investigation, will be for the best interests of such person, his family and the Commonwealth;"

and ask if it is the mandatory duty of probation and parole officers to investigate persons convicted of violations of ordinances of cities, towns and counties. In my opinion, the duties of probation and parole officers with respect to persons convicted of violations of city, town and county ordinances are dependent upon the request of the governing body of any particular city, town or county made pursuant to section 4(f) and upon such city, town or county sharing the expense of the services of the probation and parole officers, as provided in the section. When the quoted paragraphs are read together, it seems clear that section 5(4) refers to persons convicted of violations of State law.

Your next question is:

"Sections 6 and 7 of the Act define the terms under which inmates of the penal institutions of the Commonwealth shall become eligible for parole. Section 6 states that except as otherwise provided, every person convicted of a felony and sentenced and committed under the laws of the Commonwealth to any penal institution shall be eligible for parole after serving one-third of the term of imprisonment imposed. Section 7 abolishes time off for good behavior in the cases of those persons convicted on and after October 1. In the cases of those persons who were convicted prior to October 1, who prefer to serve their definite sentences with time off for good behavior, and thus be relieved of the burden of supervision after they leave the Penitentiary, how shall the Board proceed? Is it the legal right of these prisoners to refuse to be considered for parole?"

In my opinion, section 6 of the Act expressly provides that, except persons sentenced to die or to life imprisonment, every person convicted "*either heretofore or hereafter*" of a felony and sentenced and committed under the laws of this State to a penal institution in the State shall be eligible for parole after serving one-third of the term of imprisonment imposed. In view of the provisions of section 6, I do not think that it is the right of prisoners convicted prior to October 1 to refuse to be considered for parole. It is true that persons convicted after October 1, 1942 (section 7) are not entitled to a deduction of any time off for good behavior, but I do not think that this provision nullifies to any extent the provisions of section 6 prescribing who are eligible for parole.

You finally ask:

"In connection with the definition of eligibility for parol contained in section 6, we should like to ask that you state whether we shall count the time of serving a sentence from the day of conviction by the court, or whether we shall follow the common practice of Virginia courts of allowing credit for all time served in jail prior to trial, or pending appeal to the Virginia Supreme Court of Appeals. Provision for this procedure is, I believe, made in the Virginia Code."

I have already had occasion to express an opinion on this question in a letter to Major R. M. Youell, Commissioner of Corrections, under date of October 13, 1942, in which I reached the conclusion that the existing provisions of law relating to credit for time spent in jail are still in effect. I enclose a copy of my letter to Major Youell.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Prisoner May Refuse Parole.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 9, 1942.

HONORABLE WILLIAM SHANDS MEACHAM,
Chairman State Parole Board,
Richmond, Virginia.

MY DEAR MR. MEACHAM:

I am in receipt of your letter of December 7, from which I quote as follows:

"At a hearing of the Virginia Parole Board held on November 19, Grafton Leake, #39849, white, who was sentenced to serve ten years in the penitentiary in the Circuit Court of Goochland County, was granted parole. This prisoner's term expires on April 17, 1943. Subsequently, upon being informed that he had been granted parole, this prisoner refused to sign a parole agreement with the Director of Parole, frankly stating that he preferred to leave the penitentiary free of any supervision. I should like to know whether, in your opinion, this prisoner, and others whose sentences are near their expiration date, who desire to refuse parole, may be compelled to accept it under the terms of Chap-

ter 218. We should naturally like to grant many prisoners whose terms are near their expiration date parole, so that we might keep them under the supervision of our parole officers possibly for a long time. Under the terms of the Act, we may fix a period of parole equal to the maximum sentence which might have been imposed upon the prisoners for the offense he committed, less the time he has served in prison.

"I should appreciate your opinion as to whether or not we may compel reluctant inmates who are on the verge of release to accept parole."

In my opinion, the Board may not compel a convict to accept parole. The rule seems to be well established that a parole must be accepted by the convict before it becomes effective and that it is the convict's privilege to elect whether he will accept the parole with its conditions or reject it and remain in prison. If the convict prefers to serve out his sentence as originally imposed rather than to accept a parole and thus subject himself to the conditions nominated in the parole, he has a right to do so. See 39 American Jurisprudence, Pardon, Reprieve and Amnesty, Section 89. See also 59 American Law Reports, at pages 835-838.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Felons on Jail Farms Eligible for Parole.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 22, 1943.*

HONORABLE WILLIAM SHANDS MEACHAM,
Director of Parole,
Richmond, Virginia.

DEAR MR. MEACHAM:

This will acknowledge receipt of your letter of January 20, asking my opinion as to whether or not persons convicted of felonies and required to serve their sentence on city prison farms are eligible for parole under chapter 218 of the Acts of 1942.

In prescribing the functions of the Board, the Act says in part:

" * * * the Parole Board shall * * * .

"(2) Release on parole, subject to the general rules adopted pursuant to paragraph (1) of this subsection, for such time and upon such terms and conditions as the Parole Board shall prescribe, *persons convicted of felonies and confined under the laws of the Commonwealth in any penal institution in the Commonwealth* when such persons become eligible, and are found suitable, for parole;" (Section 4788d of Michie's Code of 1942; italics supplied.)

The section as to eligibility for parole provides:

"(a) Except as herein otherwise provided, every person convicted, either heretofore or hereafter, of a felony, and sentenced and committed under the laws of this Commonwealth to any penal institution in the Commonwealth, shall be eligible for parole after serving one-third of

the term of imprisonment imposed. * * * ." (Section 4788h of Michie's Code of 1942.)

The question then turns upon whether or not city jail farms are penal institutions in the Commonwealth. Beyond peradventure I think they are. A city prison farm is certainly a "penal institution" and it is "in the Commonwealth."

Under section 10 of the Act providing for the Department of Corrections (section 4992(10) of Michie's Code of 1942), there is this:

"(b) The term 'penal institution' as used herein means and includes every prison, prison camp or prison farm heretofore or hereafter established with funds appropriated from the State treasury, and every jail, *jail farm*, lock-up or other place of detention owned, maintained or operated by any political subdivision of the Commonwealth * * * ." (Italics supplied.)

Of course, this definition is by no means conclusive so far as the construction of the probation and parole Act is concerned, but I do consider it persuasive, and I do not see any reason for excluding city prison farms from the category of "penal institutions" within the meaning of the probation and parole Act. It seems to me that the humane provisions of the statute should be extended to all persons convicted of felonies irrespective of where they may be detained.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Women Misdemeanants; Conditional Parole of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 3, 1943*

DR. WILLIAM H. STAUFFER,
*Commissioner of Public Welfare,
Richmond, Virginia.*

MY DEAR DR. STAUFFER:

I am in receipt of your letter of February 25, in which you refer to chapter 428 of the Acts of 1922, providing for the commitment of certain delinquent women misdemeanants to the State Board of Charities and Corrections (now the State Board of Public Welfare) on indeterminate sentences of not less than three months nor more than three years, and dealing with the disposition of such women by the said Board.

The Act provides that the Board may (a) recommit such women to the institutions described therein, or where it is not possible or expedient to place such women in such institutions the Board may (b) commit them to jail or in its discretion place them on probation.

You ask my opinion as to whether or not the State Board, having followed the procedure outlined in (a) above, that is, committed a woman to an institution, may order the release of the woman on condition, and where the condition is violated may have her arrested and returned to the institution.

In the case of a committal of a woman to an institution the Act provides that after the expiration of the minimum sentence of such woman the Board "may at any time order the release of such female when satisfied that such release is conducive to the welfare of such female and will not be detrimental to the Commonwealth." The Act does not provide for the *conditional* release of a woman who has been committed to an institution. I am of the opinion, therefore, that where the Board has chosen to follow the method of committing the woman to an institution it may order the release of the woman at any time after her minimum sentence has expired, but the Act does not provide for such release to be on condition. While it is true that under the method (b) above described the Board may place the woman on probation, this is an alternative method of handling any particular case and is not applicable under the Act where the Board has first elected to commit the woman to an institution.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Computation of Time of Eligibility.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 13, 1942.*

HONORABLE RICE M. YUELL,
Commissioner of Corrections,
Richmond, Virginia.

DEAR MAJOR YUELL:

This is in reply to your letter of October 8, in which you ask whether or not the time spent in jail before and after trial by a person convicted of a crime shall be considered a portion of the sentence in computing the date of eligibility of such person for parole.

Section 6 of Chapter 218 of the Acts of Assembly, 1942, provides that:

" * * * every person convicted * * * shall be eligible for parole after serving one-third of the term of imprisonment imposed. * * * ."

The Act setting up the Parole Board makes no reference to time spent in jail while awaiting trial or pending an appeal. However, Section 5019 of the Code of Virginia provides in part as follows:

" * * * any person who may hereafter be sentenced by any court to a term of confinement in the penitentiary, or by any court or justice to a term of confinement in jail, for the commission of a crime, or in jail for default of the payment of a fine, shall have deducted from any such term all time actually spent by such person in jail awaiting trial, or pending an appeal, and it shall be the duty of the court or justice when entering the final order in any such case to provide that such person so convicted be given credit for the time so spent. * * * ."

Since Section 5019 has not been repealed, it is my opinion that the time spent in jail awaiting trial or pending an appeal, is to be considered as

service of a part of the term of imprisonment imposed for the purpose of computing the date of eligibility of the person convicted for parole.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Parolee Not Entitled to Time Credit During Parole Period.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 26, 1943.

MR. W. F. SMYTH, JR.,
*Superintendent the State Penitentiary,
Richmond, Virginia.*

DEAR MR. SMYTH:

I am in receipt of your letter of May 25, which I quote as follows:

"Under Chapter 218, Acts of Assembly 1942, establishing the Probation and Parole Board, the question has arisen whether inmates who have been paroled from this institution and returned for parole violation should receive credit for the time that they are on parole. I invite your attention to section 8, paragraphs (e) and (d).

"The point that I would like to have cleared is, should he receive credit for the time that he is under supervision and not receive credit for any time that he was away from supervision under violation of his parole or is he entitled to any credit upon his return to the institution of the time that he is away from the institution under supervision."

Section 8(e) of Chapter 218 of the Acts of 1942 provides that:

"The time during which a parolee is at large on parole shall not be counted as service of any part of the term of imprisonment for which he was sentenced upon his conviction."

This language is plain and I am of opinion that a prisoner who has been paroled and returned to imprisonment for parole violation should not receive any credit on his sentence of conviction for the time he was absent from prison on parole.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**PARDON AND PAROLE—Revocation of Parole Does Not Forfeit Credit
Previously Earned for Good Behavior.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 4, 1943.

HONORABLE WILLIAM S. MEACHAM.
*Director of Parole,
Richmond, Virginia.*

MY DEAR MR. MEACHAM:

This will acknowledge receipt of your letter of May 1, from which I quote as follows:

"In connection with the revocation of parole by the Virginia Parole Board, Chapter 218 of the Acts of Assembly of 1942, section 10, reads as follows:

"'Revocation of parole; extension of terms and conditions of parole; further confinement.—Whenever any parolee is arrested and recommitted as hereinbefore provided, the Parole Board shall consider the case and act with reference thereto as soon as it may be conveniently possible. The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed upon him, or it may reinstate the parole either upon such terms and conditions as were originally prescribed or as may be prescribed in addition thereto or in lieu thereof.'

"While good time allowance for prisoners confined in the major penal system of the State was abolished for all prisoners sentenced after October 1 by Chapter 218, many of the prisoners eligible for parole will have earned at the time of their release approximately one-half time off for good behavior. In the case of second offenders, approximately one-third time off for good behavior will have been allowed. In revoking the parole of a prisoner, is the Board compelled to require the prisoner to serve the unserved portion of the term of imprisonment *originally* imposed upon him, without respect to the good time credit he had earned at the time of his release?"

Credit for good conduct of prisoners under the supervision of the Superintendent of the Penitentiary is provided by section 5017 of the Code. This credit is forfeited only for the specific causes set out in that section, none of such causes being a violation of the conditions under which a prisoner is paroled by the Virginia Parole Board. In my opinion, the Virginia Parole Board has no authority over the good conduct credit provided by section 5017, the amount of such credit being determined by the Superintendent of the Penitentiary in accordance with the directions of the section. It is further my opinion that, where the Virginia Parole Board revokes the parole of a prisoner, the intention of section 10 of Chapter 218 of the Acts of 1942 is that the Board may in its discretion recommit the prisoner to the State Penitentiary, and such prisoner then serves the unserved portion of the term for which he was originally sentenced less any good conduct credit to which he may be entitled under section 5017. I do not think that it was intended by the section to which you refer that the Parole Board in recommitting the prisoner has any authority to add to or to take from the length of time which the prisoner has to serve under the sentence originally given him, the good conduct credit of such prisoner being determined solely under the provisions of section 5017. In other words, when the prisoner is recommitted to the Penitentiary by the Parole Board, he begins anew the service of his

term just as if he had never been paroled, and he is entitled to all of the unforfeited good conduct credit which he may have earned prior to his parole.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Warrant for Arrest of Parolee to Be Signed by Director of Parole Board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 19, 1943.*

MR. CARROLL R. MINOR,
*Executive Secretary,
Virginia Parole Board,
Richmond, Virginia.*

DEAR MR. MINOR:

I have examined the form of warrant for the arrest of parolees accused of violation of the terms of their parole which you submitted for my opinion on April 14, 1943, and am returning the same with the following suggestions.

The section of the Parole Act dealing with this matter is found in Code section 4788k-(b), and it does not authorize such warrant to be issued by members of the Board, but only by the Board or its Director, therefore, in my opinion, it would be improper to have the warrant issued by a member of the Board other than the Director.

Also, to remove all uncertainty concerning the authority under which the Board is acting, I would suggest that such authority be referred to as "Chapter 218, Acts of the General Assembly of Virginia, 1942."

Also, I think it would be proper to conclude the directive concerning commitment to jail as follows: "there to be held subject to the further action of the said Board."

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PENAL INSTITUTIONS—Various Superintendents Not Required to Take Oath of Office.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 1, 1942.*

MAJOR R. M. YUELL,
*Commissioner of Corrections,
Richmond, Virginia.*

DEAR MAJOR YUELL:

This will acknowledge receipt of your letter of September 30, in which you inquire if the superintendents of the several penal institutions formerly

under the control of the Prison Board are required to take an oath of office before entering upon their duties.

By section 7 of Chapter 217 of the Acts of 1942, establishing a Department of Corrections, all the powers, functions and duties heretofore imposed upon the State Prison Board and the superintendents of the penal institutions under the control of the State Prison Board are transferred to and imposed upon the State Board of Corrections. By section 6 of the chapter the Commissioner of Corrections may employ such agents and employees as may be needed by the Board and by the Commissioner to carry out the duties and powers imposed upon them, such agents and employees having no term of office but being removable by the Commissioner subject to the approval of the Board.

Since the powers and duties of the superintendents of the various penal institutions heretofore operating under the State Prison Board are now conferred upon the State Board of Corrections, I am of the opinion that the persons the Board and Commissioner employ to supervise these penal institutions are not public officers within the ordinary meaning of that term and that, therefore, it is not necessary that they take an oath of office.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PHARMACY—Prohibition on Distribution of Dangerous Drugs Include Physicians' Samples.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 18, 1942.*

HONORABLE A. L. S. WINNE,
*Secretary State Board of Pharmacy,
400 Travelers Building,
Richmond, Virginia.*

MY DEAR MR. WINNE:

This will acknowledge receipt of your letter of August 14, in which you say:

"I have had a request for a clarification of a provision carried in the last sentence of section 1698-c of chapter 209 of Acts of Assembly, 1942. This law was amendatory to the former hypnotic drug law, and has been designated in its amended form as the dangerous drug law.

"The sentence referred to is one reading, 'No person shall give away or distribute any sample package containing a dangerous drug.' An interpretation of this has been asked for by a representative of a reputable pharmaceutical manufacturing firm located in another state, and is with reference to a practice which has been followed by field representatives of many of these drug manufacturing concerns for a number of years; namely, the distribution of samples of medicinal products; and, in this instance, such samples would be those containing derivatives of barbituric acid in particular. I am not sure that there has been any sampling of drugs containing derivatives of sulfanilamide, although that practice may also be exercised to some extent. These sample packages of drug products

are usually left by detail men when they call upon a physician in connection with literature which is usually left with the physician explaining the use of the products. Frequently, they are new products or new combinations with which the physician may not be thoroughly familiar, and which he may wish to try out in his professional practice. As is stated above, it has been customary for samples of this kind to be left with the physician for strictly professional use, and the question which we would like answered is whether in your opinion the language carried in the section referred to does or does not prohibit the exercise of this practice by representatives of such drug firms as I have referred to."

What is included in the words "dangerous drug" is specified in section 1698-a of the Code. The language is section 1698-c to the effect that "no person shall give away or distribute any sample package containing a dangerous drug" is plain and unequivocal and needs no interpretation.

It is my opinion, therefore, that the practice described by you insofar as it consists of giving away or distributing sample packages of "dangerous drugs" is prohibited by section 1698-c of the Code, as amended in 1942 (Acts 1942, p. 264).

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

POLL TAX—Who May Lawfully Pay Poll Taxes of Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 12, 1943.

HONORABLE W. M. McFALL,
*Treasurer of Dickenson County,
Clintwood, Virginia.*

MY DEAR MR. McFALL:

This will acknowledge receipt of your letters of January 19 and January 21, relative to the duties of a treasurer in accepting payment of capitation taxes in cases where such taxes are tendered by a person other than the taxpayer, and also relative to the duties of the treasurer in placing the names of such persons whose capitation taxes have been so tendered by another on the treasurer's list of persons who have paid their State capitation taxes as prescribed by section 109 of the Code of Virginia, which list I shall hereinafter refer to as the treasurer's list.

Your first question is:

"If money for poll tax is tendered by a person other than the taxpayer or one of the persons mentioned in Act 1940, section 116, page 390, under circumstances that I do not believe it is the money of the taxpayer *bona fide* sent; should I accept the money? If so, should I place such person's name on the poll tax list? If I do not think it *bona fide* should I notify the person making the tender, at the time, that I will not place the taxpayer's name on the list, or should I reject the tender?"

Our Supreme Court of Appeals has held that a treasurer should embrace in the treasurer's list the names of only such persons as have personally paid their

poll taxes. In the case of *Tazewell v. Herman*, 108 Va. 416, 423, 424, the court said:

"When all the provisions of article II of the Constitution, referred to above, are considered together, as they should be, in construing section 38, in the light of the evil which was intended to be remedied (Sutherland on Stat. Constr., secs. 292, 300), we think that it is clear that it was intended that the treasurer should embrace in the list the names of only such persons as had personally paid their poll taxes. If this be done, then the list will accomplish the purpose for which it was intended; the courts and judges will not be required to place upon the list, in correcting it, the names of persons who are not entitled to vote; and the judges of election will have before them evidence which shows, *prima facie*, at least, who have paid their poll taxes as required, as a prerequisite to their right to vote.

"This construction, as is argued, does place a power in the hands of the treasurer which may be greatly abused; but his power to say *when* the poll tax of any voter was paid is just as liable to abuse as his power to say *how* it was paid, yet there can be no question that he has the former power. * * *."

In the light of the foregoing, it is my opinion that a treasurer may exclude from the treasurer's list the names of persons who have not "personally paid" their capitation taxes.

Likewise our Court of Appeals in *Tilton v. Herman*, 109 Va. 503, 507, 508, has defined what constitutes "personal payment" as follows:

"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 hands of the taxpayer's clerk or duly authorized agent. * * *."

It is further my opinion, therefore, that where a capitation tax is tendered under such circumstances that the treasurer does not feel that the person making the tender is the authorized agent of the taxpayer, and that the payment is not being made from the taxpayer's funds, the treasurer is required to omit the name of such taxpayer from the treasurer's list. In such a case it is obviously the duty of the treasurer to inform the person tendering the payment of the poll tax that he is not satisfied that the payment tendered is a "personal payment" within the meaning of the law, and that, therefore, he will not place the name of the taxpayer on the treasurer's list of persons who have "personally paid" their poll taxes. If, after being so advised, the person tendering payment nevertheless insists on the treasurer accepting same, the treasurer should do so, because the payment may be intended merely to discharge the tax. On the other hand, it may be that additional evidence produced at some future time will satisfy the treasurer that the payment is a "personal" one, in which event the treasurer may still place the name on the list. Or it may be that the taxpayer may desire to apply to the court for the entry of his name on the list as provided by section 110 of the Code of Virginia, presenting evidence to the court as to the personal character of the payment. However, the person tendering payment may not desire it accepted under the circumstances indicated and in such event he is entitled to withdraw his tender. He still would have the opportunity of renewing the tender accompanied by additional satisfactory evidence as to the "personal" nature of the payment if he so desired. On the other hand, if the treasurer should accept the payment of the tendered tax under such circumstances as to lead the taxpayer or his alleged agent to believe that the

name would be placed on the treasurer's said voting list, it would be an obvious injustice not to place it thereon. Not only would the taxpayer have been misled or deceived by such an act, but he would be lulled into a feeling of false security, and naturally fail to take the steps necessary to secure the placing of his name on said list.

Your second question reads as follows:

"If a list of union coal miners are presented and union check tendered, should I accept the list and check and place all names on poll tax list or should I reject the check and list, and require them to pay according to Acts 1940, section 116, page 390?"

The effect of your question seems to be whether, if a labor union uses its funds to pay the poll taxes of its members, this would constitute a "personal payment" so as to require you to place the names of such members on the treasurer's voting list. In such a case, under the principles set out in the answer to your first question, it is clear that this would not constitute a "personal payment" by the union members.

You then ask:

"In view of sections 20 and 21 of the Constitution of Virginia pertaining to elections and section 116, Acts 1940, page 390, please advise me what constitutes personally paid other than the taxpayer paying in person?"

In the answer to your first question I have set out the definition of "personal payment" as prescribed by our Supreme Court of Appeals."

Your last question is:

"Say, for instance, a man is in the armed forces of our country from Dickenson County, and he not being present to authorize any one to pay his poll taxes, would anyone have the right to pay or authorize anyone else to pay them for him, if so, who?"

The principles applicable to members of the armed forces are the same as those applicable to other persons. It may be, however, that a member of the armed forces has appointed an agent with authority to pay his taxes and provided the funds for that purpose.

In what I have said I have not overlooked chapter 236 of the Acts of 1940 adding to the Code section 116, in which it is made a misdemeanor for any person, with certain specified exceptions, "to pay or to offer to pay the State poll taxes of any other person under such circumstances as to show or indicate a purpose or intent to have the name of such other person placed upon the treasurer's list * * * ." This new section, in my opinion, clearly relates to the payment of or offer to pay by one person the poll taxes of another person from funds other than those of the person whose taxes are paid, and does not relate to one who as the duly authorized agent of the taxpayer pays the taxpayer's poll taxes from funds supplied by the taxpayer. In my opinion, it was not the intention of the General Assembly in enacting this new section of the Code to overrule the definition of "personal payment" in *Tilton v. Herman*, *supra*, which definition has been recognized and followed throughout the State for more than thirty years. The obvious intent of section 116 of the Code was to prevent the practice of the payment of capitation taxes for political purposes by persons other than the taxpayers out of funds not supplied by the taxpayers and often without their knowledge. Manifestly, where the treasurer believes this practice is being followed in any case or cases it is his duty, as directed by the section, "to forthwith report the fact of such payment, and the circumstances relating thereto, to the Commonwealth's Attorney of the city or county in which such

payment is made * * * ." It should be noted, however, that to constitute a violation of section 116, the offer to pay or payment must be coupled with "such circumstances as to show or indicate a purpose or intent to have the name of such other person placed upon the treasurer's list * * * ."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

POLL TAX—Who May Lawfully Pay Poll Taxes of Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 18, 1943.

HONORABLE WILLIAM M. McFALL,
Treasurer of Dickenson County,
Clintwood, Virginia.

DEAR MR. McFALL:

I have before me your letter of February 12, in which you request my opinion upon the question whether or not it would be in violation of section 116 of the Code, as enacted by chapter 236 of the Acts of the General Assembly of Virginia for the year 1940, for certain persons to pay the capitation taxes of various relatives which you refer to in your letter.

Your first question is whether or not it would be in violation of this section for a person to pay the poll taxes of his stepson, stepdaughter, daughter-in-law, son-in-law, or brother-in-law. Said section contains this exception to the general provisions making unlawful the payment of poll taxes of another under certain circumstances:

" * * * provided, however, that nothing in this section shall be construed as making it unlawful for any person to pay under such circumstances the poll taxes of a member of his or her household, or of any person related to him or her by consanguinity or *affinity* as father or mother, son or daughter, brother or sister, grandfather or grandmother, or grandson or granddaughter, and no such payment shall be deemed a violation of this section."

You will note that the language employed in making the exception embraces persons within the defined degrees of relationship whether related by consanguinity or *affinity*. The word *affinity* is defined in Webster's Dictionary as follows:

"Relationship by marriage between a husband and his wife's blood relations, or between a wife and her husband's blood relations:—distinguished from consanguinity, or relationship by blood."

I am of opinion, in view of the foregoing definition of the word *affinity*, that the statute exempts from its penal provisions a brother-in-law, daughter-in-law, son-in-law, stepson and stepdaughter, and that such payments would not be in violation of said section 116 of the Code.

Your next question is whether or not the payment of such a tax for an uncle or an aunt, or a cousin, would be in violation of said section 116.

Since persons holding these relationships are not excepted from the

penal provisions of the section, in my opinion such payments would be in violation of same; provided, of course, they are not made in the capacity of an authorized agent paying same out of funds of the taxpayer. I have heretofore expressed the view that only persons occupying the relationships specifically mentioned in the exception contained in the section are excepted from its penal provisions.

This letter is to be read along with and as supplemental to my letter to you of February 12 relating to the general subject of payment of poll taxes.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

POLL TAX—Who May Lawfully Pay Poll Taxes of Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 29, 1943.

HONORABLE RALPH L. LINCOLN,
*Attorney for the Commonwealth,
Marion, Virginia.*

MY DEAR MR. LINCOLN:

This will acknowledge receipt of your letter of March 24, from which I quote as follows:

"I would appreciate your advice in regard to the proper construction of section 116 of the Code of Virginia relating to payment of poll taxes. The particular questions I would like to raise are:

"1. Is it lawful to loan money to another person, not related, in order that the other person may use the money for payment of poll taxes; taking the note or verbal promise of the other to repay the amount loaned?

"2. Assuming that A loans to B the money to pay his poll taxes, taking a note for the amount of the loan, would this statute be violated by B giving to A authority as agent, either written or verbal, to take said money to the treasurer to pay his (B's) taxes."

Our Court of Appeals has held that the treasurer's list prescribed by section 109 of the Code should only embrace the names of those persons who have personally paid their poll taxes. *Tazewell v. Herman*, 108 Va. 416. The court has likewise defined "personal payment" to mean that the source of the payment must be the personal estate or funds of the taxpayer, although the payment may be actually made by a duly authorized agent. *Tilton v. Herman*, 109 Va. 503. Whether or not in any particular case, such as the one you present, the capitation tax is paid out of the taxpayer's estate or funds and by his duly authorized agent is a question of fact upon which I do not think this office should attempt to pass. Whether the facts in connection with any particular payment result in a violation of section 116 of the Code can only be determined by a court or jury in the case of a prosecution under the section.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Funds of County Free Library Should Be Deposited with County Treasurer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 15, 1942.

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of July 11, which reads as follows:

"On several occasions we have received requests from officials of several counties for an interpretation of Code section 365. In the past we have referred these officials to their Commonwealth's attorneys for an interpretation; but a number of the counties in the past several years have established county free libraries, as provided for by section 365, and we believe that an opinion from you is necessary to clear up certain questions which arise in handling the finances of these new agencies.

"Section 365 provides that boards of supervisors under certain circumstances may establish a free library system and that two or more counties, by action of their boards of supervisors, may establish regional library systems. The law provides that in either case a board of trustees shall be appointed in which the management and control of the free library system are to be vested. On page 35 (chapter 36) of the Acts of Assembly of 1942 it is provided that in the case of regional libraries the treasurer of one of the counties shall be provided with the custody of the funds of the regional free library system. While chapter 36 does not make any reference to the custody of funds for a county free library system, would not the fact that the section provides that 'All funds appropriated or contributed for library purposes shall constitute a separate fund and shall not be used for any but library purposes' imply that in the case of a county the funds of the library board of trustees would be in the custody of and disbursed by the treasurer on order of the board of trustees?"

While section 365 of the Code, relating to county free library systems and regional free library systems, as amended in 1942 (Acts 1942, p. 34) provides that the board of supervisors of the county shall appropriate money annually for the support of the county library, and that the board of trustees of the county free library system shall have control of the expenditures of the monies credited to the system, I do not think that it is the intent of the section that the appropriation made by the board of supervisors shall be turned over *in toto* to the trustees for deposit in such bank as the trustees may select, to be expended by checks executed by the board. It is my opinion that the treasurer of the county should have custody of the appropriation, as is the case with other county funds, and that he should disburse it on orders of the board of trustees of the library system. I do not think that there is anything in the section that would justify such a radical departure from the regular method of handling county funds as would be represented by delivering the county appropriation to the board of trustees to be deposited and disbursed in any way that might seem proper to the said board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Improper to Use Public Funds in Lobby Against Federal Tax Legislation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 18, 1942.

MRS. S. B. SAUNDERS,
*Secretary the State Port Authority of Virginia,
1203 Royster Building,
Norfolk, Virginia.*

MY DEAR MRS. SAUNDERS:

I am in receipt of your letter of December 16, in which you ask if the State Port Authority of Virginia has authority to subscribe for a \$100 membership in what you term "Conference on State Defense," the money to be used to carry on the campaign of the conference against the Federal taxation of State and municipal securities.

I do not think the State Port Authority may use for this purpose funds appropriated to it by the General Assembly. Of course, individuals in their individual capacity may take part in such a campaign, but I do not think that State funds may be used for this purpose without the specific authority of the General Assembly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Investment of in War Bonds by Localities.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 7, 1943.

MR. WALLACE T. CLARK,
*Chairman Virginia Beach School Board,
Virginia Beach, Virginia.*

MY DEAR MR. CLARK:

I am in receipt of your letter of May 6, from which I quote as follows:

"During the recent War Bond campaign the Virginia Beach School Board, having a surplus of funds, decided to purchase the amount of this surplus in War Bonds.

"Upon presenting a bill to the Treasurer of Virginia Beach, he saw fit to obtain a ruling from the Town Attorney as to the legality of our action.

"The School Board of Virginia Beach would be very grateful to you for your opinion in this matter."

I quote from Chapter 15 of the Acts of the Special Session of 1942:

"That so long as a state of war exists between the United States and any foreign power the board of supervisors of any county, or the council of any city or town, may by resolution or ordinance authorize

and direct the treasurer of such county, town or city, or the custodian or manager of any sinking fund, to purchase out of any moneys available in the general fund, or in any sinking fund, or any special fund of such county, city, or town, bonds of other evidences of debt of the United States of America, or of the State or any political subdivision or institution thereof, the amount of such purchases to be prescribed in the resolution or ordinance directing the purchase of same, and it shall be the duty of any such treasurer or custodian of such funds to comply with any such ordinance or resolution. Any bonds or other evidences of debt purchased under the provisions of this Act shall be held by the Treasurer, or other proper custodian thereof, until such time as the board of supervisors or council, by resolution or ordinance, directs the sale or other disposition thereof. No county treasurer, town treasurer, city treasurer, or other custodian or manager of such funds shall be held liable for any loss of public money which may occur as a result of depreciation in the value of securities purchased pursuant to the provisions of this Act."

Under this Act this office is of the opinion that the investment that you describe may be made, but that such investment must first be authorized by the Council of your Town.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Use of to Repair Courthouse; Investment of in War Bonds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 21, 1942.*

HONORABLE R. W. HEVENER,
*Treasurer of Highland County,
Monterey, Virginia.*

MY DEAR MR. HEVENER:

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

"Our county has a surplus in the general fund of some fifteen thousand dollars which the county court wants to use for building purposes, courthouse and jail improvements. They would like to designate or earmark this amount or a part thereof for this specific purpose. Have they the legal right to so designate this for such a purpose, it having been raised under a general and not a specific levy?

"Also we would like to be patriotic and invest this money in war bonds. A type of bond that could be cashed in at the expiration of the war when building materials and supplies will be available for this improvement to county buildings. Has the county court the legal right to so invest these funds?"

Unquestionably I think the board of supervisors would have the authority to use the funds to which you refer for the purpose of improving the

courthouse and jail. If the funds be not used for this purpose by the present board, I do not think that this board would have the authority to bind the future board of supervisors.

In view of the provisions of an Act of the recent special session of the General Assembly, I am of the opinion that the board of supervisors may direct the treasurer to invest this fund in United States bonds.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Investment of in War Bonds by Localities; School Board May Not Carry Over in Special Fund Unexpended Items.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 8, 1943.*

MR. H. V. WHITE,
*Division Superintendent Nansemond County Schools,
Suffolk, Virginia.*

MY DEAR MR. WHITE:

I am in receipt of your letter of April 7, from which I quote as follows:

"In the Nansemond County School budget we have had provisions for the purchase of new busses. Experience in the county shows that it is necessary in a fleet as large as ours to replace about 15 per cent of the busses each year in order to maintain them. Because of the emergency we were able to buy no busses last year or this year. If and when we are permitted to buy busses it is quite likely that a large sum of money will be necessary. This will not be available unless provisions are made for this in advance.

"Can the Nansemond County School Board transfer by resolution a sum, say ten or fifteen thousand dollars through the county treasurer to one of the local banks and have it earmarked as Bus Replacement Fund, or can the School Board purchase certain United States bonds that will be on the market this month if the said Board passes resolution for same?

"It is felt by me and the Board, too, that if we attempt to carry this money in a regular balance eventually it will be used for some of the many other things needed in the school system. It seems to me that if the School Board has the right to buy ten thousand dollars' worth of busses and not use them, say until another year, that it also has the right to set aside certain moneys by which it may buy busses another year, or two years."

I question the authority of a local School Board to transfer school funds to a bank, there to be earmarked and held as a "bus replacement fund."

However, I suggest that the solution to your problem is to be found in chapter 15 of the Acts of the Special Session of the General Assembly of 1942, authorizing the Board of Supervisors of a county to direct the purchase of United States or certain other bonds from "monies available * * *

in any special fund" of the county. Under this Act your School Board could request the Board of Supervisors to direct the investment in United States bonds from money available in the school fund. I understand from your letter that the school budget carries an appropriation for the purchase of new busses.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC HEALTH—Definition of Public Water Supply.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 2, 1942.

DR. I. C. RIGGIN,
*State Health Commissioner,
Department of Health,
Richmond, Virginia.*

DEAR DR. RIGGIN:

This will acknowledge receipt of your letter of June 26, regarding the water supply located on the so-called Preston Estate, approximately four miles east of Bristol. You desire the opinion of this office as to whether this is a public water supply within the meaning of sections 1785-1791 of the Code.

Section 1785 of the Code defines the term "waterworks" and "water supply" as follows:

"The term 'waterworks,' whenever hereinafter in this chapter used, shall be construed to mean and include all structures and appliances used in connection with the collection, storage, purification and treatment of water for drinking or domestic use and the distribution thereof to the public or more than twenty-five individuals, except only the piping and fixtures inside the buildings where such water is delivered. The term 'water supply,' whenever hereinafter used, shall be construed to mean and include water that shall have been taken into waterworks as hereinbefore defined from all streams, springs, lakes and other bodies of surface water, natural or impounded, and the tributaries thereto, and all impounded ground water; but nothing in the following sections shall be held to apply to any waters above the point of intake of such waterworks."

You state that the water supply described in your letter and the report of your representative serves thirteen homes or probably fifty consumers. From the description of the operations described in your letter and in the report of your representative, I do not think there can be any question but that this is a public water supply subject to the control of the State Board of Health, as provided in section 1786 of the Code. While it may be true that "each owner using the supply shares equally in costs incident to pumping water, maintenance, etc.," yet it seems to me equally true each of the lot owners is participating in the distribution of water to at least fifty individuals. When the purpose of the sections of the Code in question is considered, that is, giving to the State Board of Health control over public water supplies in

the interest of the public health, I think it is entirely clear from the facts stated by you that the water supply in question is subject to the control of the Board.

Replying to your second question in which you ask if the usual procedure relative to the issuance of an order and the calling of a hearing may be followed, I am of opinion that it follows from what I have already said that this procedure may be followed and that the order should be addressed to the thirteen lot owners who are operating the water supply.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC HEALTH—Voluntary Inmates at Green Bay Camp.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 7, 1942.

HONORABLE COLGATE W. DARDEN, JR.,
*Governor of Virginia,
Richmond, Virginia.*

DEAR GOVERNOR DARDEN:

This is in reply to your letter of December 4, with which you transmitted a letter to you from Mr. Kenneth Markwell, Regional Director of the Federal Works Agency, and your request that I give an opinion upon the question raised in Mr. Markwell's letter.

The question presented is whether or not the proposed Detention Center for Women at the Green Bay Camp, which I am advised is a branch of the State Industrial Farm for Women established by the Acts of the General Assembly of 1930, page 84, and carried into Michie's Code as section 5058(15), is authorized to receive for detention and treatment persons voluntarily submitting themselves thereto, when such admission is approved by the State or local Health Department.

Under the provisions of section 1554f of Michie's Code (Acts 1920, page 548), a local health officer is authorized to quarantine persons who have the particular diseases which it is contemplated will be treated at this camp, and the local health officer also is authorized to designate the place of quarantine. This section has been construed in actual practice as authorizing the designation of the State Industrial Farm for Women as the place of quarantine, and, in my opinion, this construction is a proper one. Any woman, therefore, who desires voluntarily to receive the treatment to be given at the Green Bay Camp may indicate such desire to the local health officer, who, in turn, may quarantine her at the said camp. While admission to the camp would be voluntary, she could not be released from quarantine until danger of contagion from the disease has been removed or the disease itself cured.

I have talked this matter over with Major Youell and Miss Kates, and also with Mr. Markwell, the Regional Director of the Federal Works Agency, and members of his general and legal staff. They have all expressed the opinion that this authority is all that is required in order for the application

for the grant to meet with the requirements of the Federal Works Agency.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC HEALTH—Prosecutions Under Venereal Disease Act.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 25, 1943.

HONORABLE L. R. SLAGLE,
*Trial Justice of Greensville County,
Emporia, Virginia.*

MY DEAR MR. SLAGLE:

This will acknowledge receipt of your letter of June 17, from which I quote as follows:

"Our local health unit has caused to be issued warrants against certain parties charging that they did 'fail and refuse to take treatment or treatments for a venereal disease as required by a Virginia State Health Officer.'

"These warrants were issued without first having the venereal patients quarantined for the protection of the public health as required by Code section 1554-f.

"I am wondering whether or not the above referred to section or any other section or sections coming under the laws of the State of Virginia for the control of venereal diseases authorize and direct any such health officer to have warrants issued for failure to take treatments for such diseases without first proceeding to have the patients quarantined."

If it is the purpose of the local health officer to charge any particular individual with refusing to take treatments for venereal disease, such treatments having been required as one of the conditions of quarantine under section 1554-f of the Code (Michie 1942), then, of course, the quarantine of the individual is a necessary condition precedent.

However, I call your attention to section 1554-h of the Code (Michie 1942), which reads as follows:

"It shall be a violation of this act for any infected person to knowingly expose another person to infection with any of the said venereal diseases, or for any person to knowingly perform an act which exposes another person to infection with venereal disease, for which such offending person shall be guilty of a misdemeanor, and fined not to exceed one hundred dollars and confined in jail a term not to exceed six months."

I am informed by the State Health Department that individuals infected with a venereal disease are given detailed instructions in measures for preventing the spread of such disease, are informed of the necessity for treatment until cured, and are further warned of the danger of infecting others with the disease. These instructions are given pursuant to section 1554-d of the

Code (Michie 1942). I quote below from a letter which I have received from the State Health Department:

"As is required by law (Code of Virginia, section 1554-d) the health officer, the clinic physician or the clinic nurse instructs the individual found to be infected with a venereal disease as to the nature of the disease, measures necessary to prevent spreading the disease, and informs them of the necessity for treatment, presenting them with a copy of printed instructions, a sample of which is attached.

"If the patients become delinquent from treatment, they are visited by a member of the staff of the health department and further instruction along these lines is given. If delinquency from treatment continues or occurs again, the trial justice has permitted the health officer to issue a warrant summoning the patient to appear in court under the authority of section 1554-h, Code of Virginia, which reads as follows:

* * * * *

"In justifying their action under this section of the Code, these trial justices state that where an individual has been thoroughly informed of the nature of the disease and the necessity for continuing regular treatment as outlined above and neglects doing so that they will interpret such action as knowingly exposing other persons to their infection inasmuch as such individuals may be or will soon become infectious if their treatment is not continued regularly. Individuals may contract the disease from the patient through casual contact with the common drinking cup, towels, wash cloths, etc., if external lesions reappear as often happens where treatment is discontinued before adequate treatment has been given.

"This latter interpretation has been of great assistance to the health officers, especially in handling colored persons who become delinquent from treatment. As you know, we have a high prevalence of syphilis and gonorrhea, especially in the colored race in Virginia and we are bending every effort in an attempt to control this menace to our public health. We do find that we are greatly handicapped, especially in rural communities, by not having a more definite legal hold on the infected individual."

I suggest for your consideration, therefore, that in a case where it has been shown that an infected individual has been given the detailed instructions heretofore mentioned and has been warned of the danger of others becoming infected with a venereal disease by reason of the discontinuance of treatments by the infected individual, whether a prosecution would not be justified under section 1554-h quoted above. This would mean that, instead of being charged with refusing to take treatments, the individual would be charged with knowingly exposing another person to infection or knowingly performing an act which exposes another person to infection. This procedure seems to have been followed by some of the trial justices of the State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—To Serve After Expiration of Term Until Successor is Appointed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 7, 1942.

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

DEAR MR. NOLTING:

This is in reply to your letter of July 7, in which you call attention to the fact that under the provisions of Chapter 390 of the Acts of 1942 it is provided that the terms of all members of the Commission of Game and Inland Fisheries, including the chairman, who may be in office on the 30th day of June, 1942, shall expire on that day. You state that the Governor has not yet appointed any new members of the Commission, and inquire whether or not, in my opinion, you may continue to discharge the duties of chairman of the Commission and will have authority, as such, to sign requisitions, payrolls, invoices, and so forth, until your successor has been appointed.

Section 33 of the Constitution contains this provision:

“ * * * All officers elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified.”

It is my opinion that, by reason of the constitutional provision above quoted, the chairman and other members of the Commission of Game and Inland Fisheries are authorized and empowered to continue to discharge the duties of their respective offices until their successors have been appointed and have qualified. This being the case, I am further of opinion that you, as chairman, have the same authority with respect to signing requisitions, payrolls, invoices, and so forth, as you possessed prior to the taking effect of the 1942 Act, and will continue to have such authority until your successor has been appointed and qualified.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICERS—Requiring Bond of Treasurers of State Agencies Where Statute is Silent.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 1, 1942.

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

DEAR MR. BRADFORD:

This will acknowledge your letter of July 28, requesting an opinion from this office as to whether or not the Governor can or should require a bond

to be given by the secretary-treasurers of the State Board of Accountancy and the Virginia Board of Law Examiners.

As you may know, sections 566, et seq., dealing with the State Board of Accountancy, and sections 3410, et seq., dealing with the Virginia Board of Law Examiners, do not, in express terms, provide that these officers shall execute a bond as a condition precedent to the performance of their official duties.

I have been unable to find any general statute authorizing the Governor to require bonds from public officers in the absence of an express statute dealing with the particular officer. However, section 85 of the Constitution of Virginia is to this effect:

"All State officers and their deputies, assistants or employees, charged with the collection, custody, handling or disbursement of public funds, shall be required to give bond for the faithful performance of such duties; the amount of such bond in each case, and the manner in which security shall be furnished, to be specified and regulated by law."

In my opinion this constitutional provision is not self-executing and, as I have stated above, there does not appear to be any general statute in substantial conformity with its terms. However, it does serve as a declaration of the public policy of this Commonwealth with respect to this important matter.

With respect to the United States government, I find in the case of *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66 (1831), that the court upheld the practice of the Federal government to require a bond from a purser in the Naval Department, although such a bond was not prescribed or required by any Federal statute. This principle was reaffirmed later in *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119 (1897), where an army disbursing officer was required to give bond by the Secretary of War, although there was no law requiring the execution of such bond. The authorities indicate that the principle of these two cases has been extended to State and municipal officers under similar circumstances. In the *Moses* case, *supra*, the court quoted from the *Tingey* case, *supra*, as follows:

" * * * "That a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of the public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursery of public moneys, is a binding contract between him and his sureties and the United States, *although such bond may not be prescribed or required by any positive law*. The right to take such a bond is, in our view, an incident to the duties belonging to such a department, and, the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view.' * * * ." (17 Sup. Ct. 687-688; italics supplied.)

In view of these authorities, it is my opinion that the Virginia Board of Law Examiners and the State Board of Accountancy, as an incident to their power to appoint a secretary-treasurer, may require of him that he execute a bond for the faithful performance of the duties of his office. However, I do not believe that the Governor is possessed of any such power.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—County Officers' Residence Must Be Within County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 5, 1943.

HONORABLE M. A. COGBILL,
*Attorney for the Commonwealth,
Chesterfield Court House, Virginia.*

MY DEAR MR. COGBILL:

This will acknowledge receipt of your letter of January 4, in which you ask the following question:

"On January 1, 1942, the City of Richmond annexed a part of the County of Chesterfield, and in that part one of our constables resided and has been acting as constable in the County of Chesterfield since that time and until January 1, 1943. The sheriff of Chesterfield County desires to appoint this constable as a full time deputy sheriff and he has asked me to obtain your opinion as to the legality of such appointment where the appointee lives in the City but will move to the County immediately. Understand that he has lived in the City since January 1, 1942, by reason of the annexation decree."

Section 2703 of the Code provides that every county officer shall at the time of his election or appointment have resided one year next preceding his election or appointment in the county for which he is elected or appointed. There are certain exceptions, none of which is applicable to the case you put. In view of this provision of law, I am of opinion that the individual you mention is not eligible for appointment as deputy sheriff in Chesterfield County at this time.

Section 2967 of the Code provides that where certain county and district officers reside in territory annexed to a city they shall hold their offices until the end of the term for which they were elected or appointed, but you do not present such a case, as the individual in question would be appointed to a new office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Interest in County Contracts by State Officials.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 1, 1943.

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

MY DEAR MR. SHRADER:

I am in receipt of your letter of February 27, in which you ask the following question:

"Please advise me whether or not since I am owner or interested in the Amherst Publishing Company, which does printing and publishing, I can now, as Trial Justice being wholly paid by the State, do job printing for the County of Amherst and collect for the same under the law."

You will recall that under date of December 7, 1939, I advised you that under section 2707 of the Code, your salary then being paid in part by the county, I was of the opinion that you would be prohibited from doing printing for the county. However, since that time the Legislature has provided that the entire compensation of trial justices shall be paid by the State and, therefore, it would now appear that you are not a "paid officer of the county." In view of this change in your status, therefore, I am of the opinion that you are not prohibited by section 2707 from doing printing for the county and being compensated therefor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Waterworks Commissioner Interest in Contracts with Commission.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 14, 1943.*

HONORABLE CHARLES K. HUTCHENS,
*Member of House of Delegates,
Newport News, Virginia.*

MY DEAR MR. HUTCHENS:

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

"If an automobile dealer were a member of the Newport News Waterworks Commission, having been appointed by the City Council of Newport News, Virginia, would it be a violation of the Code for him to continue selling the Commission necessary trucks and passenger cars?"

The Newport News Waterworks Commission seems to be an agency set up by an ordinance of the City Council of Newport News for the management of the waterworks system of the city, the members of the Commission being appointed by the City Council. See Chapter 530 of the Acts of Assembly of 1926. Section 2708 of the Code, among other things, makes it unlawful for any member of a committee of a city "appointed for the management, regulation, or control of corporate property" of the city to be interested directly or indirectly "in any contract, sub-contract, or job of work, or materials, or the profits of the contract price thereof, or any services to be performed for the city." The language of the section is quite broad and, in my opinion, clearly prohibits a member of the Newport News Waterworks Commission from being interested in a contract for the sale of automobiles to the Commission of which he is a member. Although the waterworks, as you suggest, may be run separately from other city operations,

it is being operated for the city by a body created by the City Council under express statutory authority.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Military Service, Voluntary or Otherwise, Does Not Vacate Office—Incumbent in Military Service May Be Candidate for Re-election.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 16, 1942*

MR. HENRY S. MYERS,
*Sheriff of Amherst County,
Amherst, Virginia.*

DEAR MR. MEYERS:

I am in receipt of your letter of September 10, from which I quote as follows:

"I am sheriff of Amherst county and forty-two years of age and subject to draft in the Army. I have been thinking of volunteering for some branch of service and it has occurred to me that if I should volunteer for military services I might vacate the office of sheriff, which I would not like to do unless absolutely necessary. Therefore, I will appreciate it if you will advise me—first, whether or not the office of sheriff would be considered vacated in the event I should volunteer for service; second, if the office is not vacated, could I become a candidate for re-election in the August primary and general election in 1943 if then in the military service, when outside of Amherst county and possibly outside of the United States, since there is no certainty as to where I will be; and, third, in the event I should be drafted and not volunteer, would this vacate my office of sheriff and could I also become a candidate for re-election as above in the event I should be drafted?"

I call your attention to section 291-b of the Code (Michie 1936) reading as follows:

"No State, county or municipal officer or employee shall forfeit his title to office or position or vacate the same by reason of engaging in the war service of the United States; and any such officer or employee who voluntarily or otherwise enters such war service may notify the officer or body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office or position during the period of his war service; and the officer or body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in war service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting."

Under this section it is the opinion of this office that, whether you are drafted or volunteer for a branch of the armed services of the United States, you would not vacate your office, but that upon notice to the au

thority designated to fill the vacancy in your office you would be relieved of your duties and some other person would be appointed as acting sheriff for the remainder of your term or until you returned to resume your duties as sheriff.

As to becoming a candidate for re-election, I know of no reason why you may not do this, provided you are in a position to comply with the requirements of the statutes applicable to candidates.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; State and Federal.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 2, 1943.*

D. W. McNEIL, Esq.,
*Acting Attorney for the Commonwealth,
Lexington, Virginia.*

MY DEAR MR. McNEIL:

I have your letter of March 1, in which you call my attention to section 290 of the Code, as amended by chapter 4 of the Acts of the Special Session of the General Assembly of 1942, relating to the disability of State, county, or municipal officers or employees from also holding office under the government of the United States. You are particularly interested in the exceptions contained in the last sentence of the section. These exceptions, in my opinion, provide for three classes of persons to whom the prohibition of the section does not apply:

1. The section as amended does not now prohibit a State, county, or municipal officer or employee from becoming a member of the armed forces of the United States.

2. The section as now amended does not prohibit a State, county, or municipal officer or employee from accepting an office or post of trust or emolument under the government of the United States, provided such compensation attached to such office or post under the said government does not exceed the sum of \$1,200 per year. In this second class the amount of the compensation of the State, county, or municipal position is immaterial.

3. The section as now amended does not prohibit a State, county, or municipal officer or employee receiving a salary of \$1,200 a year or less from such State, county or municipality from accepting an office or post of trust or emolument under the government of the United States, the amount of the compensation attached to such office or post being immaterial.

The exceptions added by the Special Session of the General Assembly of 1942 only apply "during such period as the present state of war exists between the United States and any foreign power."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Assn't. U. S. Dist. Atty. as Member of Atlantic States Marine Fisheries Commission.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 18, 1942.

HONORABLE COLGATE W. DARDEN, JR.,
Governor of Virginia,
Richmond, Virginia.

MY DEAR GOVERNOR DARDEN:

I am in receipt of your letter of August 7, in which you enclose a letter from Honorable C. H. Morrissett, State Tax Commissioner, and one from Mr. H. H. Holt, Jr., of Hampton, relative to the eligibility of an Assistant District Attorney of the United States for appointment as a member of the Atlantic States Marine Fisheries Commission under chapter 400 of the Acts of 1942 (Acts 1942, page 640).

I have carefully considered both of the above letters, the Act providing for the establishment of the Commission, and sections 289, 290 and 291 of the Code of Virginia. This office has had occasion in the past to consider many similar questions, and in such cases I have uniformly expressed opinions in accordance with the views set out in Mr. Morrissett's letter to you.

I have noted Mr. Holt's suggestion that there may be some doubt as to whether or not a member of the Commission is an officer. However that may be, section 290 of the Code includes any "post of profit, trust, or emolument under the government of this Commonwealth, * * * ." Certainly a member of this Commission, whose appointment is provided for by an Act of the General Assembly and who is appointed by the Governor, would hold a post of trust under the government of the Commonwealth.

I must advise, therefore, that in my opinion under existing law an Assistant District Attorney of the United States is not eligible for appointment as a member of the Atlantic States Marine Fisheries Commission.

The enclosures contained in your letter are herewith returned.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Member of General Assembly, Member of Board of Supervisors, Supervisor of Soil Conservation District.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 17, 1942.

MR. H. L. DUNTON,
Soil Conservationist,
Blacksburg, Virginia.

MY DEAR MR. DUNTON:

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

"The question has been raised as to whether a member of the General Assembly of Virginia is eligible to become a candidate for an elected supervisor of a soil conservation district; also, whether a member of the county board of supervisors would be eligible or not. I would appreciate having your opinion on this question at your earliest convenience."

I know of no statutory or constitutional provision which would prohibit a member of the General Assembly from becoming a candidate for an elected supervisor of a soil conservation district.

Section 2702 of the Code provides that no person holding the office of supervisor shall hold any other office, elective or appointive, with certain exceptions which are not pertinent here.

I am of opinion, therefore, that a member of the county board of supervisors may not be a supervisor of a soil conservation district.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Offices of Trial Justice and Collector of Delinquent Taxes Are Incompatible.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 28, 1942.

HONORABLE C. LACY COMPTON,
Trial Justice
Manassas, Virginia.

MY DEAR MR. COMPTON:

This will acknowledge receipt of your letter of July 24, from which I quote as follows:

"The local board of supervisors, under section 394 of the Tax Code of Virginia, has appointed me as 'local delinquent tax collector.' I am at present trial justice for the county.

"I would like to have your opinion as to whether or not it is permissible, in view of section 4987-a of the Code of Virginia, to accept this appointment as tax collector.

"I have been advised that one trial justice in the State has been so appointed and is now acting as delinquent tax collector, but I am not satisfied as to whether or not this is proper."

As you know, a delinquent tax collector appointed under Section 394 of the Tax Code is authorized to collect delinquent local taxes on tangible personal property, machinery and tools, and merchants' capital, and local capitation taxes. It appears to me that in the normal course of events the collection of some of the items which may be referred to you will be enforced through the trial justice court. If my assumption is correct, I am sure you will agree with me that the trial justice, in view of section 4987-a of the Code, should not appear as counsel for the county in such cases.

For this reason I am inclined to be of the opinion that the offices of trial justice and delinquent tax collector are incompatible.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Trial Justice May Serve for Limited Period to Receive Payment of Delinquent Taxes But Not to Collect Same.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 30, 1942.

HONORABLE C. LACY COMPTON,
Trial Justice,
Manassas, Virginia.

MY DEAR MR. COMPTON:

This will acknowledge receipt of your letter of July 29, in reply to my communication of July 28.

I note that your appointment as delinquent tax collector is only for the purpose of receiving payment of taxes in the place of the former delinquent tax collector, who has resigned, and that it is not intended to institute any action for the collection of tax claim.

In my opinion, there would be no impropriety in your engaging in this quite limited field of activity. However, as I pointed out in my former letter, I am of opinion that the offices of trial justice and delinquent tax collector appointed under section 394 of the Tax Code, where such delinquent tax collector has all of the authority given by statute to such an officer, are incompatible.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Game Wardens May Be Deputy Sheriff.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 26, 1942.

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of August 22, enclosing a communication addressed to you from Mr. J. A. Tune, Sheriff of Halifax County. Mr. Tune asks you the following question and you desire the opinion of this office thereon:

"Mr. P. T. Wilborn and Mr. T. H. Hudson are State Game Wardens for Halifax County and are both working as Deputy Sheriffs for me, and I would like to have your opinion as to whether or not they may be allowed to work as Deputy Sheriffs under the new set-up beginning January 1, 1943."

I know of no statute which has the effect of prohibiting a game warden from being appointed and acting as deputy sheriff, and I am of opinion, therefore, so far as the statute law is concerned, that a game warden may be appointed and act as a deputy sheriff.

However, my information is that the Commission of Game and Inland Fisheries, as a matter of policy, is opposed, except under unusual circumstances, to its game wardens acting as general law enforcement officers. I would suggest, therefore, that it would be wise for a game warden to obtain the consent of the Commission of Game and Inland Fisheries before accepting an appointment as deputy sheriff.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Sheriff and Justice of the Peace.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 14, 1942.*

MR. C. M. GRIZZARD,
*Sheriff of Greensville County,
Emporia, Virginia.*

DEAR MR. GRIZZARD:

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

"Can a jailor appointed under Chapter 386 of the Acts of 1942 also act as a justice of the peace?"

As you know, the sheriff of a county is by virtue of his office keeper of the jail. Section 2702 of the Code provides among other things that a sheriff shall not hold any other office, elective or appointive, with certain exceptions not pertinent here. Furthermore, I am of opinion, that, on account of the nature of the duties of the respective offices, the office of sheriff (including a deputy sheriff) and that of a justice of the peace are incompatible.

For the reasons stated, I am of opinion, therefore, that your question must be answered in the negative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Justice of Peace of County May Also Be Justice of Peace of Town.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 1, 1943.

M. E. RUFFNER, ESQ.,
Justice of the Peace,
Luray, Virginia.

MY DEAR MR. RUFFNER:

This will acknowledge receipt of your letter of March 29, from which I quote as follows:

"I am now a duly elected justice of the peace for Luray magisterial district, Page county, Virginia. I live in the town of Luray. The ordinances for the town of Luray provide for the election of justice of the peace or magistrate for the town of Luray for the purposes of issuing warrants and so forth on behalf of the town. I would like to know if my present position as justice of the peace for the magisterial district would prevent me also running for the office of magistrate for the town of Luray. Is there anything in the law that would prevent me from holding the two offices at the same time?"

I have made a careful examination of the Constitution and statutory provisions prohibiting certain officers from holding two offices, but do not find in any of these provisions anything which has the effect of prohibiting you from holding the office of justice of the peace for a magisterial district of your county and also the office of justice of the peace authorized by sections 60 to 63 of the charter of the town of Luray, as enacted by chapter 338 of the Acts of 1928.

I call your attention to the fact that as justice of the peace for the town of Luray you have no authority to try cases involving violations of ordinances of the town of Luray unless the Council of such town adopts the resolution specified in section 4987-f(6) of the Code (Michie's Code of 1942). As you, of course, probably know, you would have no authority to try cases involving violations of State laws either as justice of the peace for the magisterial district of your county or as justice of the peace for the town of Luray.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC RECORDS—Prior Jury Lists Are Open to Public Inspection.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 17, 1941.

HONORABLE E. E. FRIEND, Clerk,
Chatham, Virginia.

DEAR MR. FRIEND:

This will acknowledge receipt of your letter of December 16, in which you request an opinion from me as to whether or not the jury lists filed in

your office for years prior to the present are open to inspection by parties who have an interest therein.

Section 3388 of the Code, which deals with clerks' offices, is in part as follows:

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

In view of this section, it is my opinion that such lists as you mention should be shown to persons who appear to you to have a proper interest in seeing said lists.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Application of Public Assistance Act to Certain Counties.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 2, 1943.

HONORABLE H. CLARK THOMPSON, \,
Acting Commonwealth's Attorney,
Hampton, Virginia.

DEAR MR. THOMPSON:

This will acknowledge receipt of your letter of January 19, enclosing copy of a letter from Mr. Stephen Clark, Chairman of the Elizabeth City County Board of Public Welfare, and asking my opinion regarding an apparent conflict between chapter 396 of the Acts of 1940, providing for the county board form of government in certain counties, and the Virginia Public Assistance Act of 1938 (chapter 379 of the Acts of 1938, as amended by chapter 344 of the Acts of 1940 and chapter 396 of the Acts of 1942) with respect to Elizabeth City County.

The Public Assistance Act of 1938 provided that the local board of public welfare in each county should consist of three residents of said county appointed by the judge of the circuit court of said county. There was an exception relating to counties operating under the county executive form or county manager form of government and other types of government patterned somewhat after these. This provision of the Public Assistance Act was not changed by the 1940 amendment. Chapter 396 of the Acts of 1940, in making provision for the county board form of government, provides in section 13 as follows:

"The board of county supervisors shall select three qualified citizens of the county who shall constitute the county board of public welfare. The said board shall, in so far as not inconsistent with this form of county organization and government, exercise all the powers conferred, and perform all the duties imposed, upon county boards of public welfare by law. There shall also be a superintendent of public welfare who shall

be chosen by the board of county supervisors, or by the county board of public welfare if the board of county supervisors so provides, from a list of eligibles furnished by the State Commissioner of Public Welfare. He shall, in so far as not inconsistent with this form of county organization and government, exercise all the powers conferred and perform all the duties imposed upon superintendents of public welfare by general law. The county board of public welfare and the superintendent of public welfare shall also perform such other duties as shall be required by the board of county supervisors."

This created a statutory exception to the Public Assistance Act of 1938 and, to the extent that they are inconsistent, this 1940 statute clearly prevails. The 1940 Act re-enacts, subject to several amendments, section 6 of the original Public Assistance Act, but does not carry an exception with respect to how the local board of public welfare should be appointed in counties where the county board form of government has been adopted. The question arises as to whether Elizabeth City County, in the selection of its local board of public welfare, is governed by section 13 of chapter 396 of the Acts of 1940 or by section 6 of the Virginia Public Assistance Act, as amended. It is my opinion that the local board of public welfare in Elizabeth City County should be chosen by the county board of supervisors pursuant to the provisions of section 13 of chapter 396 of the Acts of 1940.

While chapter 396 of the Acts of 1940 may be applicable only to Elizabeth City County in practice, it is not, in legal contemplation, a special Act. *Gandy v. Elizabeth City County*, 179 Va. 340, 19 S. E. 2d 97 (1942). There is a well known rule of statutory construction to this effect:

" * * * where a later law is merely a re-enactment of the former it will not be regarded as repealing an intermediate act, which qualifies and limits the former, but such intermediate act will be deemed to have remained in force and to qualify or modify the new act as it did the first. * * * " (*Board of Education v. County Court of Tyler County*, 77 W. Va. 523, 530, 87 S. E. 870 (1916); *Lybrand v. Wafford*, 174 Ark. 298, 296 S. W. 729, 733 (1927).)

In the instant situation chapter 396 of the Acts of 1940 is the intermediate Act and it is not affected by the mere re-enactment in 1942 (insofar as is pertinent here) of section 6 of the Public Assistance Act unless the legislative intent to change the intermediate statute is made plain, and it is not so here.

It is my opinion that this same conclusion holds true with respect to the employment of a local superintendent by the county board of supervisors of Elizabeth City County if they have not delegated this power to the local board of public welfare. The re-enactments of section 8 of the Public Assistance Act in 1940 and in 1942 do not evidence an intention to change the law with respect to counties which adopted the county board form of government.

Mr. Clark's letter to you contains this:

" * * * The law" (chapter 396 of the Acts of 1940) "makes no specific provisions in that section relating to the terms of members of the Board of Public Welfare, their compensation method by which the staff of the department is employed and how the compensation of the Superintendent and staff is fixed."

If the county board form of government statute is silent as to all of these details, it would naturally follow that these functions of the local board would be governed by the general statutes covering these subjects which are applicable throughout the remainder of the State.

It appears to me that in setting up the local boards of public welfare it was the intention of the Legislature to accommodate their organization to the form of government which might exist in the various counties. The county board form of government apparently was not in existence when the original Public Assistance Act became law, nor when it was amended in 1940. The Legislature attempted to fit it into the existing welfare set-up when it created this special statutory form of county government. True, it would have been plainer if the 1942 amendments to the Public Assistance Act had included this county board form of government in the other exceptions found in subsection (f) of section 6 of the Public Assistance Act, but the failure of the Legislature to do so does not, in my opinion, leave any county which might adopt such form of government in the same condition as other counties throughout the State. The legislative will, as manifested in chapter 396 of the Acts of 1940, should prevail.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

**PUBLIC WELFARE—Authority of State Board of Public Welfare to Fix
Maximum Fees to Be Allowed Attorneys.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 18, 1943.*

DR. WILLIAM H. STAUFFER,
*Commissioner of Public Welfare,
Richmond, Virginia.*

MY DEAR MR. STAUFFER:

I am in receipt of your letter of February 12, with reference to the regulation adopted by the State Board of Public Welfare prescribing the maximum fees which may be paid to attorneys employed by local boards of public welfare for the purpose of collection of recoveries from estates of recipients of old age assistance.

Since the State and Federal governments are interested in recoveries from estates of recipients of old age assistance, being entitled to a large proportion of the net amount so recovered, I am of the opinion that the State Board of Public Welfare, under its power to make rules and regulations for the proper supervision and administration of the Public Assistance Act, has the authority to prescribe the maximum fees to be paid attorneys employed by local boards of public welfare to make such recoveries. However, since these attorneys are employed by the local boards of public welfare and not by the State, I do not think that the Attorney General is given any authority to approve or disapprove fees fixed for and charged by such attorneys. I would suggest, however, that in adopting a regulation dealing with this subject the State Board of Public Welfare make such regulation elastic enough to take care of cases where attorneys have to devote an unusual amount of time and work to make the recoveries.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—No Duty on Board of Supervisors to Furnish Quarters for Board of Public Welfare.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 4, 1943.*

HONORABLE CHARLES R. FENWICK,
*Member State Board of Public Welfare,
726 Woodward Building,
Washington, D. C.*

MY DEAR MR. FENWICK:

This will acknowledge receipt of your letter of December 23, in which you discuss the question of the liability of a county to provide office quarters for its board of public welfare.

I know of no statute which requires the board of supervisors of a county to provide quarters for the county board of public welfare. Section 2854 of the Code deals generally with the question of furnishing offices for county officers and agencies, but this section certainly does not make it mandatory upon the board of supervisors to furnish offices for the county board of public welfare. Unquestionably I think the board of supervisors has authority to provide quarters for this agency of the county and, if it does provide such quarters from available space in the court house, I doubt the authority of the board to charge rent. Certainly the board of supervisors may not require its local board of public welfare to use office space in a courthouse or other building owned by the county and pay rent therefor. If there is no space for a county board of public welfare made available by the board of supervisors in the court house or other county building without a rent charge, then such board of public welfare unquestionably may acquire other office space and pay to the owner thereof such rent as may be agreed upon.

I note that you expect to be in Richmond soon and desire to confer with me on this subject. I shall be glad to talk with you at any time that you are in the city.

The enclosure contained in your letter is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Commitment of Females Convicted of Operation of House of Illfame.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 15, 1942.*

DR. WILLIAM H. STAUFFER,
*Commissioner of Public Welfare,
Travelers Building,
Richmond, Virginia.*

MY DEAR DR. STAUFFER:

This will acknowledge receipt of your letter of December 10, in which you ask if Chapter 18 of the Acts of the Extra Session of the General

Assembly of 1942, amending Chapter 404 of the Acts of 1918, has the effect of repealing Chapter 428 of the Acts of 1922, authorizing the commitment of certain misdemeanants to the State Board of Charities and Corrections (now the State Board of Public Welfare) on indeterminate sentences.

As you know, Chapter 18 of the Acts of 1942 was introduced primarily as a war measure at the suggestion of commanding officers of certain army and navy establishments. Its chief purpose was to empower the court or justice to cause the person charged with prostitution to be examined for contagious venereal disease and, if found to be infected with such a disease, to require such person to be confined, whether convicted of prostitution or not, until pronounced not dangerous in the community on account of such disease. The Act of 1942 does not in terms repeal the Act of 1922 to which you refer, and repeals by implication are not favored.

When the background of the 1942 Act is considered and the further rule of construction that, if possible, statutes are not deemed to be repealed by implication, I am of the opinion that the Act of 1922 is still in effect, and that any female convicted by a court or justice of the offenses named in that act may in the discretion of the court or justice still be sentenced as provided in said Act. In other words, Chapter 428 of the Acts of 1922 affords an alternative method of dealing with the misdemeanants therein mentioned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Commitment of Females Convicted of Operation of House of Illfame.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 11, 1943.*

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

DEAR MR., SPENCER:

This will acknowledge receipt of your letter of January 7, in which you ask my opinion upon the following questions:

"Quaere: Where a female person charged with one of the several offenses prohibited and punished under section 4548, et seq., demands a jury trial,

"(1) May a jury in ascertainment of the punishment, act under the provisions of section 4548g, or is it confined to the penalties set forth in sections 4548 and 4548e?

"(2) If a jury finds a person guilty of any of the offenses mentioned and fixes a punishment under either section 4548 or 4548e, may a court or justice, under the provisions of section 4548g, commit such female to the State Board of Charities and Corrections; and, if so, for what period would the commitment have to be?"

As to the first proposition, it is my opinion that in ascertaining the punishment the jury is limited to the penalties set forth in sections 4548 and

4548c. I construe section 4548g of Michie's Code of 1942 to mean that the court or justice is given a discretion to commit females convicted of the offenses therein enumerated to the State Board of Charities and Corrections (now the State Board of Public Welfare). I further believe that such a commitment is in lieu of any jail sentence which may have been fixed by the jury or court as punishment for the crime; that is, if the court in its discretion thinks that the particular case is one which can best be handled by the State Board of Public Welfare, the court or justice may enter a commitment for an indeterminate sentence and such commitment takes the place of any jail sentence that might previously have been ascertained by a court, justice or jury.

It appears that the answer above would necessarily answer your second question. The order of commitment does not stipulate the period for which it shall be, for the statute provides that it shall be an indeterminate sentence, and thereafter the question as to how long a female shall remain under the custody of the State Board of Public Welfare is a matter resting in the Board's sound discretion after the expiration of the minimum sentence, i. e., three months.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Transfer of Surplus Farm Commodities from One Institution to Another.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 21, 1942.*

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Travelers Building,
Richmond, Virginia.

MY DEAR DR. STAUFFER:

This will acknowledge receipt of your letter of October 19, in which you quote the following provision from section 8-a of the 1942 Appropriation Act (Acts 1942, at page 901):

"It is hereby further provided that the Governor may authorize or direct under such terms and conditions as he may prescribe the transfer of surplus farm commodities produced at any one of the aforesaid institutions to any other of the aforesaid institutions."

The "aforesaid institutions" refer to the four industrial schools which by virtue of the amendment to the Reorganization Act (Acts 1942, at page 625) were transferred as to operation and management to the State Board of Public Welfare.

You inquire whether or not surplus farm commodities may be transferred from one of these institutions to another without requiring the institution to which the commodities are transferred to pay for such commodities.

Unquestionably, I think this may be done with the approval of the Governor, and I can see nothing in section 38 of the Appropriation Act to forbid it. In my opinion, the Governor may under the quoted provision

authorize the transfer of such surplus farm commodities from one institution to another with or without payment by the institution to which the commodities are transferred. The whole matter under the quoted language is in the hands of the Governor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**REAL ESTATE ASSESSMENT BOARDS—During What Periods They
May Be Paid for Service.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 20, 1943.*

HONORABLE A. O. LYNCH,
*Attorney for the Commonwealth,
Norfolk, Virginia.*

MY DEAR MR. LYNCH:

This will acknowledge receipt of your letter of January 16, from which I quote as follows:

"Norfolk County has a continuing Board of Real Estate Assessments, appointed under the provisions of Chapter 237, Acts of 1942, which provides that the Board shall meet annually, on the fifteenth day of March, of each year, and continue in session until its work is completed for that year, not later, however, than the fifteenth day of May.

"New buildings costing more than nine million dollars were constructed in 1942 and the members of the Assessment Board are of the opinion that they cannot complete the assessment for 1943 in the time provided in the Act. The Board of Supervisors are of the same opinion and are willing that the Board shall have sufficient time to complete the assessment, and would like for it to begin its work prior to March fifteenth, if this can legally be done. Does the Board of Supervisors have the authority to pay members of the Assessment Board for their services, except between March fifteenth and May fifteenth?"

Chapter 237 of the Acts of 1942, to which you refer, as to the time of meeting and the compensation of the Board of Real Estate Assessments provides in part as follows:

" * * * The said board shall meet annually at the courthouse of the county, or at such other place as may be designated by the board of supervisors of said county, on the fifteenth day of March, of each year, beginning in the year nineteen hundred and forty-two, and continue in session until its work is completed for that year, not later, however, than the fifteenth day of May.

"The board of supervisors of the county may prescribe the duties of such board in so far as they are not prescribed by this act and fix their compensation, not to exceed the sum of ten dollars per day for each of the members of said board, and may provide for such clerical assistance and other expenses as may be necessary, in the

opinion of such board of supervisors. All salaries, expenses and other costs of the county real estate assessment board shall be payable out of the county treasury."

While the quoted language seems to contemplate that the official work of the Board shall be done between the fifteenth day of March and the fifteenth day of May, yet it gives to the Board of Supervisors the power "to prescribe the duties of such Board in so far as they are not prescribed by this act and fix their compensation, not to exceed the sum of ten dollars per day for each of the members of said board, * * * ." If, therefore, under the circumstances you present, the Board of Supervisors is satisfied that some preliminary work is necessary to be performed before March fifteenth in order to enable the Board of Real Estate Assessments to satisfactorily complete its work, in my opinion, the language of the Act to which I have just referred authorizes the Board of Supervisors to prescribe as a duty of the Board of Assessments that it shall do such work prior to March fifteenth and to prescribe the compensation therefor. It seems to me that this is a reasonable construction to place on the power given the Board of Supervisors to prescribe the duties of the Board of Assessments in so far as they are not prescribed by the Act, especially where the situation seems to be that the real estate assessments cannot be completed between March fifteenth and May fifteenth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Grain Chattel Mortgages.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 28, 1942.*

HONORABLE T. W. CARTER, *Clerk,*
Franklin County Circuit Court,
Rocky Mount, Virginia.

MY DEAR MR. CARTER:

I further refer to your letter of August 19, with reference to a "grain chattel mortgage" which has been presented to your office.

I presume that this mortgage is to secure a production credit association's money advanced by such association and evidenced by a note of the borrower. It is my understanding that these production credit associations are agencies of the Federal government, such as described in section 1 of chapter 336 of the Acts of Assembly of 1936. In my opinion, this mortgage should be docketed in the Federal Farm Credit Lien Book in your office. Your fee for this service is \$1 and is provided by section 6 of the Act. There is no tax.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Recovery Claims Against Estate of Recipient Under Assistance Acts.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 26, 1942.

MR. JAMES W. PHILLIPS, *Director,*
County and City Organization,
Department of Public Welfare,
Richmond, Virginia.

DEAR MR. PHILLIPS:

I am in receipt of your letter of August 22, in which you refer to section 20 of the Virginia Public Assistance Act of 1938, as amended in 1942 (Acts 1942, page 520). This section provides under certain circumstances for the recovery from the estate of a recipient of the amount paid as such assistance under the Act. The section then goes on to provide:

"The local board may require the superintendent of public welfare to execute and acknowledge, as deeds are required to be acknowledged, a notice of such claim showing the total amount paid as such assistance, which notice may be filed within one year after the death of the deceased recipient, with the clerk of the court authorized to record deeds in the county or city where the real estate of such recipient subject to such claim is situated, and when so filed the clerk shall record it in the current deed book and index it in the names of both of the local board and the deceased recipient. No fees shall be charged or collected by the clerk for filing, recording or indexing any such notice. After the expiration of said period of one year, such notice, when filed, recorded and indexed as aforesaid, shall have, as to purchasers, the same effect as though a creditors' suit had been instituted and a memorandum of lis pendens duly filed and recorded."

You inquire if under the quoted language the clerk of the court where the notice of the claim against the estate is filed should prepare a special book in which to enter all such claims.

In my opinion, the quoted language is perfectly plain in providing that when the claim is properly executed and acknowledged by the superintendent of public welfare it shall be recorded "in the current deed book" and indexed in the names of the local board and the deceased recipient. The amended section certainly does not require that a special book be used in which to record such claims, but, on the contrary, it expressly provides that they shall be recorded in the current deed book.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

RECOGNIZANCES—Procedure to Recover Amounts Forfeited.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 14, 1943.

SENATOR HARRY C. STUART,
*Elk Garden,
Virginia.*

DEAR MR. STUART:

I have your letter of June 11, enclosing a letter from Mr. V. L. Sexton, Jr., in which he inquires as to whether under the Constitution and laws of Virginia any provision is made for relief from forfeited recognizance, and you ask me to advise you on this subject.

Section 2569 of the Code provides as follows:

" * * * the governor shall also have power, in his discretion, to remit, refund or release, in whole or in part, any forfeited recognizance, heretofore or hereafter forfeited; or any judgment rendered thereon provided, in the opinion of the governor, the evidence accompanying such application warrants the granting of the relief asked for. But the provisions of the three following sections and section twenty-five hundred and seventy-four shall be complied with as a condition precedent to such action by the governor; * * * ."

The other Code sections referred to in the above quotation provide for the filing of a petition in the clerk's office of the court wherein the recognizance was forfeited, giving notice to the Commonwealth's Attorney, and a hearing by the court. Pursuant to such hearing the court shall cause to be made out by the clerk of the court a certificate of the facts proved, and file with the same an opinion, in writing, as to the propriety of granting the relief.

Section 2574 provides for the proceedings to be had in the event the Governor remits the forfeited recognizance.

I am returning herewith Mr. Sexton's letter.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RETIREMENT SYSTEM—Status of Employees on Leave of Absence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 18, 1942.

HONORABLE FRANK P. EVANS, *Director,*
Virginia Retirement System,
Finance Building,
Richmond, Virginia.

MY DEAR MAJOR EVANS:

This is in reply to your letter of November 13, which I quote in full as follows:

"The Board of Trustees of the Virginia Retirement System has directed me to request your opinion of the right of certain employees

of the Unemployment Compensation Commission to file a 'Notice of Election Not to be Included in Membership of the Virginia Retirement System' under Section 6(b) of the Virginia Retirement Act.

"In January, 1942, upon the federalization of the Public Employment Service, the persons in question went off the Unemployment Compensation Commission payroll and into the employment of the United States Employment Service. In an agreement entered into between the Unemployment Compensation Commission and the Federal Social Security Board at that time, we are informed by the Unemployment Compensation Commission the following language occurs:

"The State Unemployment Compensation Commission will endeavor to effect an agreement with the appropriate State official for an indefinite leave of absence without pay to employees in the State Employment Service, which will permit such employees to accept employment in the United States Employment Service without any deterioration of rights, so that any time they might return to State employment, such employees may be reinstated as though their term of employment with the State had not been interrupted."

"At the time this agreement was entered into, the signer of this letter was a member of the Unemployment Compensation Commission and while the individual personnel records may not have indicated that the persons involved were placed on leave of absence without pay, the Commission had every idea of complying with the agreement in this respect. We might add that at the time of the agreement the Governor authorized the Commission to take the necessary steps to comply with the requirements of the U. S. authorities for the Federalization of the Employment Service.

"Some time after July 1, 1942, these persons were re-instated by the Unemployment Compensation Commission and have since remained in the Commission's employment.

"We further understand that while these persons were with the United States Employment Service they were under the retirement system of the United States Government and deductions were made from their salaries on that account.

"Under the circumstances above mentioned, the Board of Trustees of the Virginia Retirement System is uncertain whether the persons involved should be construed as on leave from service July 1, 1942, as contemplated by Section 6 (b) of the Virginia Retirement Act."

Under the facts stated in your letter, it is my opinion that at the time the Retirement Act became effective the employees to whom you refer had been granted a leave of absence by the Unemployment Compensation Commission, and, therefore, are within the provisions of section 6 (b) of the Act, which confers upon "any person on leave from service at the time" of the taking effect of the Act the right to file with the Retirement Board a notice of his election not to be included in the membership of the retirement system. It follows that I am of opinion that these persons are not compelled to become members of the retirement system, but, at their election, may file a notice of their desire not to be included therein.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RETIREMENT SYSTEM—Disposition of State Deduction from Teachers' Salaries.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 25, 1942.

HONORABLE DABNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond, Virginia.

DEAR MR. LANCASTER:

This is in reply to your request for my opinion as to the disposition which should be made of deductions from teachers' salaries under the retired teachers' pension act of 1908, as amended in 1910 (See Chapter 313, Acts 1908; Chapter 97, Acts 1910).

It seems that the localities during the last fiscal year have made the required deductions from the teachers' salaries, and that the State Board of Education is required to deduct the aggregate amount of said local deductions from the annual apportionment on account of the appropriation made by the 1942 General Assembly and other school funds referred to in said 1910 act. The net effect of this deduction is to leave the money in the State Treasury.

I have been unable to find any provision in the 1942 Retirement Act (Chapter 325, Acts 1942), or any other statute, which would provide for any disposition of the money remaining in the Treasury resulting from such deductions. It is my opinion, therefore, that such moneys should remain and be held in the general fund of the State Treasury until other disposition thereof is made by appropriate action taken by the General Assembly.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Not Liable in Torts for Injury Sustained by Pupil.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 11, 1943.

HONORABLE DABNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR MR. LANCASTER:

I am in receipt of your letter of January 8, enclosing a communication from Mr. H. V. White, Superintendent of Nansemond County Schools. It appears unnecessary to recite the detailed facts set out by Mr. White; it is sufficient to say that his letter presents a question of the liability in tort of the local school board.

This office has repeatedly expressed the opinion, which is supported by decisions of our Supreme Court of Appeals, that no such liability exists. While the accident described by Mr. White is indeed regrettable, I know of nothing which takes it out of the well recognized rule that I have mentioned. Not being legally liable for the medical expenses of the injured

child, I know of no authority which the school board has to pay such expenses out of public funds.

Mr. White's letter is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—No Authority to Compensate Student Injured.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 11, 1943.*

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

MY DEAR MR. THOMPSON:

This will acknowledge receipt of your letter of June 8, from which I quote as follows:

"The Campbell County School Board has asked my opinion on the question of whether or not they can pay the doctor's bill and hospital bill of a student who was injured while taking physical education at a school in connection with the physical education program as required by the State Board of Education.

"As I understand the situation, the student in question was, of course, required to take physical education, and while taking physical education in some manner he was rather seriously injured, his injury requiring hospitalization and doctors' care. The School Board would like, if it is lawful for them to do so, to appropriate the sum of \$200 to take care of this student's doctors' bill and hospital bill."

It is well settled in Virginia that a county school board is not liable in tort on account of an injury sustained by a pupil at a public school. There being no legal liability on the school board, I know of no authority granted to the board, expressly or by implication, to pay the medical and hospital expenses of a pupil so injured. While the situation you describe appeals greatly to the sympathy, yet, if compensation in such cases is to be paid, the authority for such action must be given to the school board by the General Assembly.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Carrying Public Liability Insurance Does Not Waive Board's Immunity from Tort Liability.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 5, 1943.

MR. G. L. H. JOHNSON,
*Superintendent of Schools,
Danville, Virginia.*

MY DEAR MR. JOHNSON:

Dr. Lancaster, of the State Department of Education, has forwarded me your letter of March 31, in which you refer to my letter of December 10, 1942, to Dr. Lancaster, relative to the carrying of public liability insurance by local school boards. You state that one of your insurers has raised the following question:

"One of our insurers having our boiler insurance, with policies containing public liability provisions, contends that if we do not hold firmly to the right to plead this lack of liability on the part of the school board, or to have the insurer do so on behalf of the board, we might open up the way for unlimited and uninsured liability. I do not think that this follows logically just because the board is willing to get enough money from the city council to give the public some limited protection. Nevertheless, we should like very much to have the Attorney General's opinion as to whether taking out an insurance policy providing limited protection to the public automatically opens up the way for unlimited and uninsured liability on the part of a school board or in any way deprives a school board of its right to plead its lack of liability in a suit for damage."

I do not think that you need be concerned that the carrying of this public liability insurance will in any way deprive a school board of its right to plead its lack of liability in tort. As I have indicated to you in my former letter, public liability insurance is not carried for the protection of a governmental agency, but in the interest of the public generally. I might mention also that such insurance will also protect the State or local employee.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Authority to Insure School Buildings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 29, 1943.

DR. DABNEY S. LANCASTER,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DR. LANCASTER:

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

"Who has the right to place insurance and determine the amount to be carried on school buildings owned by the school board, the school board itself or the board of supervisors?"

By section 676 of the Code it is provided that the title to all school property shall be vested in the county school board and that such property shall be managed by said board. In my opinion, therefore, it is within the power of the county school board to determine the amount of insurance to be carried on school buildings and to place the said insurance. This power of the county school board to handle the matter of insurance on school property seems to be recognized by section 2726 of the Code, which provides that:

"The board of supervisors, *or other governing body*, of every county shall have power to cause the county buildings to be insured, * * *."
(Italics ours.)

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SCHOOL BOARDS—May Repair Private Road to Transport Pupils—
Boards of Supervisors May Appropriate Money for This Purpose.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 2, 1942.

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

MY DEAR MR. PEACHY:

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

"The School Board and Board of Supervisors of James City County have requested me to furnish them with an opinion of the legality of the following: A certain private road in the county is in need of repairs in order to enable the school bus to reach a number of children; these children live approximately 5 miles from the school and about 2 miles from a public road. The Board of Supervisors has taken the position that they are prohibited from spending any money on roads, public or private and, therefore, they propose to appropriate to the School Board sufficient funds to cover this work and the School Board is planning to contract out the work.

"I would like for you to advise me whether or not, in your opinion, the School Board has the authority to expend this money for the aforesaid purpose, and whether or not the Board of Supervisors has the authority to appropriate these funds for such purpose."

Section 656 of the Code, prescribing the duties of the local school board, provides that such board "shall have authority, and it shall be the duty of the school board * * * 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." If the school board is of opinion that it is necessary, in providing for the transportation of pupils,

to repair the road which you mention, I am of opinion that under the quoted language of section 656 it may do so out of any funds available for the purpose, and I am further of the opinion that the board of supervisors would have the authority to appropriate such funds to the school board. You will observe that the section makes it the duty of the school board to provide for the transportation of pupils where it will contribute to the efficiency of the school system, and, if there is no other way by which the children you mention can be transported to school than by repairing the road in question, it would seem to follow that the board has the authority to take this action.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—No Authority to Issue 2-Year Note for School Construction.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 27, 1942.

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

MY DEAR MR. WILLIAMS:

I am in receipt of your letter of July 25.

In view of the provisions of section 115-a of the Constitution, to which I referred in my letter of July 16, I am of opinion that the county school board has no authority to issue its note for two years for the purpose of raising money for the construction of a school. The county school board having no authority to issue such a note, I am of opinion that the board of supervisors has no authority to invest any part of the county sinking fund in such a note. It seems to me that the language of section 115-a of the Constitution is plain and that the making of such a note by the county school board is undoubtedly prohibited by said section unless the matter is submitted to a vote of the people.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Authority to Sell and Convey Real Estate.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 17, 1943.

HONORABLE DANIEL WEYMOUTH,
*Commonwealth's Attorney,
Heathsville, Virginia.*

MY DEAR MR. WEYMOUTH:

I am in receipt of your letter of February 15, in which you refer to section 678 of the Code, giving to the local school board the same power to

sell and convey real estate as the Board of Supervisors has under section 2723 of the Code.

However, section 678 contains a proviso which, in effect, allows the school board to sell property less than \$500 in value without complying with section 2723 of the Code. Section 2723 provides that the Board of Supervisors may sell real estate belonging to the county at public or private sale, subject to the approval of and ratification by the circuit court of the county.

After considering the two sections, it is my opinion that it is clear that, where school property is less than \$500 in value, it may be sold by the school board either under the authority of section 678 or of section 2723. In the case you put, therefore, I am of the opinion that the school board may proceed under either of the two sections.

With best wishes. I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Nepotism for Board to Employ Daughter-in-Law of a Member.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 16, 1943.*

DR. DABNEY S. LANCASTER,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DR. LANCASTER:

This will acknowledge receipt of your letter of April 13, in which you enclose a letter from Mr. W. E. Garber, Division Superintendent of Schools of King William County, in which he asks if the School Board of King William County may employ a school teacher for the coming year under the following circumstances:

"In reply to your letter of April 7, I beg to state that the teacher about whom I wrote you was employed by the King William School Board in August, 1942. She was just out of college and had no teaching experience.

"During the winter she married a son of one of my School Board members. None of the members of my Board or myself had any idea that this young lady contemplated matrimony when we employed her."

As you know, section 660 of the Code prohibits a school board from employing teachers within certain degrees of relationship to the division superintendent of schools or a member of the school board, and among the prohibited relationships is that of daughter-in-law of a member of the school board. There are certain exceptions to the prohibitions contained in the section, but none of them seems to cover the case of the young lady about whom you write. It is my opinion, therefore, that this young lady may not be employed by the School Board of King William County as a teacher for the coming year.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Appeals from Action Dismissing Division Superintendent.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 12, 1943.*

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

DEAR MR. WHITEHEAD:

This will acknowledge receipt of your letter of February 10, referring to my opinion under date of April 16, 1940, to Senator Robert C. Vaden, of Gretna, Virginia, in which I took the position that under sections 628 and 651 of the Code the local school board of a county had the power to remove a division superintendent of schools. You would like to know whether or not there is any appeal from the decision of the school board when it has made its decision as to whether or not a particular superintendent should be removed.

The only statute which I have been able to find dealing with appeals from the school boards is section 667 of Michie's Code of 1942. It is as follows:

"Any five interested heads of families, residents of the county, or city, who may feel themselves aggrieved by the action of the county or city school board, may, within thirty days after such action, state their complaint, in writing, to the division superintendent of schools who, if he cannot within ten days after the receipt of the said complaint, satisfactorily adjust the same, shall, within five days thereafter, at the request of any party in interest, grant an appeal to the circuit court of the county or corporation court of the city or the judge thereof in vacation who shall decide finally all questions at issue; but the action of the school board on questions of discretion shall be final unless the board has exceeded its authority or has acted corruptly. The proceedings on such an appeal shall be informal, and no pleading shall be required, other than the complaint hereinabove provided for. A copy of the order shall also be entered by the clerk of the board in the minute book of the county or city board."

This enactment is couched in very general terms and would seem to give a right of appeal from any decision of the school board to any five interested heads of families who might feel themselves aggrieved by the action of the school board. Although the matter is not entirely free from doubt, I am of the opinion that this section gives an appeal to the circuit court of the county from the action of the school board removing, or refusing to remove, the division superintendent of schools. You will notice that the right of appeal is given to five interested heads of families, residents of the county, who may feel themselves aggrieved by the action of the school board. No right of appeal is given to the division superintendent of schools.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Compulsory Attendance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 4, 1942.

HONORABLE DABNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR MR. LANCASTER:

This will acknowledge receipt of your letter of November 3, from which I quote as follows:

"I have an inquiry from one of our division superintendents which reads, in part, as follows:

"Section 683 of the Code of Virginia provides that we can enforce the compulsory attendance of school children as regards distance measured from the entrance to the school grounds to the "residence" of the children. In some cases the residence or home is as much as one-fourth or one-half mile from the highway. If the word "residence" is taken literally, the distance is measured from the house. Usually, however, it is measured from the gate or entrance on the highway to the farm or home."

"I shall appreciate a statement from you giving me an interpretation of what is meant by 'residence.'"

The portion of section 683 of the Code pertinent to your inquiry provides that the provisions of the section relating to compulsory attendance shall not apply to "children under ten years of age who live more than two (2) miles from a public school, unless public transportation is provided within one mile of the place where such children live; nor to children between ten and fifteen years of age who live more than two and one-half (2½) miles from a public school, unless public transportation is provided within one and one-half (1½) miles of the place where such children live. Compulsory education distances shall be measured or determined by the nearest practical routes, which are usable for either walking or riding, from the entrance to the school grounds, or from the nearest school bus stop, to the residence of such children. * * *."

The policy underlying the quoted provision is, of course, that the compulsory attendance law shall not apply to children who would otherwise have to walk more than the prescribed distances to get to school. With this policy in mind, I am of opinion that it is clear that the distance the child would otherwise have to walk should be measured from the house in which the child lives. The fact that the gate or entrance to the farm or home may be half a mile or more from the house does not result in the child walking any less distance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Teaching of Religious Education Therein.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 26, 1943.

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

MY DEAR MR. LEE:

This is in reply to your letter of May 17, enclosing a letter addressed to you by Mr. Harold W. Ramsey, Superintendent of Schools for Franklin County. Mr. Ramsey describes a proposed plan for giving a course of religious instruction sponsored by the Virginia Council of Religious Education, which the Franklin County Ministerial Association desires the School Board to allow to be conducted in the elementary schools of the county. The following is quoted from Mr. Ramsey's letter:

"This plan as I understand it would work somewhat as follows: A person trained in religious education would be employed by the Council of Religious Education and would be paid from funds raised from private sources. The School Board would bear no part of the expense of this instruction. This teacher would visit each school one day per week. She would spend approximately one hour with each grade. This class would not be compulsory. The parents' permission in writing would be obtained before admitting the child to the class. It is proposed by the local Ministers' Association that this instruction be inaugurated in grades four to seven, inclusive, beginning next fall.

"This would require that one hour each week be taken from the present school schedule to make time for religious instruction. This course as I understand it would not be under the control of the School Board. The school authorities would set up no standards for the course. If a child failed this course he would not be penalized on his regular school program. It would probably involve cooperation on the part of the School Board and the Council of Religious Education in regard to matters of discipline, pupil conduct, etc.

"I have examined rather carefully the outlines for these courses which have been prepared by the Council of Religious Education. The course is outlined somewhat in detail and seems to involve historical study of the Bible and the Church. This course as outlined is non-sectarian in nature I am sure."

You desire my opinion on the question of whether or not the School Board may lawfully permit the teaching of this course in the manner described by Mr. Ramsey.

Whether or not what is sometimes termed religious instruction may be given in the public schools has been the subject of much controversy and there is considerable conflict in the authorities. Frequently the question turns on the construction of particular constitutional and statutory provisions. Likewise the nature of the courses offered is of great importance, it being generally held that sectarian instruction (and the authorities differ as to what constitutes sectarian instruction) is not permissible. I do not think it is properly within the scope of this letter to attempt to analyze and evaluate the many opinions of courts of last resort dealing with this question. After careful consideration, however, I am of opinion that, while the question is not at all free from doubt, the better view is that a course in biblical history and literature may be allowed

to be taught in the elementary public schools during school hours under the following conditions:

(a) The course must be entirely non-sectarian; (b) its outline must be adopted or approved by the local School Board or the State Board of Education; (c) the teacher, the time and the method of teaching must be approved by and subject to the control of the Local School Board; (d) the parents of each pupil taking the course should give their consent thereto and no pupil should be asked or required to take the course or penalized, or his or her school standing in any way affected, for not taking it; (e) the course must not interfere with the teaching of the required subjects.

While the specific plan referred to by Mr. Ramsey departs in several respects from the foregoing requirements, it would seem that the necessary modifications could be made to conform thereto if the School Board desires the course to be taught. That is a matter resting solely in the discretion of the School Board.

I am advised by the State Board of Education that it has approved three courses in biblical history and literature for teaching as an elective in public *high* schools. I enclose a syllabus of one of these courses from the Bulletin of the State Board of Education for January, 1941. You will observe that, while the course was approved by the State Board, it was prepared by a selected committee composed of persons actively connected with the Jewish, Roman Catholic and Protestant Churches, and that it was to be entirely an elective.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—When Tuition May Be Charged to Persons Residing on Federal Reservations.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 5, 1942,*

MR. J. S. McDONALD,
Clerk Roanoke City School Board,
P. O. Box 1907,
Roanoke, Virginia.

DEAR MR. McDONALD:

This will acknowledge receipt of your letter of October 3, 1942, from which I quote as follows:

"Enclosed herewith I am sending you a letter to the Roanoke City School Board from Mr. Marshall Bryarly who states that he resides upon the Government reservation at the Veterans' Facility, Roanoke, Virginia, and, therefore, requests admission of his two children in the Roanoke City Public Schools without the payment of tuition charges.

"The School Board will give consideration to this request at its next meeting and in the meantime has suggested that I make some

inquiry as to whether the applicant is within his legal rights, State or Federal, in making application for the attendance of his children in the Roanoke City Public Schools without the payment of tuition charges."

Section 682 of the Code provides in part that children of persons residing on any Federal military or naval reservation located wholly or partially within the geographical boundaries of a county or city may be admitted free to the schools of such county or city.

If the Veterans' Facility is on a Federal military reservation (a question upon which I do not have sufficient information to express an opinion) located wholly or partially within the geographical limits of Roanoke City, then I am of the opinion that Mr. Bryarly's children are entitled to free tuition in the public schools of the city. If, however, no part of the reservation is within the geographical limits of Roanoke City, then I am of the opinion that these children are not entitled to free tuition in the city schools.

Mr. Bryarly's letter is herewith returned.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Salary of Division Superintendent.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 22, 1942.*

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

MY DEAR MR. BUTLER:

I am in receipt of your letter of September 14, in which you refer to section 615 of the Code, as amended in 1942 (Acts 1942, p. 242) and then ask in effect if the board of supervisors of a county having a school population of more than 3,000 is required to pay its division superintendent of schools one-half of the minimum salary fixed by said section.

The section in part provides:

" * * * The division superintendent shall receive as a minimum salary twenty-two hundred dollars per year, provided he is employed for his full time in a school division with a school population of not less than three thousand. * * * In school divisions with a school population of over three thousand the division superintendent shall receive, in addition to the minimum of twenty-two hundred, ten dollars per hundred for each hundred school population above three thousand. * * * One-half of the salary thus determined shall be paid by the State treasurer in monthly installments * * * and the other half shall be paid by the * * * county board of supervisors out of the

If the salary of the division superintendent of schools of Alleghany county, computed pursuant to the above quoted provision, amounts to \$2,550, then I am of the opinion that one-half of such salary shall be general fund of the * * * county."

paid by the board of supervisors of the county, and that this provision as to the county's share of his salary is mandatory.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Anticipating Payment of Loans from Literary Fund.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 15, 1943.*

DR WALTER S. NEWMAN,
*Assistant Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR DR. NEWMAN:

I am in receipt of your letter of April 14, from which I quote as follows:

"At the last session of the General Assembly two Acts were passed permitting the local school boards to anticipate the payment of their bonds to the Literary Fund.

"The first Act, found on page 29, Chapter 30, requires the permission of the State Board of Education for anticipation of these payments. The second, page 180, Chapter 135, does not require the permission of the State Board. Please inform me if there is a conflict in these two laws and if the State Board of Education's approval is necessary before anticipation can be made by the local school boards."

The second Act to which you refer (Chapter 135 of the Acts of 1942) gives to the school board of any county the "option" of anticipating the payment of the principal amount of money borrowed from the Literary Fund. This Act was approved subsequent to Chapter 30 of the Acts of 1942 and, in my opinion, giving the school board this authority at its "option" is inconsistent with first securing the permission of the State Board of Education. The two Acts, therefore, conflict in this respect and, in my opinion, the Act last approved controls. It follows that the permission of the State Board of Education is not necessary for anticipating the payment of loans made from the Literary Fund.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Reimbursement to Schools Operating School Busses.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 31, 1942.*

HON. DABNEY S. LANCASTER,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR MR. LANCASTER:

This will acknowledge receipt of your letter of December 30, in which you raise the following questions:

"The question has arisen as to the interpretation of the term 'at public expense' in item 93A of the Appropriation Act for the biennium 1942-44.

"This section covers an appropriation of \$500,000 for each year in the biennium for adding the counties and cities in the cost of transporting pupils to and from public schools.

"We would like very much for you to render an opinion giving a definition of the term 'at public expense'—that is, does this mean 100% at public expense?

"Also, in case you interpret the statute to mean 100% public expense, would the State Board of Education be within its rights in withholding any of the above mentioned funds from school divisions in which the transportation of school children is not borne 100% from public funds?"

Item 93A of the Appropriation Act (Chapter 475 of the Acts of 1942), to which you refer, reads as follows:

"It is provided that \$500,000 for each year of the biennium shall be paid by the State Board of Education to the counties and cities of the State as an aid to the counties and cities in the cost of transporting pupils to and from the public schools; \$250,000 of such sum to be prorated, and paid to the counties and cities in the proportion that the total sum of miles traveled by the school busses while transporting pupils to and from public schools at public expense in each such county or city during the preceding year bears to the total number of miles so traveled during such year in the State as a whole; and the remaining \$250,000 of such total appropriation shall be prorated and paid to the said counties and cities, respectively, in the proportion that the total number of school busses operated at public expense in each such county or city during the preceding year bears to the total number of school busses so operated for such year in the State as a whole."

In my opinion, the term "at public expense" as used in the item means entirely at public expense. For example, if a county is defraying part of the cost of transporting pupils to and from public schools and the parents of the pupils are paying part of the cost of transporting their children by means of a fixed charge per month, I do not think that such transportation would be at public expense for the reason that it would be partly at public expense and partly at private expense. Indeed this office in an opinion to your predecessor under date of August 29, 1935, expressed the view that the school board of a county did not have the authority to charge patrons of the public schools a fee for transporting their children to and from the public schools.

It is further my opinion that the county which is not transporting

children to and from the public schools entirely at public expense does not come within the scope of the quoted language of item 93A of the Appropriation Act and is, therefore, not eligible for the aid provided by that item.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Felony Convictions May Be by Jail Sentence.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 6, 1943.*

HONORABLE C. E. MORAN,
*Clerk Corporation Court,
Charlottesville, Virginia.*

DEAR MR. MORAN:

This office is in receipt of your letter of January 5, in which you seek an opinion upon the following:

“ * * * is a man who is indicted for a felony, found guilty under such indictment and his punishment fixed at a term in jail convicted of a felony or a misdemeanor?”

It has been established by a long line of Virginia cases that such a person is guilty of a felony. In the most recent case—*Fletcher v. Commonwealth*, 163 Va. 1007, 175 S. E. 895, 95 A. L. R. 1112 (1934)—it is said:

“ * * * “In quite a number of cases our Virginia Statutes submit it to the discretion of the jury whether an offense shall be punished with confinement in the penitentiary or in jail, or by fine only; and in those cases it may be a question whether the act is a felony or a misdemeanor. The doctrine seems clearly established that in such cases, *whatever may be the verdict of the jury*, the offense is always to be deemed a felony.” * * * .” (95 A. L. R. 1115.)

See also *Benton v. Commonwealth*, 89 Va. 570, 16 S. E. 725 (1893); *Forbes v. Commonwealth*, 90 Va. 550, 19 S. E. 164 (1894); *Quillin v. Commonwealth*, 105 Va. 874, 54 S. E. 333, 8 Ann. Cas. 818 (1906).

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Credit on Sentence for Good Behavior in Misdemeanor Convictions.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 7, 1943.

HONORABLE J. TINSLEY COLEMAN, JR.,
*Attorney for the Commonwealth,
Livingston, Virginia.*

MY DEAR MR. COLEMAN:

This will acknowledge receipt of your letter of May 27, which for purposes of reply I quote in full:

"Under the provisions of the Probation and Parole Act, passed at the 1942 session of the General Assembly (Michie's 1942 Code, Secs. 4788c-4788n), the trial justice of this county has directed the jailor and sheriff not to allow any time off for good behavior to persons convicted of a misdemeanor and sentenced to confinement in jail.

"The Act (Sec. 4788-i) expressly provides that a person convicted of a felony shall not be entitled to any deduction from his time, for good behavior, but does not so provide in the case of a misdemeanor. The Act (4788-g), however, does provide for the investigation of persons convicted of a misdemeanor and sentenced for a term of more than thirty days, by the probation and parole officer and for the recommendation by such officer for the release of the person so convicted and sentenced.

"I will thank you to advise me whether or not, under the provisions of Sec. 4788-g, referred to above, the person convicted of a misdemeanor and sentenced to confinement and jail for more than thirty days, must serve all of his sentence with no time off for good behavior, unless his release is recommended by the probation and parole officer."

The Probation and Parole Act (Chapter 218 of the Acts of 1942) does not do away with the good behavior credit granted by section 2860 of the Code to misdemeanants serving sentences in jail. The Act (section 5), however, does provide for the investigation by probation and parole officers of persons convicted of a misdemeanor and sentenced for a term of more than thirty days and for such officers to *recommend* to the court the release of any misdemeanant where such release will be for the best interest of the misdemeanant, his family and the Commonwealth.

You state, however, that the trial justice has directed "the jailor and sheriff not to allow any time off for good behavior to persons convicted of a misdemeanor and sentenced to confinement in jail." Section 2860 of the Code provides that credit for good behavior "shall, with the consent of the judge, be deducted * * * ." I think that there is doubt as to whether or not the word "judge" as used in this section includes a trial justice. Literally construed, I think the better view is that the word refers to the judge of the circuit court of the county, although it would certainly appear to be wise to allow the trial justice to determine whether the good behavior allowance shall be made, certainly in cases of misdemeanor tried by a trial justice. Since section 4987-k of the Code gives to the judge of the circuit court of the county general supervisory power over the trial justice of such county, I suggest that you consult with the judge of the circuit court of Nelson county as to the authority of the trial justice to enter the order to which you refer.

I call your attention to section 1922-b of the Code (Michie 1942), under which the trial justice has the power to suspend any unserved por-

tion of the sentence of a prisoner convicted by him of a misdemeanor, and the trial justice has this power even in the absence of a report of the probation officer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Credit Not Given for Time Spent in Criminal Insane Hospital Before Conviction Where Final Order is Silent.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 7, 1942.

HONORABLE COLGATE W. DARDEN, JR.,
Governor of Virginia.
Richmond, Virginia.

MY DEAR GOVERNOR DARDEN:

Pursuant to the request of your office for an opinion, I have had under consideration the case of John Francis Hunter, who was convicted in the Circuit Court of Arlington County, Virginia, on February 25, 1937, of murder in the second degree and sentenced to confinement in the State penitentiary for a period of twenty years. It appears that Hunter was first apprehended and placed in custody on May 7, 1934, and on June 23, 1934, pursuant to the provisions of section 4909 of the Code, he was committed to the State Hospital for the Criminal Insane, at Marion, Virginia, for proper care and observation, the Circuit Court of Arlington County having some ground to doubt the sanity of the defendant at that time. It further appears that Hunter remained at Marion from the date of his commitment until the day of his trial in 1937, and your question is whether or not, in computing his period of confinement, he should be given credit on his sentence for the time spent in the State Hospital.

The final order in the case (entered February 25, 1937) does not provide for any credit on the penitentiary sentence for the time that the prisoner remained in the Southwestern State Hospital before trial. Section 5019 of the Code directs that the final order in a criminal case shall stipulate what credit the prisoner shall be entitled to on account of confinement in jail. In my opinion, therefore, in the absence of any credit on the penitentiary sentence allowed by the final order, the superintendent of the penitentiary has no authority to allow any credit under the circumstances here present.

I may further say that as far back as 1926 my predecessor, in a letter to the Superintendent of the State Penitentiary (Opinions of the Attorney General 1926-27, page 167), expressed the opinion that the pertinent statutes did not provide any credit on a penitentiary sentence for the time spent by a prisoner in an insane hospital under observation where such time was spent prior to trial and conviction. The General Assembly has since that time not seen fit to amend the statutes to provide for such credit in such a case.

The papers enclosed with your letter of July 28 are herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Fees When Appointed Administrator of An Estate.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 6, 1893.

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of February 4, in which you enclose a communication addressed to you under date of January 31 from Sheriff A. A. Fleming, of Dickenson County. Mr. Fleming asks you the following question and you request my opinion with respect thereto:

"In a case where the sheriff is appointed as administrator of an estate and sells same at public sale, as administrator, what disposition should be made of the commission earned? Should this commission be turned over to the state or county or should it be retained by him as his own?"

"The sheriff is frequently appointed as administrator of estates by the court, he being already under bond which makes it unnecessary to bond as administrator."

I had occasion to express an opinion on this question very recently, and I quote below an excerpt from said opinion which will, I think, answer your inquiry:

"I have expressed the opinion that all compensation received by the sheriff for the performance of any act which it is his duty as sheriff to perform, which in my opinion would include his duty as *ex officio* administrator of an estate committed to the sheriff pursuant to the statute, must be paid over to the county treasurer in accordance with the statute. While technically this may not come under the original definition of 'fees,' this word has been used in connection with the administration of the fee system in Virginia to embrace all forms of compensation received by the so-called fee officers. Most of the compensation received by the treasurers and commissioners of revenue has been on a percentage or commission basis, yet they have been generally considered to be fees as that term is used in connection with the fee system.

"You will note that the fee system of compensation for sheriffs is abolished and the sheriffs shall hereafter be compensated for their services on a salary basis. In my opinion, the effect of this statute is to prohibit the sheriff from retaining as his own property any compensation received for performing his official duties other than the salary allowed to him by the Compensation Board, or by the Court on appeal therefrom."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS—Fees When Named or Appointed Administrator of an Estate—
Fees When Serving Process Outside State.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 17, 1943.

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of February 15, in which you ask for my opinion on several questions that have been asked you by Sheriff C. G. Ashmore of Nottoway County. The first question is:

"There never has been any doubt in my mind about fees from an administrator's account, acting under the sheriff's bond, but I would like to know, where the judge requires the sheriff to put up an administrator's bond separate and distinct from the sheriff's bond, if such fees would still have the same status."

If the sheriff is acting as administrator by virtue of his office as sheriff (see section 5374 of the Code), then all fees and commissions as administrator should be paid into the treasury of the county to be distributed as provided in chapter 386 of the Acts of 1942. If, however, the sheriff is appointed administrator in his individual capacity, then he may retain the fees and commissions paid him as such administrator. The fact that the court requires the sheriff to give an additional bond as administrator would indicate that he is not acting as such by virtue of his office as sheriff, for section 5374 provides that, where any estate is committed to a sheriff, he may administer the same without giving any other bond than his bond as sheriff. However, whether the sheriff is acting as administrator in his individual capacity or by virtue of his office as sheriff is a question of fact to be decided in each particular case.

The second question is:

"I have been appointed administrator in several cases this year for the purpose of getting judgment against the deceased's estate. It was my duty to find what estate was left, etc., which sometimes entails a lot of travel. The money, I understand, is paid by court order to the plaintiff's lawyer—none of this money passing through the sheriff's hands and no compensation whatever for the sheriff. Now that the State and county are paying the traveling expenses, can I require the plaintiff to advance sufficient funds to cover this and any other expense I may be put to?"

Section 5374 of the Code provides that, where an estate is committed to the sheriff on the motion of a creditor or other person, the State tax due for such administration "shall be paid by the party upon whose motion the estate was committed." The only source out of which the other fees and commissions of the sheriff, including his expenses, in administering an estate is the estate itself, and I know of no authority that the sheriff has to require a plaintiff, under the circumstances stated, to advance any part of his expenses as administrator.

The last question is:

"Service on papers for parties outside of the State. Where it is necessary to travel 40 miles or more to make such service and to have same notarized, also certificate from the clerk to show that I have

qualified as sheriff, what, in your opinion, is a proper charge for this service? Personal service is the only kind acceptable in these cases. Would you put Washington, D. C., in the same category as a State? I have no authority that I know of to charge mileage for this service, but I do."

Where a sheriff renders a service for a party outside the State, in my opinion the sheriff clearly has the right to demand payment in advance of all fees prescribed by statute for such services as he is required to render to serve such process. Most of the sheriff's fees in civil cases are fixed by section 3487 of the Code. If in connection with the service of such process a fee for the clerk of the court is necessary, then the sheriff may also require the prepayment of that fee to be paid, of course, to the clerk. I know of no authority that the sheriff has to demand in advance the payment of his necessary mileage in serving the process. Unquestionably the rendering of service for someone in Washington, D. C., would be considered as rendering such service for a person outside the State.

With best wish, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Expenses to Be Approved by Locality and Compensation Board.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 28, 1943.

HONORABLE E. R. COMBS,
Chairman Compensation Board
Finance Building,
Richmond, Virginia.

My DEAR MR. COMBS:

This is in reply to your letter of January 27, in which you request my opinion with respect to the following questions which were propounded to your Board by Mr. J. S. Potter, sheriff of Wise County. I quote from his letter:

"In cases requiring requisition from the Governor's office, what expenses will be allowed the sheriff and his full-time deputies? What expenses and per diem will be allowed a part-time deputy? Will the expenses incurred be billed the same as other expenses of the sheriff or will the State pay the entire account?"

The first question is what expenses will be allowed the sheriff and his full-time deputies. The answer to this question is found in section 4 of chapter 386 of the Acts of 1942, which requires that such officers shall submit a statement of expenses incurred by them, including travel and other expenses incident to his office.

Prior to the enactment of this statute abolishing the fee system as to sheriffs, it was customary for the Governor to pay the compensation and expenses of the sheriff, as provided in section 2176 of the Code covering such expenses, incurred in cases where no particular provision therefor was made by law. It is my opinion, however, that, since sections 4 and 6 of the said Act do make provisions for the payment of these expenses,

said section 2176 is no longer applicable, and no allowances may now be made by the Governor under that section. As stated, said expenses, after approval by the board of supervisors in the case of a sheriff, and by a city council in the case of a sergeant, and after further approval by the Compensation Board, shall be paid in the manner provided by section 6 of chapter 386 of the Acts of 1942.

When these expenses and the compensation of the officer were paid pursuant to the provisions of section 2176, it was customary for the Governor's office to provide certain limitations upon the amount of expenses which might be incurred by the officer in travel to another State to return a prisoner. I call attention to the past practice for the reason that the Compensation Board may desire to issue a regulation along the same lines.

The next question is what expenses and per diem will be allowed a part time deputy.

In the event that under the regulations of the Compensation Board it is permissible to employ a part-time deputy for this purpose, his expenses would be passed upon and paid in the same manner as the expenses of the sheriff above set out. The compensation of such a part-time deputy would be determined as provided in section 5 of said Chapter 386 of the Acts of 1942, which requires the board of supervisors of a county, or the city council of a city, to recommend to the Compensation Board what, in its judgment, is a fair compensation to pay to each part-time deputy for his services during the preceding month. I call attention to the fact that the combined allowance for such compensation and expenses may not exceed the limit of five dollars per day except with the approval of the Judge of a Circuit Court. Should said Court approve a larger allowance, then the board of supervisors may recommend same to the Compensation Board and the Board may approve and direct its payment.

The third question is whether the expenses incurred will be paid in the same manner as other expenses of the sheriff and his deputies.

In my opinion the statute does not make any distinction between expenses of this nature and other expenses of the office of the sheriff or sergeant. It seems clear that said chapter 386 of the 1942 Acts was intended to completely cover all allowances for compensation and expenses which are to be paid out of public moneys to a sheriff or his deputies for services rendered in the discharge of their official duties.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Compensation Board
Has Authority to Define "Full-time" and "Part-time" Deputy Sheriffs.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 3, 1943.*

HONORABLE E. R. COMBS,
*Chairman Compensation Board,
Finance Building,
Richmond, Virginia.*

MY DEAR MR. COMBS:

This is in reply to your letter of January 16, which I quote in full as follows:

"Chapter 386 of the Acts of 1942 placing sheriffs and sergeants on salary basis of compensation provides for the appointment of full-time and part-time deputies.

"The Act itself does not define either one of these terms. The Act does provide, however, that no part time deputy shall receive a fixed salary. Fixed salaries, however, are authorized in the case of full-time deputies.

"In as much as the Act itself does not give definitions of full-time and part-time deputies, it is the view of the Compensation Board that it is authorized in its sound discretion to define these terms within the spirit of the law. Such definitions are necessary for administrative purposes.

"It is the view of the Compensation Board that while, without doubt, a deputy who devotes his entire time to his duties and engages in no other occupation whatever is a full-time deputy, yet it is apparent that such a restricted definition would not be practicable and that the true definition for practical reasons should necessarily include deputies who may be engaged in such activities as farming, store keeping, etc., where such activities do not interfere with responses by such deputies to all calls for official duty which may come to them, either day or night, and especially where such deputies are serving in communities where calls for official duty are likely to be frequent.

"On the other hand a part-time deputy may be defined as a deputy who is serving in a community wherein the calls for official duty are likely to be infrequent and because of such infrequent calls his private occupation is subject to small and infrequent interference.

"Information in the possession of the Compensation Board, as adduced by oral evidence and communications in writing, shows that in various counties deputies which under almost any definition of 'full-time,' would be regarded as full-time are yet farmers, storekeepers, etc. If the term 'full-time' were restricted to deputies who carry on no work whatever except their official work a great many deputies who have always been classified as full-time could no longer be so classified. The result would be that many of these would probably be no longer available for appointment as deputies. Moreover, in such instances even where such deputies would be willing to serve they would expect the compensation which they are now receiving on account of their unofficial work to be made up by an increase in their compensation for official work, and this would add materially to the cost of operating these offices.

"Your opinion is respectfully requested on the point whether or not the Compensation Board may, owing to the necessities of administration, adopt in its sound discretion definitions of full-time and part-time deputies in conformity with the principles herein set out."

Inasmuch as the statute fails to define the meaning of the words "full-time deputies" and "part-time deputies," in my opinion these terms must be interpreted so as to reasonably conform to the actual conditions to which they are to be applied. In this time of emergency, especially when manpower is becoming more and more scarce, particularly on the farms, it is my view that, construing the statute as a whole, it would be well within the discretion and power of the Compensation Board to adopt a practical definition of these terms based upon the principles you have outlined.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Abolition of Fee System Applies to Civil, as Well as Criminal, Matters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 1, 1942.*

HONORABLE L. B. SMITH,
*Substitute Trial Justice,
South Hill, Virginia.*

My DEAR MR. SMITH:

Replying to your letter of September 28, I beg to advise that, in my opinion, Chapter 386 of the Acts of Assembly 1942, placing sheriffs and sergeants on a salary basis applies to the services of these officers in civil as well as criminal matters. The fees to which these officers would otherwise be entitled will still be taxed, but when collected they will be paid into the treasury of the county and by the treasurer credited one-third to the county and two-thirds to the State. See section 1, subsection (b) of the Act, Acts 1942, at page 612.

I call your attention to the fact that the new method of compensating sheriffs and sergeants does not go into effect until January 1, 1943.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Interpretation of Sheriffs' Act of 1942 to Certain Cities.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *August 14, 1942.*

HONORABLE E. R. COMBS,
*Chairman Compensation Board,
Finance Building,
Richmond, Virginia.*

DEAR MR. COMBS:

This is in reply to your letter of August 13, in which you propound several questions, as hereinafter set out, with reference to the interpretation of Chapter 386 of the Acts of 1942 relating to the compensation of certain sergeants and sheriffs in the State of Virginia.

You first inquire as to whether the sheriff of the City of Richmond comes within the provisions of said Act.

Section 1, subsection (a), provides for the abolition of the fee system and the payment of the salaries of "the sheriffs of the counties and the sergeants of the cities of the Commonwealth of Virginia." Since the Act does not by its terms, or by implication, include the sheriff of the City of Richmond, who I am informed does not have jurisdiction over the jail and jail prisoners, it is my opinion that this officer is not included within the terms of the Act and is unaffected thereby.

You next inquire whether or not the sergeants of the cities of Hampton,

Harrisonburg, Martinsville, South Norfolk, Staunton, and Winchester, are included within the provisions of the Act. You state that none of these cities operate a jail.

Section 10 of said Act provides as follows:

"The provisions of this Act shall not apply to any city which does not operate a jail, nor to the sergeant of such city, but they shall, however, apply in every respect to the City of Suffolk and to the sergeant thereof."

If your information that said cities above named do not operate jails is correct, obviously the sergeants of said cities are excluded from the provisions of the Act and are unaffected thereby.

Your third inquiry is directed to the question whether or not the sergeants of the cities of Roanoke, Lynchburg, and Norfolk, whose compensation is now provided for by special Acts, are by the provisions of said Acts brought within its terms.

Section 10, subsection (b), provides that the Act shall apply in every respect to each city which operates a jail, and to the sergeant thereof, while at the top of page 620 the following provision is found:

"2. Be it further enacted, That all acts, general, special, private and local, inconsistent with the provisions of this act are hereby repealed to the extent of such inconsistency."

In my opinion, in view of the above quoted provisions, the sergeants of the cities of Roanoke, Lynchburg, and Norfolk, are clearly within the provisions of said Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Fees of Part-time
Deputy Sheriffs Abolished.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 31, 1942.

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

MY DEAR MR. DOWNS:

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

"I am informed by the sheriff of Chesterfield county that it has been the practice for dance hall proprietors to request the sheriff to supply a part-time deputy sheriff to be on hand in certain dance halls for the purpose of preserving order, and that such deputies are paid \$1.00 an hour for their services—which sum, under the fee system, they are permitted to retain as their compensation. The sheriff desires to know whether or not after January 1, 1943, when the salary system for sheriffs and deputies will be effective, this same practice

will be permissible. To put the question differently: Do the provisions of section 5, chapter 386, Acts of Assembly of 1942—fixing the manner and method of compensation of part-time deputies—prohibit a part-time deputy from retaining this \$1.00 an hour fee?"

Section 5 of chapter 386 of the Acts of 1942 provides how and what compensation shall be paid to part-time deputy sheriffs and, in my opinion, it is plain that such part-time deputy sheriffs shall be paid for performing the duties of their office the compensation provided by the section and no other. Since the preservation of order at dance halls and other public places comes within the scope of the duties of a police officer such as a deputy sheriff, I am of opinion that a deputy sheriff may not be paid for performing this duty in the manner specified by you.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Fees Earned Prior to
But Not Collected Until After Jan. 1, 1943.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 31, 1942.*

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of December 30, which I quote as follows:

"Under chapter 386, Acts of Assembly of 1942, it is provided that sheriffs and sergeants and their deputies, who, beginning with January 1, 1943, will be on a salary basis, shall pay all fees earned and collected by them or on their behalf after January 1, 1943, into the treasuries of the counties or cities for which they are elected.

"The question has been raised as to the disposition of fees which were earned prior to January 1, 1943, but which were not collected by the sheriffs or sergeants, or on their behalf, until subsequent to January 1, 1943. We should appreciate it if you would advise us whether such fees should be paid into the treasuries of the counties and cities for which these officers were elected, to be apportioned as the aforementioned act provides, or whether they should be paid over to the sheriffs and sergeants and their deputies. The same information is desired with respect to fees earned by constables whose offices are abolished as of January 1, 1943, but for whom fees earned prior to January 1, 1943, may be collected subsequent to January 1, 1943."

It is my opinion that fees earned by sheriffs and sergeants before January 1, 1943, but not collected until subsequent to that time, belong to the respective officers. These officers were compensated on a fee basis up to and including December 31, 1942, and I can find nothing in chapter 386 of the Code, placing these officers on a salary basis beginning January

1, 1943, which in my opinion should be construed as depriving these officers of the fees earned by them before they were placed on a salary basis, even though the fees may not have been collected until after that time.

Likewise, I am of opinion that constables are entitled to fees earned by them before the effective date of the Act abolishing these officers, which date is January 1, 1943.

Very sincerely yours,

ABRAM F. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—How Fees to Be Accounted For.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 7, 1943.*

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

MY DEAR MR. DOWNS:

This is in reply to your letter of December 8, enclosing a letter from Honorable John W. Snead, Trial Justice of Chesterfield County, containing several inquiries with regard to the interpretation of Chapter 386 of the Acts of 1942 abolishing the fee system with respect to sheriffs and sergeants. His first inquiry is this:

"1. Shall the Trial Justice pay over to the sheriff in person the fee collected for him in each individual civil case, or shall he retain all such sheriff's fees until the end of the month and then pay them in a lump to the proper officer?"

Section 1, subsection (b) of the Act provides in part:

" * * * All fees collected by or for every sheriff, sergeant, and deputy of either, shall be paid into the treasury of the county or city for which he is elected or appointed, on or before the tenth day of the month next succeeding that in which the same are collected * * * ."

The quoted language, in my opinion, means that the Trial Justice shall pay all fees collected by him for the sheriff in civil cases into the treasury of the county.

His second inquiry is:

"2. If fees are to be paid over only once a month (regardless of whether they be paid direct to the sheriff or to the county treasurer), in what way is the sheriff to know on which papers fees were collected and on which papers fees are still due?"

The sheriff will simply have to secure this information from the Trial Justice.

He next asks:

"3. Is the Trial Justice Court required to collect the sheriff's fee on every civil paper which it is required to issue? Should the plain-

tiff decline to pay the sheriff's fee on a civil paper (but is willing to and does pay the issuance fee), shall the Trial Justice (or clerk) refuse to issue the paper because the sheriff's fee is not paid?"

I do not believe the Trial Justice is required by law to collect the sheriff's fee on every civil paper which he issues. The issuance and service of civil process are two distinct matters, and how the litigant desires the process served does not affect the Trial Justice in the issuance of the same. If the litigant refuses to pay the sheriff's fee, I do not believe the Trial Justice can refuse to issue the civil process. However, the sheriff may, and probably should, refuse to serve the process until the prescribed fee is paid.

Lastly, he asks:

"4. What shall be done with fees collected for sheriffs and sergeants in other counties and cities? Is it permissible to send the fee direct to the sheriff or sergeant when the paper is forwarded him for service?"

It is my understanding that it is customary for the litigant or his attorney to forward the process to an officer in another county if it is necessary that the same be done. In that case the Trial Justice is not concerned as to how the other officer gets his fee. If the officer from the other county is not paid in advance and his fee is taxed in the case, then the Trial Justice should forward the fee to the treasurer of the sheriff's county or city.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Procedure for Paying Jail Bills.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 13, 1943.*

MR. JOHN A. RIFE,
*Sheriff of Buchanan County,
Grundy, Virginia.*

DEAR MR. RIFE:

This will acknowledge receipt of your letter of January 12, which I quote below:

"There has been some question of whether or not the sheriff pays for cook hire, food and other items and is reimbursed by the county, or does the county pay direct to the cook helper and the groceryman. I realize that it is the sheriff's duty to put these bills before the board of supervisors, but I want to know just how they will be paid."

Under the Sheriff's Salary Act (Chapter 386 of the Acts of 1942) bills covering foodstuffs and provisions for jail prisoners should be submitted by the sheriff to the board of supervisors of his county and, if

approved by the said board, the board in turn causes warrants to be drawn on the county treasurer in payment of such bills. The sheriff himself does not pay these bills. See section 89 of the Act.

If the State Compensation Board has allowed the sheriff to employ a cook, as an expense of his office, the wages of the cook should be paid by the sheriff and report thereof made to the State Compensation Board, as provided in section 4 of the Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—How Reimbursed for Transporting Persons to Institutions.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 10, 1943.

HONORABLE E. R. COMBS,
*Chairman State Compensation Board,
Richmond, Virginia.*

MY DEAR MR. COMBS:

This will acknowledge receipt of your letter of May 4, in which you ask how a sheriff or sergeant should be reimbursed for his traveling expenses in transporting delinquent women and children committed to the State Board of Public Welfare or to some State institution for confinement, observation and treatment.

In my opinion, a court or the judge thereof or a justice, after a trial or hearing, may in its or his discretion direct a sheriff or sergeant to transport a woman or child found to be delinquent to the place of committal. It being the duty of the officer to carry out the order of the court, I am of opinion that his expenses should be reported to the State Compensation Board, as provided in section 4 of chapter 386 of the Acts of 1942, and paid as provided by section 6 of said Act. These sections, in my opinion, prescribe the method of reporting and payment of all of the expenses of a sheriff or sergeant in carrying out the duties of his office in the absence of any specific provision directing how such expenses shall be paid in a particular case. I may say that I have been able to locate no statute which directs that the State Board of Public Welfare should out of the appropriation made to that department pay the expenses of transporting these delinquent women and children.

You next ask for my opinion "as to whether or not State Hospitals for the Insane and the Colony for Feeble-minded are required to send for persons committed to those institutions, and how and in what manner the cost of such transportation should be paid; * * *."

Section 1027 of the Code makes it the duty of the superintendent of a hospital or colony, upon application for the admission of an insane, epileptic, feeble-minded, or inebriate person, to send an attendant from such hospital or colony to conduct such insane, epileptic, feeble-minded, or inebriate person to the hospital or colony. The section then goes on to provide that, if it is impracticable for the hospital or colony to send an attendant for this purpose, then the superintendent may appoint some other suitable person for the purpose or "may order the sheriff or sergeant of the county or city in which said insane, epileptic, feeble-minded, or inebriate person

is held to convey him to the hospital or colony." It is, therefore, the primary duty of the hospital or colony to send for an insane, epileptic, feeble-minded, or inebriate person committed to such hospital or colony, but under certain circumstances this duty of the hospital or colony may be performed by a sheriff or sergeant. I am, therefore, of the opinion that, it being the duty of a hospital or colony to send for persons committed to it, the expense of performing such duty should be paid by the hospital or colony out of its appropriation, and that, where a sheriff or sergeant, at the direction of the superintendent, performs this duty, the actual expenses of such sheriff or sergeant (without any fee or other compensation of any character, section 1027 providing that the officer shall receive "only his actual expenses") should be paid by the hospital or colony.

Finally, you ask, "where persons are charged with crime and sent to the State hospitals for observation, are these persons in the same or different category from other persons committed to State hospitals?"

The answer to your last question is to be found in sections 4909 and 4910 of the Code. These sections relate to the disposition prior to trial or conviction of persons believed to be insane and to the disposition of such persons who become insane after conviction and while serving a sentence. It is provided in section 4910 that such persons "shall be taken to and from the hospital to which he was committed by an officer of the penal institution having custody of him, or by the sheriff or sergeant of the county or corporation whose court issued the order of commitment, and the expenses incurred in such removals shall be paid by such penal institution or the county or corporation." It follows, I think, from the quoted language that, where a person is found to be insane after conviction and while serving sentence "in the State penitentiary, or any other penal institution, or in any reformatory or elsewhere," the expense of taking such person to and from the hospital for the insane is to be borne by the "penal institution having custody of him."

In the case, however, of a person charged with crime and directed to be sent to a hospital for the insane prior to trial or conviction, such person shall be taken to the hospital "by the sheriff or sergeant of the county or corporation," and the expense incurred in taking such person to and from the hospital shall be borne by the county or corporation whose court issued the order of commitment. In this latter case, however, it being made the *duty* of the sheriff or sergeant to transport such person, due to the provisions of sections 4 and 6 of chapter 386 of the Acts of 1942, the expense of the sheriff or sergeant in transporting such person is no longer to be borne by the county or corporation, but should be included in the expense account of the sheriff or sergeant submitted to the State Compensation Board and paid as directed in section 6 of said chapter 386.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Duty to Certify Receipt of Merchandise Purchased.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 24, 1943.

MAJOR R. M. YOELL,
*Commissioner of Corrections,
Richmond, Virginia.*

DEAR MAJOR YOELL:

I am in receipt of your letter of May 22, inquiring as to the interpretation of chapter 386, section 8, subsection (b), of the Acts of 1942, from which you quote in your letter.

It is my opinion that the fact that the sheriff purchases his merchandise through a purchasing agent does not relieve him of the duty of certifying that the merchandise has been received, and that the terms of the purchase have been complied with by the vendor. I do not think that the manner of purchase in any way affects this requirement.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Duty to Serve Notices to Vacate, and Notice Not to Trespass; Duty to Make Fire Reports.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 12, 1943.

MR. W. E. CURTIS,
*Sheriff of Stafford County,
207 William Street,
Fredericksburg, Virginia.*

DEAR MR. CURTIS:

I am in receipt of your letter of February 9, in which you ask several questions. Your first question is:

"Kindly advise whether fees collected by sheriffs or sergeants for serving notice to vacate or notice not to trespass should be kept by officer serving them or mileage charged state and fees collected for same as in other civil cases.

"My reason for asking your advice is I do not believe the above has to be served by an officer and if the officer served same he would be entitled to what charge he saw fit to make."

It is the duty of sheriffs or sergeants to serve the notices mentioned by you. Fees for such service are provided by statute. See section 3487 of the Code. While it is true that many kinds of notices and processes may be served by a private individual as well as by an officer, it is my opinion that a sheriff or sergeant whose duty as an officer it is to serve any notice or process may not divorce himself from his office, so to speak,

and serve such notice or process as an individual and make a charge for such service and retain the same. Such service should be made by the sheriff as an officer and the fee prescribed by statute collected and turned into the treasury of the county, as provided by chapter 386 of the Acts of 1942. As you probably already have been advised by the State Compensation Board, the necessary mileage traveled by you in performing the duties of your office will be allowed by the Board as an expense of your office.

Your second question is:

"Also will you kindly advise if sheriffs will be compelled to make fire reports (sections 4185 and 4192) as formerly required by them, and whether this will be on a mileage or fee basis."

In my opinion, a sheriff should continue to make reports required by section 4185 of the Code. However, inasmuch as the fee provided for such reports is paid by the State, it is my opinion, in view of chapter 386 of the Acts of 1942, that this fee should no longer be collected by the sheriff.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Duty to Serve Subpoenas from Another County Without Prepayment of Fee.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 20, 1943.

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

MY DEAR MR. DOWNS:

Your letter of January 15 refers to the following questions asked you by Sheriff A. H. Overbey, of Pittsylvania County:

" * * * whether or not we should require the City of Danville to pay sheriff's fees in serving spas for them in criminal cases. They send us quite a few summonses for witnesses and the cases are styled '*City of Danville v. Jno. Doe*'; of course, their witnesses are for prosecution. We would also like to know whether or not we should demand sheriff's fees for serving spas for witnesses in criminal cases when the witnesses are for the defendant; it has been the custom here to make no charge for the defense witnesses."

I do not think that a sheriff should require another county or city to advance his fee for serving subpoenas for such county or city in criminal matters. Sheriffs and sergeants are now on a salary basis, such salary being paid in part by the State and part by the localities, and I do not think that chapter 386 of the Acts of 1942 contemplates that a county or city shall advance the fees of a sheriff of another county for services rendered by such sheriff in criminal cases. However, all such fees properly taxable as costs in criminal cases should be so taxed to be paid by the defendant if he is convicted.

In my opinion, the applicable statutes do not contemplate that a defendant should be required to advance fees of a sheriff for summoning defendant's witnesses in a criminal case; in fact, sections 3495 and 3517 of the Code apparently provide to the contrary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Improper to Mix Personal and Official Funds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 2, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of January 29, in which you ask if a sheriff or sergeant may place personal funds in an official bank account.

In my opinion, this practice is clearly prohibited by chapter 288 of the Acts of 1936, to which you have referred in your correspondence with Sheriff Curtis. Insofar as the bank's service charge on the sheriff's official account is concerned, in my opinion, this would constitute an expense of the office to be paid as other such expenses.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Improper to Collect Notes.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 12, 1943.*

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

MY DEAR MR. DOWNS:

I regret that my reply to your letter of January 29 has been unavoidably delayed. You desire my opinion on the following questions which have been asked you by Sheriff J. A. Tune, of Halifax County:

"Will you please advise me whether or not the sheriff or his deputies has the right to collect on notes or on open accounts where there has been no judgment issued, and the fees for collection turned in to the State and county?"

It is, of course, the duty of a sheriff or his deputy to collect the amount due under an execution issued on a civil judgment, in which case the fees and commissions prescribed by law are divided between the county or city and the State, as provided by chapter 386 of the Acts of 1942. In my opinion, the collection on commission of a note on open account placed in his hands in the absence of a judgment is so closely related to the sheriff's duty to make the collection under an execution that it would not be proper for the sheriff to make such collection. Sheriffs and their deputies are now salary officers of the State and their counties and cities, respectively, and for them to attempt to divorce themselves, so to speak, from their offices by making collections on commissions in their individual capacities obviously in numerous instances will result in conflicts between their duties as officers and their interest as individuals.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Appointed to Work in
or About Government Factories.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 22, 1943.

HONORABLE E. R. COMBS:
*Chairman Compensation Board,
Finance Building,
Richmond, Virginia.*

MY DEAR MR. COMBS:

This is in reply to your request for my opinion upon the question whether or not the provisions of subsection (d) of section 1 of Chapter 386, page 612, of the Acts of 1942, has application to deputy sheriffs whose duties are especially related to areas in and about manufacturing or industrial establishments which are not operated by or for the United States Government. I quote said subsection in full:

"The provisions of this act, with respect to compensation and expense allowances of sheriffs and their deputies, shall not apply to deputies appointed especially for service in and about manufacturing, industrial or defense establishments operated by or for the United States government, but such deputies shall promptly pay into the treasury of the county for which they are appointed and qualified all fees and mileage allowances collected by them in the execution of all civil and criminal processes."

In my opinion, the language used is very clear and explicit in restricting its application only to manufacturing and industrial establishments operated by or for the United States Government. Clearly, in my opinion said subsection would have no application to any other manufacturing or industrial establishments.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Interest in Contract for Furnishing Food to Prisoners.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 16, 1942.*

HONORABLE ASHTON DOVELL,
Williamsburg, Virginia.

MY DEAR MR. DOVELL:

Replying to your letter of December 11, I am now in a position to advise you that since receipt of your former letter of November 17 I have had occasion to express an opinion to Major R. N. Youell, Commissioner of Corrections, that neither the sheriff nor sergeant nor any member of his family should be directly or indirectly interested financially in furnishing meals to prisoners in jail. This interpretation of the statute would seem to prohibit the jailor from actually cooking the meals himself and being compensated therefor.

I have also advised Major Youell that, in my opinion, where it can be done economically, a sheriff or sergeant may purchase cooked meals for prisoners from restaurants or individuals. However, my information is that this arrangement would only be approved where there are very few prisoners kept in jail.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Interest in Contract for Furnishing Food to Prisoners.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 6, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of February 4, in which you enclose a communication addressed to you under date of January 30 by Sheriff T. B. Fannin, of Sussex County. Sheriff Fannin asks the following question, and you desire the opinion of this office with respect thereto:

"Until January 1, of this year, I had been supplying the jail with various food products raised on my farm. During the month of January I have attempted to purchase these supplies from wholesalers. I have found that due to the shortage of food, it is almost impossible to obtain such products as lard, bacon, and other essentials for feeding prisoners.

"Would it be permissible for me to furnish these foods from my farm and charge the State the current market prices? If this cannot be done, it will be necessary for me to buy more expensive foods in order to meet the needs of the prisoners. This will cost the State considerably more than the type of food I could furnish from my farm."

I have heretofore expressed the opinion that neither a sheriff nor any member of his family should be financially interested, directly or indirectly, in furnishing food to prisoners in jail. In view of this opinion, I think that the transaction described by Sheriff Fannin is not permissible. I might add that, in my opinion, the sale of farm produce to the county by Sheriff Fannin is also prohibited by section 2707 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—No Duty to Arrest
Members of Armed Services A. W. O. L.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 28, 1943.

MR. Y. G. JOHNSON,
*Sheriff of Buckingham County,
Dillwyn, Virginia.*

DEAR MR. JOHNSON:

Your letter of June 5 addressed to Mr. L. McCarthy Downs, Auditor of Public Accounts, has been referred to this office for reply. You ask the following question:

"It is almost a daily occurrence that I receive requests from the Federal government and the U. S. army to make investigations and arrests of soldiers that are A. W. O. L. Also I am frequently requested by the Selective Service Board to make investigations for them.

"As you know, Buckingham is rather a large county and thinly settled and to make these investigations it is often necessary to drive considerable distance.

"I am writing to find out if it is proper to include these trips in my driving expenses."

Although a sheriff may arrest under proper request from the military authorities soldiers who are absent without leave, I know of no State statute which requires a sheriff to perform this service for the Federal government as a duty of his office. Therefore, I am of opinion that the State may not compensate a sheriff for his expenses incurred in performing this service. Inasmuch as the service is rendered for the United States government, I suggest that arrangement for compensation be made with the proper officer of that government.

Likewise, I think that the expenses incurred in rendering service for the Selective Service Board should be arranged for by that Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Entitled to Keep Rewards Offered for Arrest of Deserters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 21, 1943.

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

MY DEAR MR. DOWNS:

This is in reply to your letter of January 15, in which you quote several questions asked you by Sheriff A. A. Fleming, of Dickenson County. The first question is:

"When a deserter is apprehended; who benefits by the reward offered by the Government? Who will benefit by a reward collected for the apprehension of a fugitive from justice?"

I construe the first of these questions to mean that you are in doubt as to who is entitled to the reward for apprehending deserters as between the sheriff and the State since, under the new law, all fees of the former go to the latter. In *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. Ed. 458 (1885), it was held that a police officer of a State, or a private citizen, had no authority as such, without any warrant or military order, to arrest and detain a deserter from the Army of the United States. The opinion of the court points out that the line of demarcation between civil and military jurisdiction has always been clearly maintained in this country, and that civil officers as contrasted with military officers have no authority to apprehend deserters from the militia unless by special direction or warrant from the militia. To remedy this situation Congress passed the following statute:

"It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, *summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.*" (10 U. S. C. A., section 1578; italics supplied.)

The reward statute provides:

"No greater sum than \$25 for each deserter or escaped military prisoner shall, in the discretion of the Secretary of War, be paid to any civil officer or citizen for services in the apprehension, securing, and delivering of soldiers absent without leave and of deserters, including escaped military prisoners, and the expenses incident to their pursuit." (10 U. S. C. A., section 1431.)

With respect to the general law of rewards, the rule seems well settled upon considerations of public policy that an officer cannot lawfully receive or recover a reward for the performance of a service which it is his duty to discharge. *Buek v. Nance*, 112 Va. 28, 70 S. E. 515 (1911).

My conclusion is that a sheriff is not required in the discharge of his duties to arrest an army deserter and, in fact, he is only permitted to do so by virtue of a special Federal statute quoted above. This clearly means that such action on his part is above and beyond the discharge of the ordinary duties of his office. For this reason I do not believe that the rule of *Buek v. Nance*, *supra*, controls such a case, and that a sheriff is entitled to this

reward. Moreover, he is not required to account for the same to the State, even in view of the statute abolishing the fee system.

I do not think that it would be wise to attempt to lay down a general rule in relation to rewards offered for the apprehension of fugitives from justice generally. This may depend upon the facts in any particular case, and I believe it would be better to pass on each case as it arises.

With respect to the expenses in jail of United States prisoners, it seems to me that this is covered by section 9, subsection (c) of chapter 386 of the Acts of 1942. As to the practical details of how these expenses are to be handled you will probably want to advise Sheriff Fleming yourself.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Mileage Allowance
When Transporting Prisoner.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 12, 1943.

HONORABLE A. S. WHITE,
Sheriff,
Yorktown, Virginia.

MY DEAR MR. WHITE:

I am in receipt of your letter of May 10, which is as follows:

"Some question has arisen in this county concerning the mileage of the Deputy Sheriff. The State Compensation Board allows the Deputy Sheriff mileage but in that mileage would a prisoner's mileage be included also.

"At your convenience will you let me hear from you in this connection."

The provision for mileage traveled by a sheriff or his deputy, and also for the prisoner, has been in effect repealed by the recent Act abolishing the fee system as to sheriffs. Under that Act the Compensation Board allows the sheriff what it estimates to be a sufficient sum to reimburse him for traveling expenses incident to the discharge of his duties. Since there will be no greater expense incurred in carrying a prisoner in his car than there would be without the prisoner, no additional mileage expenses would be allowed on that account. If the prisoner is carried by rail, of course, the sheriff would be reimbursed the actual expense of his own railroad fare and that of the prisoner.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Fees and Allowance
for Attendance as Commonwealth Witness.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 24, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of February 19, in which you refer to this office the following question asked you by H. Elmer Kiser, Clerk of the Circuit Court of Tazewell County:

"It often happens that a sheriff and his deputies are summoned as witnesses for the Commonwealth in criminal cases, and in this connection I wish to ask the following question: Is it proper to issue a certificate of witness attendance in these cases to the sheriff and his full-time deputies and part-time deputies? Of course, in either case the amount of the certificate of attendance for either the sheriff, his full-time deputies, or part-time deputies would be taxed in the recoverable costs of the Commonwealth."

In my opinion, it is clearly proper to issue a certificate of witness attendance to a sheriff or one of his deputies where such sheriff or deputy has been summoned as a witness for the Commonwealth in a criminal case. Furthermore, I am of opinion that under section 1, subsection (b), of chapter 386 of the Acts of 1942, where the amount of the certificate of attendance is collected from the defendant, the sum collected should be paid in to the treasurer of the county for distribution as provided in said subsection. I express this view as to the distribution of the amount so collected for the reason that, with rare exceptions, the testimony of a sheriff in a criminal case relates to facts which came to his knowledge in his capacity as an officer. It seems to me, therefore, that where a sheriff appears as a witness in a criminal case such appearance is so intimately related to the duties of his office that the fees and mileage which are taxed for him as a part of the costs in such a case should be treated when collected as "fees and mileage allowances" referred to in said subsection (b) of section 1 of chapter 386 of the Acts of 1942 and distributed as therein provided. It follows, of course, from what I have said that where a sheriff uses mileage in attendance upon court as a witness for the Commonwealth in a criminal case such mileage will be allowed him by the Compensation Board as an expense of his office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees and Allowance for Attendance as Commonwealth Witness.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 16, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of March 15, enclosing a communication addressed to you from Mr. H. E. Kiser, Clerk of the Circuit Court of Tazewell County, in which he refers to my letter to you of February 24, 1943, wherein I expressed the opinion that where a sheriff or his deputy is summoned as a witness for the Commonwealth in a criminal case he should not retain the fees and mileage allowance taxed for him as a part of the costs, but that such fees and mileage allowance should be turned in to the treasury of the county and distributed as provided by subsection (b) of section 1 of chapter 386 of the Acts of 1942.

It appears from Mr. Kiser's letter that he thought that, because I stated in my letter to you that when a sheriff or his deputy is summoned as a witness for the Commonwealth in a criminal case a certificate of attendance should be issued him, the sheriff or his deputy could then present the certificate to the treasurer and collect the amount shown on the certificate. I did not mean to convey this impression. Section 1, subsection (b), of chapter 386 of the Acts of 1942 expressly provides that a sheriff shall continue to collect all fees and mileage allowances "other than such as he would have been entitled to receive from the Commonwealth * * * ." The clerk, of course, should tax the sheriff's fee and attendance as a part of the costs in the case, but these items should not be collected by the sheriff from the treasurer, but only from the defendant where the costs are taxed against the defendant. In order that there may be no doubt about the matter, it may be wise to stamp or mark on the certificate issued to the sheriff or his deputy that it is not to be collected from the county treasurer. The clerk or the trial justice, however, should be careful to see that the sheriff's fee and mileage allowance as a witness is taxed as a part of the costs to be paid by the defendant if the costs are taxed against him.

Mr. Kiser further makes inquiry as to the amount of allowance to a sheriff or his deputy when summoned as a witness on behalf of the Commonwealth in a criminal case. This is fixed by section 3512 of the Code, namely, 50 cents for each day of attendance and "all necessary ferriage and tolls and five cents per mile over five miles going and returning to place of trial or before grand jury." Neither the amount of mileage allowed to the sheriff by the Compensation Board nor the amount of compensation of a part-time deputy has any bearing on the amount that should be taxed against the defendant as costs where these officers are summoned as witnesses for the Commonwealth in a criminal case.

Mr. Kiser further states:

"It is not unusual for the sheriff or his deputy to be summoned both by the Commonwealth and the defendant. How should this attendance be handled? If he is summoned in a criminal case on behalf of the defendant only where the defendant is a pauper, is it proper for him to bill the Commonwealth for the mileage traveled?"

Where a sheriff or his deputy is summoned as a witness by both the Commonwealth and the defendant, I am of the opinion that there should be

only one fee and mileage allowance taxed as a part of the costs, this to be paid by the defendant if the costs are taxed against him, but in no case to be paid by the Commonwealth.

Where the sheriff or his deputy is summoned as a witness by the defendant who is a pauper, the attendance and mileage should not be paid by the Commonwealth as a part of the costs taxed in the case. Indeed, as I have already stated, in no case should a sheriff or his deputy summoned as a witness in a criminal case be paid by the county treasurer on a certificate of attendance. As I said in my former letter, however, where a sheriff or his deputy has to travel in attendance upon court as a witness for the Commonwealth in a criminal case, his mileage will be allowed him by the Compensation Board as an expense of his office.

I return Mr. Kiser's letter herewith.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees for Posting Poll Tax Lists.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 21, 1943.

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

MY DEAR MR. BROWN:

This is in reply to your letter of June 19, from which I quote as follows:

"Section 112 of the Code provides that the sheriff posting the lists of persons who have paid their poll taxes shall receive a fee of 25 cents for each list which he posts, and section 109 of the Code provides that one of these lists shall be posted at each of the voting places in the county. Prior to January 1, 1943, the county, of course, had been paying the fees prescribed for this service direct to the sheriff.

"Chapter 386 of the 1942 Acts, section 1, subsection (b), provides that 'every sheriff * * * shall * * * continue to collect all fees and mileage allowance now or hereafter provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county * * * for which he is elected * * * the fees and mileage allowances provided for services in connection with the prosecution of any criminal matter. Such fees and mileage allowances accruing in connection with any criminal matter shall be collected by the clerk of the court in which the prosecution is had.'"

Since that part of chapter 386 of the Acts of 1942 which you quote expressly provides that the sheriff shall continue to collect all fees "other than such as he would have been entitled to receive from the Commonwealth or from the county," it is my opinion that the sheriff should now post the lists mentioned in section 109 of the Code without collecting the fees prescribed by section 112, as these fees would otherwise be payable by the county. It does not appear to me that chapter 386 permits any other construction. This

office has heretofore frequently expressed the opinion that section 1, subsection (b) of chapter 386 applies to sheriffs' fees in civil as well as criminal matters.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Fees for Service of
Two Related Notices.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 24, 1943.

MR. LEE F. LAWLER,
*City Sergeant,
Norfolk, Virginia.*

DEAR MR. LAWLER:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has referred to this office your letter of June 22 addressed to him. You state that you received for service a notice attached to a petition, which notice reads as follows:

"Take notice that on Saturday, June 26th, 1943, at ten o'clock A. M., or as soon thereafter as council may be heard, I will move the Court of Law and Chancery of the City of Norfolk for an elimination of alimony, or a decrease in alimony, as the Court may deem proper, as set out in petition attached hereto."

You desire to be advised as to whether you should charge one fee for serving the notice and the petition or a fee for serving each paper.

I have given careful consideration to your inquiry and have reached the conclusion that the notice and the petition are so closely integrated that the petition should be treated as a part of the notice for the purpose of charging the fee for service prescribed by section 3487 of the Code, and, therefore, only one fee should be charged for serving both papers. I do not mean to suggest that an attorney by the device of attaching two entirely separate instruments together can avoid the proper fee for service of such instruments, but in the case you put, as I have indicated, it seems to me that the better view is that the petition is a part of the notice.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees in Sales Where Property Levied Upon is Subject to Prior Lien.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 30, 1943.

MR. A. S. WHITE,
Sheriff,
Odd, Virginia.

DEAR MR. WHITE:

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

"I have in hand an execution to levy on an automobile, the execution being in the sum of \$275 plus costs. The Morris Plan Bank has a prior lien on this automobile in the sum of \$699, and I presume the Morris Plan Bank or someone for it will have a bidder present when this sale takes place.

"What I want to know is what would be my commissions on this transaction. If the Morris Plan Bank collects \$699 and the other man collects \$300, will I get commission on the \$699 plus the \$300, or will I just collect on the \$300?"

I call your attention to section 6486 of the Code, which reads as follows:

"Tangible personal property subject to a prior lien, or in which the execution debtor has only an equitable interest, may nevertheless be levied on for the satisfaction of a *fiери facias*. If such prior lien be due and payable, the officer levying the *fiери facias* shall sell the property free of such lien, and apply the proceeds first to the payment of such lien, and the residue, so far as necessary, to the satisfaction of the *fiери facias*. If such prior lien be not due and payable at the time of sale, such officer shall sell the property levied on subject to such lien."

Pursuant to this section, if the lien of The Morris Plan Bank is due and payable, I am of opinion that you should sell the property involved free of such lien, and that under section 3487 you would be entitled to your commission on the gross amount received. If the lien is not due, the automobile should be sold subject to such lien, and in that case it seems to me that you would only be entitled to the commission on the cash proceeds of the sale.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees for Collecting Upon an Execution.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 25, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of March 24, in which you ask my opinion on the following questions asked by Sheriff A. A. Fleming, of Dickenson County:

"When I collect on an execution without a levy should I collect commission?"

"When I levy and collect without a sale should I collect commission?"

"When I levy and sell should I collect commission?"

Section 3487 of the Code, specifying sheriffs' fees and commissions in civil cases, provides in part as follows:

"An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum of the first one hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum on the residue; except that when such payment or sale is on execution on a forthcoming bond his commission shall only be half what it would be if the execution were not on such bond."

The word "of," which I have italicized, is apparently a typographical error, the word "or" obviously being intended. In the official Code of 1919 the word "or" is used.

In view of the quoted provision, I am of opinion that all three questions should be answered in the affirmative where the sheriff actually makes the collection. These commissions when collected, of course, should be paid in to the treasurer of the county to be distributed as provided in section 1(b) of chapter 386 of the Acts of 1942.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees of Sheriff Where Levy is Made.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 17, 1943.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of April 16, in which you ask for the

opinion of this office on the following question asked you by H. B. Cherm-side, Jr., Trial Justice for Charlotte County:

"I note from a recent opinion of the Attorney General that the sheriff is chargeable with a levy fee when levy is made on an execution, even though no collection is made from the levy. * * * Is it your opinion that the trial justice should endeavor to collect the levy fee from the plaintiff at the time the warrant is issued, or judgment rendered, or should the collection of this fee be left entirely to the sheriff?"

I do not think that the trial justice should collect the sheriff's fee for making a levy at the time that the warrant is issued. At that time the trial justice does not know whether or not a levy will be made. In my opinion, the sheriff's fee for making the levy should be collected by the sheriff from the person at whose instance the levy is made.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees to Be Collected in Execution Marked "No Effects"; Holding Prisoner for Sheriff of Another County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 20, 1943.*

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of January 15, in which you refer to this office a number of questions submitted to you by Sheriff C. O. Mullins, of Mecklenburg County. The first question is:

"When an execution is received and levy made but nothing collected, then marked 'No effects' and returned to the Clerk, should the officer collect, the \$1.50 for levy and 50 cents return of *fifa*, even though no money collected on *fifa*?

"When nothing is found to levy on, what fees if any should be collected by officer? The above question and this has been construed differently by attorneys here."

In my opinion, when an officer makes a levy under an execution, although nothing is collected, he is entitled to a fee of \$1.50. See section 3487 of the Code, the twentieth numbered paragraph. I can find no provision for a fee of 50 cents for making a return in such cases.

Where no levy is made under an execution in an officer's hands, but a return is made by the officer, such officer is entitled to a fee of 50 cents for making the return. See section 3488 of the Code.

Your second question is:

"When I arrest a prisoner for another county in Virginia and hold him in our county jail, should I make the sheriff of the county which this man was arrested for, pay the fees for the arrest, mileage, board and committal, etc., of this prisoner when he comes for him? Also should I do the same for another State? There are very few cases where I have ever had to pay one cent to another officer for arresting a man for me, in or out of the State, and I certainly do not wish to charge them unless I have this to do."

In my opinion, the Sheriffs' and Sergeants' Salary Act (Chapter 386 of the Acts of 1942) does not contemplate that the sheriff of a county should collect a fee from another county or city for the arrest of a man wanted in such other county or city. The sheriff's arrest fee, however, should be taxed as a part of the costs to be collected from the defendant in the event that he is convicted.

The mileage of the sheriff in performing his official duties will be allowed by the State Compensation Board as an expense of his office, but I am of the opinion that the sheriff should not require another county or city to advance the mileage of the sheriff in making an arrest for such county or city before the prisoner is turned over.

The question of the expense of a prisoner held in jail for another county or city is expressly dealt with in section 9, subsection (c) of chapter 386 of the Acts of 1942. I presume that you will desire to explain to Sheriff Mullins the exact procedure which he should follow in such a case.

As to the sheriff's fees in connection with the arrest of a prisoner wanted in another State, I enclose copy of a letter written by this office to Sheriff G. M. Gilkeson, of Staunton, Virginia, under date of March 28, 1940, which will give you my views. The matter of the expense of keeping such a prisoner in jail is expressly covered by section 9, subsection (c) of said chapter 386.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees Where Execution Returned "No Effects."

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 5, 1943.

MR. TAYLOR L. BARR,
*Sergeant City of Winchester,
Winchester, Virginia.*

DEAR MR. BARR:

This will acknowledge receipt of your letter of recent date, from which I quote as follows:

"The office of City Sergeant of the City of Winchester, Virginia, is still under the fee system. In criminal cases tried in the Civil and Police Justice Court the warrants are docketed or filed in the office of the Clerk of the Corporation Court. In cases where fines and costs are not paid, they are docketed as judgments against the defendants, and

executions issued by the clerk and placed in my hands. In most instances the returns made by me show no property found. Have had a good number of these executions in the past few weeks.

"Will you please give me a ruling as to whether or not I am entitled to a fee for making a return on these executions, and if so, by whom is the fee to be paid?"

The executions to which you refer are, I presume, those issued pursuant to section 2552 of the Code. Section 2561 of the Code provides that a sheriff or sergeant to whom such an execution may be directed "shall be entitled to a commission of five per cent on the amount collected to be paid by the defendant as other costs are paid". Other than this commission in the case of a collection I know of no statute which allows a fee to the sheriff or sergeant for making a return on such an execution. In the absence of a statute providing for a fee for this service, I am of opinion that no such fee can be collected.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Fees for Collecting
Upon An Execution; Garnishment Executions.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *March 11, 1943.*

MR. JOHN A. RIFE,
*Sheriff of Buchanan County,
Grundy, Virginia.*

DEAR MR. RIFE:

This will acknowledge receipt of your letter of March 1, in which you ask the following question:

"Where part-time deputies serve civil process and later judgment is granted thereon and an execution is issued, shall the commissions for collecting this judgment be likewise included in the total amount collected by the deputies or part-time deputies as the case may be as well as the principal, interest and other costs?"

In the light of section 3487 of the Code, I am of the opinion that a sheriff or his deputies (part or full-time) making a collection under an execution issued on a judgment for money should include in the amount collected the commissions allowed by law in addition to the amount of the judgment, such commissions to be paid into the treasury of the county as provided by section 1, subsection (b) of chapter 386 of the Acts of 1942.

Your next question is:

"Should either a deputy or part-time deputy serve a garnishee on any judgment and the money collected on said garnishee be not paid in to the court or trial justice office, should ten per cent commissions be added to principal, interest and costs for the services of the deputy or part-time deputy for services rendered in their collecting the total amount

of the judgment from the garnishee debtor or employer of the defendant debtor?"

Where a sheriff or his deputy simply serves a summons on a garnishment debtor, I am of opinion that the officer is only entitled to the fee provided by statute for serving such summons. If, however, a judgment is secured against the garnishee and he fails or refuses to pay the amount of such judgment and it becomes necessary to issue an execution against him, and collection is made by such officer under the execution, then the officer is entitled to the commission specified by section 3487 of the Code for making such collection, which commission should be included in the amount collected.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees of Sheriff in Garnishment Proceedings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 17, 1943.

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

MY DEAR MR. DOWNS:

Your letter of April 16 presents the following question asked you by Sheriff A. A. Fleming, of Dickenson County:

"When an employer pays money to the trial justice, on a garnishee, should there be included in the amount commission for the sheriff, on the amount paid to the trial justice?"

Since the collection was not made by the sheriff, I am of opinion that no commission should be collected for him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES; COSTS—Fees for Service of Summons in Garnishment Cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 24, 1943.

MR. A. A. FLEMING,
*Sheriff of Dickenson County,
Clintwood, Virginia.*

DEAR MR. FLEMING:

This will acknowledge receipt of your letter of May 17, in which you ask the following question:

"After a sheriff has served a civil warrant and collected the sheriff's costs, can the plaintiff settle with the defendant without paying the court costs for trying and docketing?"

Unquestionably, in civil cases the parties thereto may agree upon a settlement before trial. When this is done and no trial is had, this office has heretofore expressed the opinion that there should be no trial fee, nor would there be any fee for docketing a judgment since no judgment is rendered.

You next ask:

"When a garnishee issues, can a sheriff be forced to serve a copy of this notice on only the garnishee and withhold the copy for the defendant?"

I presume you refer to the case where on a suggestion by a judgment creditor a summons in garnishment is issued pursuant to section 6509 of the Code. This section provides in part that "a copy thereof (i. e., summons) shall be served on the judgment debtor as well as on" the garnishee. It is my opinion, therefore, that, as directed by the statute, the service should be both on the judgment debtor and the garnishee and that the sheriff is entitled to his fee for each such service. However, if either the judgment debtor or the garnishee should accept service of the summons before it is delivered to the officer for service or if such acceptance of service is known to the officer before he serves the summons, then, of course, the officer should not serve the summons and no fee for service should be charged or collected.

Your last question is:

"If you go to a supposed garnishee and find that the defendant is not working there, this is an attempt to serve and should be paid for, what then becomes of the copy for the defendant?"

If a summons in garnishment is issued pursuant to section 6509 of the Code, it is not for the sheriff to determine whether the garnishee is indebted to the judgment debtor or not. The sheriff should serve the summons as directed and, of course, is entitled to the fee prescribed by statute for such service.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Fees Authorized on
Summons Issued by Commissioner in Chancery.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 13, 1943.

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of May 12, in which you ask the opinion of this office on the following question presented to you by the City Sergeant of Norfolk:

"It has been the practice of this office not to charge the usual fee for serving of summonses and notices issued from the office of the Commissioner in Chancery. Are we correct in following this procedure?"

I have been able to find no statute which requires a sheriff or sergeant to serve summonses and notices issued from the office of Commissioner in Chancery without the fees specified by law for the service of such papers in other cases, and I am, therefore, of the opinion that such fees should be charged by the officer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Office of Constable
Abolished as of January 1, 1943.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 24, 1942.

HONORABLE C. W. SMITH,
*Clerk Circuit Court of Appomattox County,
Appomattox, Virginia.*

MY DEAR MR. SMITH:

I am in receipt of your letter of July 23, in which you ask if the office of constable has been abolished as of January 1, 1943.

In view of the provisions of Chapter 285 of the Acts of 1942 (Acts 1942, p. 407), I am of opinion that the office of constable has been abolished as of January 1, 1943, the Act in question specifically so providing. It is true that in amending section 127 of the Code in 1942 (Acts 1942, p. 507), which section provides for the election of district officers, the office of constable was not omitted. However, I do not think that this fact can be said to repeal in effect the specific provision of Chapter 285 abolishing the office of constable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Office of Constable
Abolished as of January 1, 1943.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 13, 1943.

MR. JOHN A. RIFE,
*Sheriff of Buchanan County,
Grundy, Virginia.*

DEAR MR. RIFE:

This will acknowledge receipt of your letter of January 12, from which I quote as follows:

"I have been informed by your office that all fees and commissions must be paid to the treasurer of the county that are collected by me and my deputies. It has come to my attention that the constables and county police are still serving civil papers and keeping the commissions and fees.

"Please advise me if they should continue to do so."

As you probably know, the office of constable has been abolished as of January 1, 1943, and former constables no longer have the authority to act as such, nor do I find that the statutes authorizing the appointment of special county police give to these officers the authority of a sheriff in serving civil papers. I am, therefore, of opinion that, if a special county policeman or a former constable serves any civil processes, he is doing so not as an officer but as any other disinterested layman, and no fees should be taxed by the court or justice for him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Act Abolishing Office
of Constable is Not Applicable to Bailiffs.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 15, 1942.

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

MY DEAR MR. RATCLIFFE:

This will acknowledge receipt of your letter of July 11, from which I quote as follows:

"In chapter 285 of the Acts of 1942 the office of constable is abolished as of January 1, 1942.

"Under the County Manager Act, section 2773, subsection 63, provision is made for the board of supervisors in counties adjoining cities

with a population of 175,000 or more to appoint a bailiff who shall perform all the duties of constable and shall collect all fees and commissions allowed constables under the general law.

"In your opinion would the 1942 Act abolish the office of bailiff of Henrico county under the aforesaid section?"

Section 2773(63), to which you refer, provides that in counties adjoining cities with a population of 175,000 or more the county board of supervisors may appoint a bailiff for the trial justice court, who shall, "in addition to his duties as bailiff, exercise all of the powers and perform all of the duties conferred or imposed upon constables by the general law in all civil matters emanating from the said trial justice court in place and stead of the sheriff as set out above." It seems to me plain from the quoted language that the bailiff is treated as a separate officer of the trial justice court in such counties, and that the office of bailiff is not abolished by the Act of the General Assembly of 1942 (Acts 1942, p. 407) abolishing the office of constable. I do not think it is reasonable to presume that the General Assembly by the general Act abolishing the office of constable intended to abolish the office of bailiff specifically provided for by a provision applicable to a limited number of counties, even though some of the duties of this bailiff were prescribed by reference to the laws relating to constables.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Compensation of Special County Policemen.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 28, 1942.

HONORABLE RALPH HERBERT RICARDO,
*Trial Justice for Norfolk County,
Portsmouth, Virginia.*

MY DEAR MR. RICARDO:

This will acknowledge receipt of your letter of November 23, relative to the compensation of special county police appointed under the authority of section 4797 of the Code.

This section seems to me to plainly contemplate that such public compensation as they receive, including expenses incurred in executing their duties, shall be paid pursuant to an appropriation of the board of supervisors of the county. Indeed the section expressly provides that:

"The board of supervisors may, if deemed proper, except where the policeman is otherwise regularly employed and his duties as policeman are merely incidental to such private employment, allow such compensation to said policeman, which, together with any expense incurred in executing his duties as shall be deemed right and proper by the said board of supervisors to be paid out of the county levy."

With reference to your inquiry as to whether these special officers are entitled to fees or mileage or both for the arrest of persons charged with a violation of a criminal law, I can find no express statutory provision for

the payment of such fees or mileage. I realize that in some instances it has been the practice in the past to tax arrest fees for these officers, and there are one or two sections of the Code which seem to imply that there may be fees to which these officers are entitled, but I can find no statute which authorizes them. Certainly there is nothing in sections 4797 to 4803 of the Code, dealing with these officers and defining their powers and duties, providing for any fees or mileage for them. And, as I have already indicated, the section providing for the appointment of these officers contemplates that their compensation and expenses shall be paid out of an appropriation made therefor by the board of supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Compensation of
Special County Policemen.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., November 28, 1942.

HONORABLE COLEMAN B. YEATTS,
Substitute Trial Justice,
Chatham, Virginia.

MY DEAR MR. YEATTS:

I am in receipt of your letter of November 13, from which I quote as follows:

"Please advise me whether or not the authority conferred on judges of the circuit courts, by section 4797 of the 1936 Code of Virginia, is affected by the Sheriff's Act, or relative Acts abolishing the fee system in Virginia. If the circuit court judges still have the authority to appoint these special policemen, then are they entitled to the fees which they earn?"

I know of nothing in chapter 386 of the Acts of 1942, putting sheriffs, sergeants and their deputies on a salary basis, which prohibits the appointment of special county policemen under section 4797 of the Code.

In connection with your question as to the fees to which these special policemen are entitled, I enclose a copy of a letter I am writing today to the Trial Justice for Norfolk County, which will give you my views on this subject. I likewise enclose a copy of a letter I wrote to Governor Darden under date of November 1, 1942, in which I expressed the view that no police officer (including sheriffs, deputy sheriffs, constables and special county policemen) is allowed to accept a fee for the arrest of anyone charged with violating the motor vehicle laws of this State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Compensation of
Special County Policemen.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 31, 1942.

HONORABLE GEORGE P. CRIDLIN,
*Trial Justice for Lee County,
Jonesville, Virginia.*

MY DEAR MR. CRIDLIN:

I am in receipt of your letter of December 29, with reference to fees of special county policemen.

This office has recently expressed the opinion that the statutes relating to these officers contemplate that they shall be paid a salary by the board of supervisors of the county for which they are appointed and that they are not entitled to fees or mileage. I am enclosing copy of a letter I wrote to Honorable Ralph Herbert Ricardo, Trial Justice for Norfolk County, under date of November 28, 1942, which will give you the views of this office on the question.

Replying to your second question, I beg to advise that Chapter 386 of the Acts of 1942, relating to the salaries of sheriffs and sergeants provides that "all fees collected by or for every sheriff, sergeant and deputy of either shall be paid into the treasury of the county or city for which he is elected or appointed on or before the tenth day of the months next succeeding that in which the same are collected."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Incompatibility of
Office; Special County Policeman.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., December 10, 1942.

HONORABLE A. D. JOHNSON,
*Attorney for the Commonwealth,
Windsor, Virginia.*

MY DEAR MR. JOHNSON:

This is in reply to your letter of December 9, in which you ask the following question:

"I will appreciate it if you will advise me of your opinion as to whether or not a full-time deputy sheriff under the provisions of the new law effective January 1 may also, at the same time, hold the office of special police officer, said special police officer being appointed under provisions of existing law and paid by the county."

In my opinion, a full-time deputy sheriff may not at the same time be a special county police officer and be paid a salary by the county. The very term "full-time deputy sheriff" clearly implies that such an officer

may not hold another public office and receive a salary thereof. Furthermore, the powers and duties of a deputy sheriff in a large measure parallel those of a special county policeman and, if the same man held both offices, the result would be that he would be receiving two salaries for performing the same duties.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SHERIFFS, SERGEANTS AND CONSTABLES—Incompatibility of
Office; Special County Policeman.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 8, 1943.

HONORABLE L. C. HARRELL, JR.,
*Attorney for the Commonwealth,
Emporia, Virginia.*

MY DEAR MR. HARRELL:

This will acknowledge receipt of your letter of June 2, from which I quote as follows:

"I would appreciate your advice as to whether the Board of Supervisors may pay a salary to person appointed a Special Policeman by the Judge of the Circuit Court, who is also a Town Sergeant, in view of section 4797 of the Code.

"The particular portion of such section dealing with the question being the third sentence in the second paragraph thereof, wherein it is provided that the policeman cannot be paid if he is otherwise regularly employed and his duties as policeman are *incidental* to such *private* employment."

In my opinion, the provision to which you point in the Code section 4797 refers to a case where the policeman is regularly employed by a private corporation, such as a person employed by an industrial corporation as a watchman or plant policeman. It does not seem to me that a town sergeant, who is a public officer, comes within the scope of the language of the exception, and my conclusion is, therefore, that a town sergeant may be appointed a special county policeman under the authority of section 4797 of the Code.

You will observe from the first paragraph of section 4797 that, if a town sergeant is appointed a special county policeman, he may only act as such policeman "for so much of said county as is not embraced within an incorporated town located in the county."

What I have written, of course, is upon the assumption that there is nothing in the charter of the town involved to prevent its sergeant from being appointed and acting as a special county policeman.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Special County Policeman's Fees; Incompatibility of Office.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 20, 1943.*

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of January 18, enclosing a communication from Mr. S. L. Farrar, Clerk of the Circuit Court of Amelia County, concerning the disposition to be made of fees taxed for a special county policeman.

This office has recently expressed the opinion that the statutes do not provide for any fees to be taxed as a part of the costs for services rendered by a special county policeman either in a civil or criminal case. I have expressed the view that the pertinent statutes contemplate that the compensation of these officers should be paid by the county for which they are appointed in the form of a salary and expense allowance. In view, therefore, of the fact that these officers are not entitled to any fees, no question as to the disposition of such fees can arise.

I further note from Mr. Farrar's letter that he says that in Amelia county there is a full-time county policeman who is also a deputy sheriff of the county. This office has heretofore expressed the opinion that the offices of deputy sheriff and county policeman are incompatible and that the same person cannot hold both offices.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF EDUCATION—Power to Borrow Money in Excess of Appropriation.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 22, 1943.*

HONORABLE COLGATE W. DARDEN, JR.,
*Governor of Virginia,
State Capitol,
Richmond, Virginia.*

MY DEAR GOVERNOR DARDEN:

This is in reply to your request for my opinion upon the question whether or not the members of the State Board of Education, with the approval of the Governor, may borrow funds in excess of the amount appropriated to the Department of Education by the General Assembly and expend same for the purpose of increasing the salaries of school teachers during the emergency. The existence of the emergency, I am informed, is due to the impossibility of securing an adequate supply of competent teachers in the public schools at their present rates of compensation.

Sections 58 and 59 of the Appropriation Act of 1942 provide as follows:

Sec. 58. "No State department, institution or other agency receiving appropriations under the provisions of this act shall exceed the amount of its appropriations, except in an emergency, and then only with the consent and approval of the Governor in writing first obtained; and if any such State department, institution or other agency shall exceed the amount of its appropriation without such consent and approval of the Governor, there shall be no reimbursement of said excess, nor shall there be any liability or obligation upon the State to make any appropriation hereafter to meet such deficit, and the members of any governing board of any State department, institution or other agency, or, if there be no governing board, the head of any State department, institution or other agency, making any such excessive expenditure—in the case of members of governing boards, who shall have voted therefor—shall be personally liable for the full amount of such unauthorized deficit, and, in the discretion of the Governor, shall be deemed guilty of neglect of official duty, and be subject to removal therefor."

Sec. 59. "Any amount which a State department, institution or other State agency may expend in excess of its appropriation, under authority given by the Governor under this act to such department, institution or other State agency to exceed its appropriation or to incur a deficit, shall be first obtained by the said department, institution or agency by borrowing said amount on such terms and from such sources as may be approved by the Governor and the State Treasurer."

A provision similar to section 58 has appeared in every Appropriation Act since and including that for the year 1922, and one similar to section 59 in every such Act since and including that for 1930.

Moneys borrowed have usually been evidenced by a note signed by the department head individually, or by the individual members of a board desiring to obtain same to cover deficit expenditures. While the provisions of sections 58 and 59 impose no legal liability upon the State to pay these individual notes, no succeeding legislature has ever failed to appropriate the funds necessary to pay same. I am informed that the banks in Richmond generally have not hesitated to make the desired loans evidenced by such notes, which, as stated, have always been paid out of subsequent appropriations.

Since these loans constitute individual debts and not debts of the State they are not in violation of sections 184-a and 184-b of the Constitution, which prohibit the incurring of State indebtedness except upon the approval of a majority vote in a State referendum election. The moneys expended from such loans are not paid out of the State Treasury until a subsequent appropriation has been made and such expenditures, therefore, are not in violation of section 186 of the Constitution, which provides that "no money shall be paid out of the State Treasury except in pursuance of appropriations made by law."

It follows from the foregoing that I am of opinion that, if the State Board of Education affirms the existence of an emergency for reasons in which the Governor concurs, and requests the authority to incur a deficit to meet same, which the Governor approves, it will be lawful for the Board to borrow the money for that purpose as provided by section 59 of the Appropriation Act above quoted.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF EDUCATION—Powers to Contract for Textbooks.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 11, 1942.

HONORABLE DABNEY S. LANCASTER,
*Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.*

MY DEAR MR. LANCASTER:

This will acknowledge receipt of your letter of August 10, from which I quote as follows:

"At the June meeting of the State Board of Education several textbooks for use in high school English classes were selected for use in Virginia.

"The prices bid by several of the publishing houses were somewhat higher than prices bid heretofore in other states for the same books. The contention of these publishers is that these books cannot now be offered at the lower prices because of increased costs of material and labor. They say that the prices quoted in Virginia are as low as they are now quoted anywhere in the United States.

"In other words, if the Virginia State Board of Education should be offered the same prices as were offered elsewhere several years ago and if they are to apply to the contract in Virginia which is to extend for five years, then other states having substantially the same laws as Virginia could demand five years hence, the same low prices because of the Virginia contract. On this basis, prices could never be increased.

"Has the State Board of Education the right to sign a contract with a publishing house for the purchase of textbooks at prices that are higher than those being received for said books delivered in other states, under the terms of contracts made at some previous time?"

The applicable statute is section 618 of the Code of Virginia, the pertinent portion of which I quote below:

"The State Board of Education shall enter into written contracts with publishers of textbooks adopted for use in the public schools of the Commonwealth, said contracts to contain the following representations, terms and conditions: The contract shall set forth the lowest wholesale price free on board publisher and the lowest State depository price at which books are sold under contract anywhere in the United States. The publisher shall list with the Superintendent of Public Instruction the lowest wholesale prices at which books involved in the contract have been sold anywhere in the United States during the preceding three years, or for a longer period if designated by the State Board of Education. The State board shall stipulate a retail price to patrons, which price shall in no case exceed fifteen per centum added to the wholesale price. If subsequent to the date of any contract entered into by the State Board of Education the prices of books named in the contract be reduced or the terms of the contract be made more favorable to purchase anywhere in the United States, or, if a special or other edition of any book named in the contract shall be sold outside of Virginia at a lower price than bid in this State, then the publisher shall, in the discretion of the State Board of Education grant the same reduction or terms to the State Board of Education of Virginia and give said board the option of using said special or other edition adapted

for use in Virginia and at the lowest price at which said special edition is sold elsewhere."

The particular provision that is causing you trouble is that which provides that "the contract shall set forth the lowest wholesale price * * * at which books are sold under contract anywhere in the United States." You further advised me in our conversation that this is the first time that the precise question now presented has arisen, because contracts for books have not heretofore been made on a rising market.

As you state, if Virginia and other States having substantially the same statute (apparently many do) should insist that the publishers contract for the lowest prices at which books are being delivered anywhere else in the United States under contracts previously made, no matter how long ago, no publisher could ever increase his prices. If this is the proper construction of the statute, then the situation might well arise that Virginia could get no bids from publishers, since they would not be willing to make a contract under which they would be bound to lose. I cannot believe that the General Assembly had any such intention.

The reasonable construction of the provision involved is, in my opinion, that the contract price shall be the lowest price at which contracts are currently being made by the publisher anywhere else in the United States. The statute gives the State Board of Education ample authority, which it would have in any event, to require all necessary information from the publisher so that it may determine whether the bid price is a reasonable one and is in line with other contracts which the publisher is making or has made.

In the event that manufacturing costs should decline in the future and publishers are thus enabled to and do subsequently make sale contracts at a lower price, then the State is amply protected by the provisions which stipulates that such lower price shall also be applicable in Virginia.

After careful consideration and for the reasons stated, I am of opinion that your question must be answered in the affirmative. Of course, in making current contracts the State Board of Education will investigate all pertinent facts to ascertain whether or not they justify the signing of a contract for textbooks at prices higher than those being received for such textbooks sold under contracts previously made in other States; that is, whether increased manufacturing costs are such as to justify the increase in price.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF GRADUATE NURSES—No Authority to Issue Temporary Permits.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 17, 1942.*

MISS JOSEPHINE MCLEOD,
*Secretary State Board of Examiners of Graduate Nurses,
812 Grace-American Building,
Richmond, Virginia.*

DEAR MISS MCLEOD:

Following your telephone conversation on September 14, I have had

under consideration the question of whether or not the State Board of Examiners of Graduate Nurses could issue temporary permits to non-residents temporarily located in Virginia who desire to practice nursing for compensation and who possess the requisite professional qualifications, but who do not intend to take the examination given by the Board, nor are they from States which practice reciprocity with Virginia.

I can readily sympathize with the humane purposes of the Board in desiring to allow these persons to practice, but do not see how such action can be justified under the existing statutory law. Chapter 71 of the Code, which deals with professional nursing, provides that it shall be unlawful to practice professional nursing for compensation without a license or certificate in this State, and there are only two methods by which such license or certificate can be obtained: one is by examination—compare Code section 1706—and the other by reciprocity—compare Code section 1714. The chapter appears to be all inclusive and does not comprehend that there might be other methods for licensing applicants.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—Authority of Board of Visitors of University of Virginia to Appoint a Nominee to Handle Trust Securities.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 8, 1943.

DR. J. L. NEWCOMB,
*President University of Virginia,
University, Virginia.*

MY DEAR DOCTOR NEWCOMB:

This is in reply to your request for my opinion upon the question of the authority of the Rector and Visitors of the University of Virginia to transfer shares of stock which are a part of the endowment funds of the University to certain nominees, in order to facilitate sales and transfers of such shares when the Board of Visitors desires to sell same. You have given me a copy of an opinion on this question submitted to you by Honorable W. Allan Perkins, attorney for the Rector and Visitors of the University of Virginia, in connection with the management of its endowment funds. I concur generally in the views expressed by Mr. Perkins.

The Rector and Visitors of the University of Virginia constitute a corporation, and with respect to their powers to hold title to property they are corporate trustees for the Commonwealth of Virginia. The members of the Board of Visitors are, in effect, the Board of Directors of the corporation.

Under section 806 of the Code of Virginia corporation has power to accept, execute, and administer any trust in which it may have an interest under the terms of the instrument creating the trust. The Board may within the limitation hereafter referred to employ agents to assist it in the administration of such trusts.

The relationship created between the Board and any custodian or nominee with whom it deposits securities for registration, safekeeping, ad-

ministration and sale is one of agency and so long as the Board selects as custodians and nominees only those whose experience, reputation, and financial standing suggest that they are proper and suitable persons to execute the duties referred to no liability would attach to the Board for the initial placing of securities in the hands of such custodians or nominees.

Thereafter the duty of the Board would be to maintain diligent observation of the accounts of such custodian, to see that the income on such investments is properly reported and accounted for, that the portfolio of securities is intact, and that the custodian continues to be a proper and suitable person to execute the duties assigned to him.

Of course, the Board cannot delegate to such custodian any of the Board's powers of discretion and judgment regarding the disposal of any securities which it holds.

The terms of the clause which you now use in your contracts designating the powers of such custodian, to-wit: "the said Bank shall have no authority to sell, purchase or vary any investment or investments of the principal funds held hereunder except upon the written order or direction of the said Board, its Finance Committee or the Chairman of said Finance Committee, and the said Bank agrees to deal with the said principal funds in accordance with trusts thus given it"; are sufficient and proper to protect the Board in this regard.

In connection with banking institutions acting as depositories for the funds and securities of the University, I would suggest that the Board of Visitors consider the practicability and advisability of requiring a bond or some form of security to protect the funds in case of a depository becoming insolvent. The protection of the Federal Deposit Insurance Corporation covers deposits only up to the amount of five thousand dollars.

I suggest that the Board give consideration to the provisions of sections 2157 to 2162, inclusive, of Michie's Code relating to security required of depositories of State funds other than endowment funds, with a view to the adoption of a similar practice as to these endowment funds and securities if same is practicable.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—Scholarships to Virginia Residents.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 30, 1943.

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

MY DEAR GENERAL KILBOURNE:

I have your letter of June 29, with regard to the eligibility of a son of General English for a scholarship at Virginia Military Institute.

As you state, section 997-b of the Code (Michie 1942) prohibits any State supported institution from awarding tuition remission scholarships "to students coming from any State other than Virginia." General English seems to have been originally domiciled in Virginia, but apparently has

never voted here, nor has he paid any taxes here other than local taxes on some physical property that he owns in Richmond. You do not state whether General English has always intended to retain his domicile in Virginia or not. Certainly from the facts given by you there is no indication that he had such intention. If he had this intention, it seems to me that he should have paid his capitation tax in Virginia, as well as any State income taxes to which he was liable and taxes on intangible personal property. I realize that an army officer necessarily moves from place to place at the direction of his superiors, but it would appear that, if it had been the intention of General English to retain his legal residence in Virginia, he would have taken some affirmative action to do so.

I must reluctantly advise that, in my opinion, your letter does not present sufficient facts concerning the residence of General English in Virginia to justify the awarding of a scholarship to his son. If you know of any facts not contained in your letter or can secure any further facts from General English that would throw light on the situation, I shall be glad to consider the matter further.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—Annual Scholarship; Interpretation of Under Accelerated Program.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 12, 1943.*

DR. W. T. SANGER,
*President Medical College of Virginia,
Richmond, Virginia.*

MY DEAR MR. SANGER:

This will acknowledge receipt of your letter of April ninth from which I quote as follows:

"Chapter 354, Page 531, Acts of the last Assembly provide for a system of medical scholarships under certain conditions. Since this act was passed all medical schools in the United States are operating on a year-round basis, graduating students in three calendar years instead of four academic years. How in this situation is the word 'annual' in the law to be construed?

"To be specific we started scholarship holders under this new arrangement the first of July, 1942. They completed their courses the last of March, 1943, and have now entered upon another year's work as of April 5. Can these scholarship grants be paid now or shall we be compelled to wait until July 1, 1943, paying the entire amount then for the session which began this April and will end next September? Under that construction these beginning an academic year in September would have to wait until July 1, 1944, to be paid their scholarships for the period which would have already ended as of that date.

"You see, a new session begins every nine months in continuance cycle.

"As this subject is raised by our young men who are on scholarships your ruling at a considerably early date will be most helpful."

I have carefully considered Chapter 354 of the Acts of 1942 to which you refer, and it is clear in my opinion that the intent of the Act is to establish medical scholarships for each academic year or session. Certainly the General Assembly could not have intended the word "annual" to mean calendar year, for normally each academic year begins in one calendar year and ends in another; nor did the General Assembly have before it the existing situation where the sessions are being accelerated so as to allow a student to graduate in three years instead of four.

It is my conclusion, therefore, that the scholarships provided in the Act to which you refer may be awarded for each session.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**STATE COLLEGES AND UNIVERSITIES—Age Eligibility Requirements
for Participants in War Veterans' Orphan Fund.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 29, 1942.

DR. DABNEY S. LANCASTER,
*Superintendent of Public Instruction,
State Board of Education,
Richmond, Virginia.*

DEAR DR. LANCASTER:

This will acknowledge receipt of your letter of July 22, requesting an opinion from this office as to the age eligibility requirements for participation in the fund appropriated for the education of orphans of soldiers, sailors and marines who were killed in action or died or who are totally and permanently disabled as a result of service during World War I, as provided in Item 103 of the budget for the fiscal years ending June 30, 1943, and June 30, 1944.

It is my opinion that the Legislature, by the 1942 Act, raised the age limits for those who might receive tuition free in State institutions of secondary or college grade from twenty-one to twenty-five years; otherwise the Act remains unchanged. If Miss Ewell desires this type of assistance, then it is my opinion that she is legally eligible for the same as far as the age requirements are concerned.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—Interest Rates on Student Loans.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 11, 1943.*

MR. E. E. WOODWARD,
*Treasurer Mary Washington College,
Fredericksburg, Virginia.*

MY DEAR MR. WOODWARD:

I am in receipt of your letter of February 10, with reference to the rate of interest to be charged on certain loans made by your institution to students from the student loan fund.

I direct your attention to section 5 of the Appropriation Act of 1942 (Acts 1942, at page 898), which provides that student loan funds "shall be expended upon such terms and upon such rules as may be prescribed by the respective governing boards of the institutions * * *." The terms of the loans "as to time and security" are fixed by the State Comptroller. The section further provides that the rate of interest shall not be less than four per cent per annum. In view of the provisions of section 5 of the Appropriation Act, I know of no reason why an interest rate in excess of four per cent may not be charged, but I suggest that the matter be taken up with the governing body of your institution, which is the State Board of Education. It may be that the State Board already has adopted a resolution covering the question in which you are interested.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—May Not Reimburse Students for Injuries to Property.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 30, 1942.*

DR. W. T. SANGER,
*President Medical College of Virginia,
Richmond, Virginia.*

MY DEAR DR. SANGER:

This will acknowledge receipt of your letter of December 29, in which you ask if the Medical College of Virginia may pay the cost of repairing an automobile damaged under the following circumstances:

"The Medical College of Virginia recently made arrangements with Sheltering Arms Hospital to renovate two of their buildings for the purpose of housing nurses employed by the college hospital.

"In order to improve the draft in the chimney of one of the buildings a ten foot section of galvanized tin was added to the top of the stack and tied to the roof with iron cables. On or about November 26, 1942, during a very high wind a section blew off and landed on the top of a parked automobile belonging to Mr. G. C. Honeycutt, a medical student at the college."

You recognize in your letter to me that the State is not legally liable for repairing the damaged automobile. This being true, I am of opinion that the Medical College may not out of any State appropriation made to it pay for this damage, since such payment would in effect constitute a gift.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**STATE EMPLOYEES—Museum of Fine Arts May Purchase Painting
Painted by One of Its Employees.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 1, 1943.*

MRS. JOHN GARLAND POLLARD,
*Acting Director of Business and Finance,
Virginia Museum of Fine Arts,
Richmond, Virginia.*

MY DEAR MRS. POLLARD:

This will acknowledge receipt of your letter of March 31, from which I quote as follows:

"The Virginia Museum of Fine Arts has a small endowment fund, the income from which is used to purchase the work of Virginia artists, usually through the offering of purchase awards at a competitive exhibition of the paintings of Virginia artists. A jury from outside the State has chosen the works of art to be shown in the Ninth Exhibition of the Work of Virginia Artists and recommended certain ones for purchase by the Museum. One of the paintings recommended for purchase is an entry by an employee of the Museum. This painting was, of course, done on his own time, and he is not employed to create works of art for the Museum. May this picture be purchased by the Museum?"

Section 4706 of the Code in effect prohibits an employee of a State institution from being interested in any contract for furnishing supplies to the Institution. In my opinion, it is plain that a painting done by an employee of the institution is not included in the word "supplies" as used in the section, and I, therefore, know of no reason why the Virginia Museum of Fine Arts may not purchase the painting mentioned by you. Since the painting was done by the employee of the institution "on his own time," it is also plain that it was not done as an employee of the institution.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Leaves of Absence; Interpretation of Term "War Service."

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 24, 1943.

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

MY DEAR COLONEL BULLINGTON:

I am in receipt of your letter of recent date, in which you advise that one of the employees of the Virginia Alcoholic Beverage Control Board has left the employ of the State to become a field agent of the American Red Cross. You ask for my opinion on the question of whether such an employee is entitled to the benefits of section 291-b of the Virginia Code (Michie 1942, Acts 1918, page 540) providing that no State officer or employee shall forfeit his title to office or position "by reason of engaging in the war service of the United States."

It seems that the individual involved is now an employee of the American Red Cross as an assistant field director and is paid by that organization. At the present time he is on duty in the United States, with the possibility of overseas duty if and when he is called on for such service. An assistant field director of the American Red Cross is assigned to a military or naval station and devotes himself to promoting the general welfare of the troops at the station to which he is assigned, especially in connection with the personal and social problems of service men; such an employee also assists in disaster relief and performs such other duties as may be required of him in furtherance of the work of the Red Cross; he may, of course, in the discretion of his superiors be transferred from a military or naval station to perform such other Red Cross work as may be designated.

The question presented is whether an employee of the American Red Cross, as above described, is "engaging in the war service of the United States."

This office has heretofore held that members of the armed forces of the United States are, of course, entitled to the benefits of the statute. It has also been held, however, that the term "war service of the United States" does not include a person working for a private corporation or a private industry because such corporation or industry is engaged exclusively on contracts for the United States. For example, I have expressed the view in one case that a State employee leaving his State position to work for a private corporation whose activities are exclusively devoted to the repair of naval and other vessels that have been damaged due to the war is not entitled to the benefits of the statute. When it is considered that a large portion of the activities of the entire nation is devoted directly or indirectly to the prosecution of the war, probably a majority of our population to a greater or lesser degree is engaged in some sort of war service. Surely the Legislature could not have considered that the definition of the term "war service of the United States" should be stretched to this extent, for this would probably result in a serious breakdown of governmental services.

Another reason why this office should be extremely careful in construing the term "war service of the United States" is that persons relying on an unreasonably liberal construction might find on applying for reinstatement to their former positions in the State's service that their right to such reinstatements might be successfully contested by the persons then holding the positions. After all, the right of those leaving the service of

the State to reinstatement after their "war service" has ended must be determined by the facts in each particular case as they exist at the time reinstatement is sought. Some have erroneously thought that the statute provides for leaves of absence, but this is not correct. It simply provides for reinstatement after the war service is over.

After careful consideration I am constrained to be of the opinion, having in mind the language of the statute and the interest of the employee involved as well as the State, that the term "war service of the United States" should not be defined to include an employee of the American Red Cross. If the General Assembly, which meets in 1944, thinks it wise to further clarify the term, it will be a simple matter for it to do so.

You will understand, of course, that in writing the above I refer to the right of an employee to reinstatement under section 291-b of the Code, which could be enforced by legal proceeding. I do not mean to suggest that a State employee who has left the service of the State, for whatever reason, may not be re-employed at any time by appropriate authority if there is a position available for him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HOSPITALS—Authority to Sell Securities Held in Trust Fund.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 2, 1943.

DR. H. C. HENRY,
*Commissioner Department of Mental Hygiene and Hospitals,
309 North 12th Street,
Richmond, Virginia.*

DEAR DR. HENRY:

This will acknowledge receipt of your letter of January 28, in which you state that the State Hospital Board, as successor to the Board of Visitors of the Western State Hospital, is trustee of a certain fund held under the will of Sidney R. Murkland. You further state that \$9,500 of this trust fund has been invested in 6% First Mortgage Collateral bonds of the Postal Service Building Corporation of Indianapolis, Indiana. You further point out that the bonds have been considered practically worthless for some time, but that you are now advised that they have a sale value of about one-fourth of their original price. You wish to know if the State Hospital Board has the authority to sell these bonds at a loss and, if so, would the State Hospital Board, acting as trustee for the fund, be legally or morally obligated to request the Legislature to make an appropriation to reinstate the fund to its original value.

It appears to me that in this transaction the State Hospital Board is governed by the same rules of law applicable to fiduciary transactions between private persons. The right to sell these bonds is a necessary consequence of the power to purchase them. It seems that this very same will was in litigation years ago, and that the Court of Appeals then said:

" * * * In this instance it" (the Western State Hospital) "has seen fit to accept the trust, and stands upon the same footing with respect

to it as any other trustee. * * * ." (Citing cases. *General Board v. Robertson*, 115 Va. 527, 533, 79 S. E. 1064 (1913).)

As to whether or not the Hospital Board should request the Legislature to make good this loss, this is a matter of policy on which this office cannot express an opinion.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE INSTITUTIONS—How Gifts and Bequests to Be Handled.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 28, 1943.

DR. I. C. RIGGIN,
*State Health Commissioner,
Richmond, Virginia.*

MY DEAR DR. RIGGIN:

I am in receipt of your letter of June 25, enclosing copy of the will of Sol Kaufman, deceased, in which Mr. Kaufman makes a bequest reading in part as follows:

"Unto the Blue Ridge Sanitorium of Charlottesville, Va., I give and bequeath the sum of One Thousand Dollars (\$1,000.00)."

Mr. Kaufman does not designate a trustee, nor does he specify how the bequest should be spent. Upon information furnished by you apparently it was his desire that "this money be used to purchase something that would be of benefit to all of the patients." You desire to know if the gift, when paid, could be "segregated from the general fund to be used for a special purpose."

Under the circumstances, I very much doubt whether anyone has authority to use this sum in the manner suggested. However, as a practical way of accomplishing what seems to have been Mr. Kaufman's desire, I suggest that the gift, when paid, be turned into the treasury and that the Governor be requested to add this amount to the next appropriation to the Blue Ridge Sanatorium and insert in the Appropriation Bill authority for the money to be spent in the manner desired.

The copy of Mr. Kaufman's will is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE PAROLE BOARD—Authority to Pay Office Rent for Probation Officer.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 30, 1942.*

HONORABLE WILLIAM S. MEACHAM,
Director of Parole,
Richmond, Virginia.

MY DEAR MR. MEACHAM:

I am in receipt of your letter of October 29, in which you ask if the Virginia Parole Board "is authorized to pay rent for the office space for district probation and parole officers who are to operate under its jurisdiction."

I am of opinion that where the Board determines that it is necessary to furnish an office to a district probation and parole officer it may pay a reasonable rent for such office. The 1942 Appropriation Act (Acts 1942, at page 791) makes provision for the salary and expenses of the Parole Board and of the probation and parole officers. When an office is necessary for a parole officer, the rent of such office is obviously a proper expense.

The provision to which you refer in the Parole Act (Acts 1942, at page 306) limiting the "necessary traveling and other expenses" of the parole officer to \$1,000 per annum, in my opinion, refers to the personal expenses of such officer as distinguished from office expenses.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE PAROLE BOARD—Bonds and Insurance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 8, 1942.*

HONORABLE WILLIAM SHANDS MEACHAM,
Chairman State Parole Board,
Richmond, Virginia.

MY DEAR MR. MEACHAM:

This will acknowledge receipt of your letter of December 7.

If the parole officers of the Board do not handle any funds, either those of the Board or of probationers and parolees, then I should not think it would be necessary for the Board to require a bond of them.

The provisions of the Workmen's Compensation Act are applicable to State employees, and it is my opinion, therefore, that it would be better for the Board to take out workmen's compensation insurance rather than to be a self-insurer. Most of the State departments have taken out workmen's compensation insurance on their employees.

Most of the State departments, my information is, have taken out automobile liability insurance, though I do not think that this is compulsory. The State, of course, is not liable for damages sustained as a result of the negligence of its employees in operating automobiles, but, as I have stated, most of the departments carry such insurance as a matter of policy.

I do not think it necessary for the Board to take out public liability insurance to protect itself against injuries to persons hurt on its floors in the Corrections Building or in any other building. So far as the employees of the Board are concerned, if injured in the line of duty, they would be protected by the workmen's compensation insurance.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE POLICE—Not Entitled to Rewards for Apprehension of Criminals.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MARCH 16, 1943.

HONORABLE REDMOND I. ROOP,
Commonwealth's Attorney,
Christiansburg, Virginia.

DEAR MR. ROOP:

This is in reply to your letters of February 24 and March 4 regarding the rewards offered by the Board of Supervisors of Montgomery County and the Governor of Virginia for the apprehension and conviction of Paul Dalton for the murder of John T. Weeks. You asked whether or not Mr. Grady A. McConnell, a State Highway Trooper, is entitled to receive these rewards for services performed by him in connection with this case.

From your two letters and a report I have received from Major C. W. Woodson, Jr., Superintendent of the Department of State Police, setting forth the circumstances under which McConnell investigated the Weeks case, the following appear to be the facts.

On October 17, 1941, Dalton was arrested on suspicion of having committed the murder, but some time thereafter he was released from custody because sufficient evidence to have a trial of the case had not been obtained. In the spring of 1942 assistance from the State Police to help solve this murder was requested and in June, 1942, Sergeant E. B. Hedrick assigned Trooper Grady A. McConnell to the case with instructions to render all aid possible in solving the same. On June 7, McConnell began this work in conjunction with the regular duties required of him as a State Police Officer. Thereafter, largely through the efforts of Trooper McConnell, sufficient evidence was obtained to secure a conviction.

It is well established that for reasons of public policy an officer cannot receive a reward for the performance of a service which it is his duty to discharge. See *Buck v. Nance*, 112 Va. 28. Section 6 of the Motor Vehicle Code of Virginia (section 2154 (53) of Michie's Code of Virginia 1942), which deals with the powers of the director, assistants and police officers of the Division of State Police, reads in part as follows:

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

It is my opinion that Trooper McConnell's work in connection with the Weeks case was performed as a part of his official duties as State Trooper and that while he performed valuable services in connection with this case, working a number of hours more than required on his regular tour of duty, and while he also performed services in securing evidence to convict Dalton of housebreaking and arson as well as of the murder of Mr. Weeks, he is not entitled to receive the reward because of the rule laid down in *Buek v. Nance*, *supra*.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE MILITIA—Compensation to Be That Received by U. S. Army in 1930.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 22, 1943.

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

MY DEAR GENERAL WALLER:

I am in receipt of your letter of June 17, in which you ask my opinion concerning the compensation which members of the Virginia Protective Force should receive when called out in aid of the civil authorities.

Sections 2673(76) and 2673(77) of the Code (Michie 1942), dealing with the pay of militia, provide as follows:

"The militia of the State, both officers and enlisted men, when called into service of the State, shall be rationed and receive the same pay as when called into the service of the United States; Provided, however, that when called in aid of the civil authorities, enlisted men shall receive in addition to said pay the sum of one dollar per day.

"The governor may, whenever the public service requires it, order upon special or regular duty any officer or enlisted men of the national guard or naval militia, and the expense and compensation therefor of such officer and enlisted men shall be paid upon the approval of the governor and warrant of the comptroller. Such officer and enlisted men shall receive the same pay and allowances as officers and enlisted men of the same grade and like service of the regular army or navy. No staff officer who receives a salary from the State as such shall be entitled to any additional compensation other than actual and necessary expenses incurred while traveling upon orders issued by the proper authority."

These sections originated in chapter 446 of the Acts of 1930, codifying the military laws of the State.

You state that since the entry of the United States into the World War the pay and allowances of officers and enlisted men are much larger than they were in 1930, and your problem is whether or not the officers and enlisted men of the Virginia Protective Force, when now called out in aid of the civil authorities, should receive the pay and allowances in effect in

the United States Army in 1930, or should receive the increased pay and allowances that are in effect now.

In the absence of express constitutional inhibition a Federal statute may be made applicable in a State by the Legislature by reference, but the adoption of a statute by reference is confined to the statute adopted as it existed at the time of the legislative adoption. The rule also seems to be, however, that, whereas a Federal statute or the statute of another State may be adopted by reference, the Legislature of a State may not adopt future provisions of Acts of Congress or of another State, since this would in effect be allowing the Congress to legislate for the State adopting by reference. See 59 Corpus Juris, 618.

In view of the above, it is my opinion that our Legislature in specifying the pay of the militia in 1930 intended such pay to be the same as the militia would have received if called into Federal service at that time, and that the General Assembly did not intend, and could not have validly provided, that future Acts of Congress would control the pay of the militia of this State.

My conclusion is, therefore, that the pay of the Virginia Protective Force, when called out in aid of the civil authorities, is the same pay as officers and enlisted men of the same grade and like service received in the army of the United States in 1930. If the General Assembly desires the Virginia Protective Force to receive the new rates of pay now in effect in the army of the United States, this will have to be done by appropriate legislative enactment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE MUSEUMS—Authority to Insure Contents.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 7, 1943.

HONORABLE WALTER L. HOPKINS,
President R. E. Lee Camp Confederate Memorial Park,
Law Building,
Richmond, Virginia.

MY DEAR MR. HOPKINS:

This is in reply to your letter of June 5, in which you inquire if the Board of Directors of the R. E. Lee Camp Confederate Memorial Park may insure the contents of the museum on the park grounds where some of the contents of the museum, consisting of paintings, works of art and relics relating to the history of the Southern Confederacy, belong to the United Daughters of the Confederacy. It seems that an admission fee is charged to the museum, which fee is turned over to the State and not to the United Daughters of the Confederacy.

Section 5 of chapter 371 of the Acts of 1934 gives to the Board of Directors of the Park the authority to operate the museum and to acquire by gift, loan, or otherwise, relics of the Southern Confederacy and to enter into agreements with organizations interested in perpetuating memories and traditions. It seems to me that under the broad powers given to the Board of Directors by said section 5 the Board may agree with the United Daughters of the Confederacy, in return for the loan of the relics owned by

the Daughters and exhibited in the museum, to carry insurance on such property belonging to the Daughters. Of course, insofar as the coverage is on the property of the Daughters and insurance on such property should be carried for the benefit of the Daughters. I think that the premium on such insurance may unquestionably be paid by the Board under the authority of item 380 of the 1942 Appropriation Act (Acts 1942, p. 871) providing that the Board may use the revenue collected from the operation of the museum for the maintenance and operation thereof.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**STATUTE OF LIMITATIONS—Runs Against Incorporated Agencies
of the State.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 29, 1943.

MR. E. I. CARRUTHERS,
*Bursar University of Virginia,
Charlottesville, Virginia.*

MY DEAR MR. CARRUTHERS:

This is in reply to your letter of May 28, in which you request my opinion upon the question whether or not the statute of limitations bar the collection through legal proceedings of a debt to the University of Virginia for fees, tuition, and other expenses.

Section 5829 of the Code of Virginia provides as follows:

"No statute of limitations, which shall not in express terms apply to the Commonwealth, shall be deemed a bar to any proceeding by or on behalf of the same. This section shall not, however, apply to agencies of the State incorporated for charitable or educational purposes."

Under the provisions of section 806 of the Code, the status of the University of Virginia is declared to be a corporation under the style of "the Rector and Visitors of the University of Virginia."

It seems clear, therefore, that the statute of limitations relating to the collection of debts would apply to debts due to the University of Virginia in its corporate capacity.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Land Sold to Tax Free Institution; Taxes Cannot Be Prorated.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 11, 1942.*

MISS EDITH H. FARRAR,
*Treasurer of Fluvanna County,
Palmyra, Virginia.*

MY DEAR MISS FARRAR:

This is in reply to your letter of September 8, in which you ask the following question:

"A piece of property in this county belonging to an individual has been sold by him to the Fork Union Military Academy, a tax free institution. I shall appreciate a statement from you as to whether the individual should pay all of the 1942 real estate tax or should same be prorated and the balance returned as an improper assessment."

I know of no statutory provision which allows the proration of real estate taxes in such a case as is described by you, and in the absence of such a provision I am of opinion that the tax may not be prorated.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Label Plan May be Substituted for Tax-Paid Crown Method.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *September 3, 1942.*

HONORABLE C. H. MORRISSETT,
*State Tax Commissioner,
Richmond, Virginia.*

MY DEAR MR. MORRISSETT:

I have received your letters of July 21 and August 7 with enclosures, all of which have been carefully considered.

It is unnecessary for me to recite all of the facts set out in your letters and the enclosures, but it appears therefrom that the tax-paid crown method of collecting the malt beverage excise tax may soon be made inoperative by reason of the scarcity of metal and cork brought about by war conditions. You have given much study to the problem of collecting the tax in the event of the tax-paid crown method becoming inoperative and, as a result thereof, believe that the tax-paid bottle-neck label plan, the details of which are set out in your letter and enclosures, is the best substitute for the tax-paid crown method. You state that reports will be required from those liable to the malt beverage tax, as provided in section 10 of the Virginia Malt Beverage Act and section 27 of the Alcoholic Beverage Control Act, and that the tax-paid bottle-neck label plan may very well be regarded as a part of the report method.

In my opinion, in these times of extraordinary emergency the State Tax Commissioner would, for the reasons stated by you, be justified in resorting to the tax-paid label plan in conjunction with the report plan for use in cases where tax-paid crowns cannot be obtained.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—When Real Estate Taxes to be Assessed Against Trustee Under a Will.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 15, 1942.*

MR. JOHN M. HART,
*Commissioner of Revenue,
Roanoke, Virginia.*

MY DEAR MR. HART:

This will acknowledge receipt of your letter of December 11, from which I quote as follows:

"Section 264 of the Tax Code, bottom of page 197, provides as to transfer of real estate—'If under the will the land is to be sold, it shall continue charged to the decedent's estate until a transfer thereof.'

"In many wills a trustee (usually one of the banks) is given power to sell the real estate devised, but without specific direction to sell.

"Should such real estate be transferred to the Trustee, who holds the legal title, or should it continue charged to the decedent's estate? The point is the difference, if any, between 'if under the will the land is to be sold' and a devise to a trustee with power to sell.

"There is a great deal of real estate here charged to the several banks as 'trustee' by reason of such a power in a will and the banks are anxious to continue this manner of assessment as it is much easier for them to keep track of the properties under their control and upon which taxes must be paid. The recent Board of Assessors has left such property 'in the name of the decedent's estate.'

"It is decidedly to the advantage of the Commissioner of Revenue and of the Treasurer that such property be charged to the bank as trustee. I wish you would instruct me."

In my opinion, in the cases described by you the better practice would be to assess the property in the name of the trustee as the holder of the legal title. As you suggest, the land does not have to be sold, and indeed may never be sold by the trustee. In such a situation I do not think the provision you quote in the first paragraph of your letter from section 264 of the Tax Code is applicable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Refund of Gasoline Taxes to School Boards.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 8, 1943.*

MR. F. W. COX,
*Division Superintendent of Schools,
Princess Anne, Virginia.*

MY DEAR MR. COX:

This will acknowledge receipt of your letter of April 7, from which I quote as follows:

"The Princess Anne County School Board owns and operates two service trucks, and we would like to know if under the law the Board is entitled to the State gasoline tax refund covering the gasoline consumption of these two trucks."

Section 2154(215) of the Code (Michie 1942) provides for a refund of State gasoline tax paid on gasoline used "by motor equipment belonging to cities, towns and counties used exclusively in public activities * * *."

If, therefore, the service trucks you mention are used exclusively in public activities, I am of opinion that the refund of the State gasoline tax may be made upon application filed with the Director of the Division of Motor Vehicles in accordance with the requirements of the said section 2154(215).

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—District Taxes for Operation of School Bus.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 7, 1943.*

HONORABLE T. M. BATES,
*Treasurer of Wise County,
Wise, Virginia.*

MY DEAR MR. BATES:

My reply to your letter of December 11 has been unavoidably delayed. You ask the following question:

"Under section 698 of the Code as amended by the Special Session of 1942, payment of rents out of district funds is specifically authorized but no other expense is authorized other than capital outlays and prior debt."

Section 698 of the Code as amended at the Special Session of 1942 (Acts 1942, Special Session, Chapter 2, page 5) among other things limits generally both the amount and purposes of district levies. There are many exceptions, however, one of which is "provided, further, that in the county

of Wise * * * the board of supervisors may levy such county and district school taxes as they may deem necessary and expedient, notwithstanding the general limitations placed on such levies by this section * * *." The quoted provision, in my opinion, authorizes the board of supervisors to levy a district tax for the operation of school busses.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Assessment of Poll Tax.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 23, 1943.*

MR. A. R. SINGLETON,
*Commissioner of the Revenue,
Clintwood, Virginia.*

DEAR MR. SINGLETON:

This will acknowledge receipt of your letter of February 12, relative to the proper officer to make assessments of capitation taxes, both current and omitted, including those of voters becoming of age.

In my opinion it is the statutory duty of the commissioner of the revenue to make assessments of capitation taxes against those persons in his county or city twenty-one years of age and over, including capitation taxes assessable against persons becoming of age after the first of January in any year, and also including both current and omitted capitation taxes. See sections 310 and 420 of the Tax Code of Virginia.

I know of no statute giving to the treasurer of a county or city authority to assess capitation taxes against anyone and, in my opinion, this officer has no such authority. If a person comes to the treasurer of a county, for example, to pay his capitation taxes and there is no assessment of such taxes made against such person, in my opinion, the proper procedure is for such person to see the commissioner of the revenue and have his capitation taxes assessed, and when such assessment has been made and the treasurer notified thereof the taxes may be paid to the treasurer.

I am well aware of the decision of our Court of Appeals in the case of *Smith v. Bell*, 113 Va. 677, in which it was held that persons who are assessable with capitation 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. In fact, this office several times in the past has referred to the decision in this case insofar as it affects the eligibility of persons to vote. However, as I have indicated, *Smith v. Bell*, *supra*, deals with the eligibility of persons to vote who have paid their capitation taxes to the treasurer without such taxes having previously been assessed by the commissioner of the revenue, and is not concerned with the respective duties of the commissioner of the revenue and the treasurer as to the assessment and collection of capitation taxes. As I have stated, it is my opinion that the commissioner of the revenue of a county or city is charged with the duty of assessing capitation taxes against

those persons of his county or city liable therefor, and the treasurer of such county or city has no authority to make such assessments.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Exemptions in Favor of Federal Instrumentality.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *February 8, 1943.*

HONORABLE ROBERT H. OLDHAM,
*Clerk Circuit Court of Accomack County,
Accomack, Virginia.*

MY DEAR MR. OLDHAM:

Your letter of the 4th instant is received.

The copy of the deed of trust which you enclosed from Eastern Shore of Virginia Produce Exchange to Benjamin T. Gunter, Jr., Trustee, secures the payment of a note given to the Baltimore Bank for Cooperatives.

The beneficiary under this deed of trust is exempt from taxation by the State except as to real property and tangible personal property which said bank might own in the State. This exemption is provided by section 1138-c of the United States Code Annotated, Volume 12. This Federal agency lends money to farmers and others interested in agricultural activities at a low rate of interest, and the exemption from taxation is a part of the program of the Government to aid this class of its citizens.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax on Deeds of Trust.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *June 29, 1943.*

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

MY DEAR MR. THOMA:

I have your letter of June 24, enclosing copy of the assignment about which you wrote me on June 21.

While this assignment is not technically a deed of trust, it is certainly such a deed in effect, since apparently its sole purpose is to secure the loan of \$6,000 made by the bank to the assignor.

However, since the timber contract involved seems to be one for the sale of timber, the recordation of the conveyance of the rights under the contract might be held to be taxable under the first paragraph of section 121 of the Tax Code.

Again, the assignment being a contract relating to real or personal property, it could probably be held to be taxable under the seventh paragraph of section 121.

I imagine that the value of the timber sold is approximately the same as the amount of the loan and so, no matter under which paragraph of section 121 the recordation of the instrument is taxed, it would appear that the amount of the tax would be the same, namely, upon the value of \$6,000.

The copy of the instrument you sent me is herewith returned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax on Deed Conveying Life Estate and Remainder.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 14, 1942.*

HONORABLE R. J. WATSON,
Clerk of Courts,
Roanoke, Virginia.

DEAR MR. WATSON:

This will acknowledge receipt of your letter of October 12, enclosing a deed executed by the executor and heirs of R. H. Jennings, deceased, conveying a life estate in real estate located in Roanoke to the widow of R. H. Jennings, with the remainder in fee simple at her death to the heirs of Mr. Jennings. You inquire what recordation tax, if any, should be assessed under section 121 of the Tax Code of Virginia.

I can find no exemption in section 121 for a deed of this character and, since the deed not only conveys a life estate but the remainder in fee simple, I am of the opinion that the tax should be based on the actual value of the property, since this is greater than the consideration.

The deed is being returned to you herewith by registered mail.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax on Deeds of Release of Drainage Tax.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *July 28, 1942.*

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

MY DEAR MR. RANDALL:

This will acknowledge receipt of your letter of July 27, from which I quote as follows:

"At the June meeting of the Board of Supervisors of Norfolk County a resolution was adopted whereby Norfolk County would furnish release deeds to all owners of property in the drainage districts of Norfolk County, on which there was a special drainage tax assessment, upon the payment of the land owners of the special drainage tax assessed against said land. Some of these releases have been executed on behalf of Norfolk County and are being forwarded to the land owners, suggesting that they have same recorded.

"I would like to know whether or not there is a tax of 50 cents on these release deeds when they are recorded, as provided by section 121 of the Tax Code of Virginia."

Inasmuch as the deeds of release in question are to be offered for recordation by the land owners, I am of the opinion that the recordation tax of 50 cents imposed by section 121 of the Tax Code of Virginia should be imposed. If the deeds of release were to Norfolk County and were being recorded by the County, then no recordation tax would be assessable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax on Contracts to Sell Real Estate.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 7, 1943.

HONORABLE C. E. MORAN,
*Clerk Corporation Court,
Charlottesville, Virginia.*

MY DEAR MR. MORAN:

This will acknowledge receipt of your letter of January 5 as to the recordation tax to be charged upon a contract for the sale of real and personal property when presented for recordation.

You call attention to the first paragraph of section 121 of the Tax Code, prescribing the tax to be paid upon the recordation of a deed. However, as you say, a contract for the conveyance of property does not actually convey the same and, therefore, that part of the section imposing a tax on the recordation of a deed is not applicable. In my opinion the tax should be imposed under the language of the seventh paragraph of section 121, reading as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be twelve cents on every hundred dollars or fraction thereof of the consideration or value contracted for. * * *"

You seem to be following this practice and in my opinion it is the correct one.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Recordation Tax on Sales Contract of Church Property.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 7, 1943.

HONORABLE C. BENJ. LAYCOCK,
*Clerk of Arlington County,
Arlington, Virginia.*

MY DEAR MR. LAYCOCK:

I am in receipt of your letter of May 6, enclosing an agreement of sale between The Board of American Missions of the United Lutheran Church in America and the Resurrection Evangelical Lutheran Church of Arlington, Virginia, covering the purchase of church property in Arlington County. You desire the opinion of this office as to whether or not the recordation tax provided by section 121 of the Tax Code should be charged for the recordation of this contract.

In my opinion, the tax is applicable, the base of the tax to be the purchase price of \$28,000. I can find no exemption for the tax imposed upon the recordation of this *contract* by section 121. It is true that section 122 of the Tax Code exempts a *deed* conveying land as a site for a church and likewise a deed of trust or mortgage "given to secure debts or indemnify sureties and conveying land used as a site of a church." But the instrument you enclose is neither a deed nor a deed of trust or mortgage, but simply a sales contract. You will note that section 122, dealing with church deeds and deeds of trust and mortgages, further stipulates that "no deed or other instrument shall be admitted to record without the payment of the tax imposed thereon by law."

Not being able to find any exemption from the recordation tax for an instrument of the character you enclose, I must advise that the tax should be imposed.

The contract is returned herewith.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

TORTS; STATE LIABILITY—First-Aid Rendered by Air-Raid Warden.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 16, 1943.

HONORABLE J. H. WYSE,
*Co-ordinator Office of Civilian Defense,
1201 East Broad Street,
Richmond, Virginia.*

MY DEAR MR. WYSE:

I am in receipt of your letter of April 14, in which you inquire as to whether an air raid warden is liable for damages under the following circumstances:

"Suppose a citizen is injured during a blackout or by a bomb or other manner during an actual air raid. An air raid warden renders first aid, and the party partially recovers or may be deformed in some manner.

"Could the party injured sue the warden for improper treatment to the injuries in case the person was permanently disabled, not necessarily by the treatment but might be attributed to such?"

I have made it a rule not to attempt to express an opinion as to the liability of a person in tort under a hypothetical state of facts. However, I may say that it is difficult to conceive of circumstances under which a layman air raid warden would be liable in tort on account of unskilled first-aid rendered to a person injured by a bomb from an enemy plane during an actual air raid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS—Registration of; Union Label of International Allied Printing Trades Association.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 14, 1942.*

HONORABLE R. E. WILKINS,
*Secretary of the Commonwealth,
Richmond, Virginia.*

DEAR MR. WILKINS:

This will acknowledge receipt of your letter of December 11, enclosing application for trade-mark registration of the Union Label of the International Allied Printing Trades Association. You desire to know whether or not this Union Label is registrable under our law as a trade-mark. You also enclose a copy of chapter 364 of the Acts of 1930, providing, among other things, for the registration and protection of the insignia of labor unions.

As you know, the definition of "person," as contained in our trade-mark law, includes a "union of working men" and the term "trade-mark" includes a "label." These would seem to indicate that such union labels are registrable under the trade-mark law. However, this conclusion is not at all free from doubt and, in case of doubt, uncertainty should be resolved in favor of the applicant and registration allowed.

Beyond any question this label could be registered under chapter 364 of the Acts of 1930 as the insignia of a labor union. It is entirely probable that the applicant is not aware of this statute existing in Virginia, and if it was informed of this fact, it may prefer to register its insignia under this statute. I would, therefore, suggest to you that you inform the applicant of the existence of this statute and then, if it still insists upon the registration under the trade-mark law, I would advise you to grant the registration. After all, registration of the mark does not preclude a challenge of the same in the courts.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS—Registration of; Carter's Little Liver Pills.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 13, 1943.

HONORABLE R. E. WILKINS,
*Secretary of the Commonwealth,
Richmond, Virginia.*

DEAR MR. WILKINS:

This will acknowledge receipt of your letter of January 28, seeking my opinion as to whether or not you should register as a trade-mark an enclosed specimen with respect to Carter's Little Liver Pills. It appears that this mark was first registered in Virginia in 1903 and has been kept alive since that date. It also appears that the mark was registered in the United States Patent Office in 1891 and has been in force continuously since that date.

It is true that section 1458a of Michie's Code of 1942 provides:

"The Secretary of the Commonwealth shall not register as a trade-mark * * * any trade-mark which consists merely in the name of any person, not written, printed, impressed or woven in a particular or distinctive manner, * * * or which consists merely in words which are descriptive of the merchandise with which they are used or the character or quality of such merchandise."

Surely this mark does not consist merely in the name of a person, nor do I believe it consists merely in words which are descriptive of merchandise in as much as the large letter "L" is written in an arbitrary or unconventional manner and the name "Carter" is included in the mark. In cases of this kind, where there is any doubt as to whether or not a trade-mark should be registered, it has always been my policy to resolve the doubt in favor of the applicant. Any person who deems himself injured thereby has his remedy in court and, if it be ultimately determined that the mark was not properly registerable, less harm could have been done by an improper registration, which is wholly void and without legal effect, than would have been done by improperly refusing the protection of the registration statutes to a person who was entitled thereto. Therefore, it is my opinion that you should register this trade-mark.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS—Registration of; Esquire.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 19, 1942.

HONORABLE RALPH E. WILKINS,
*Secretary of the Commonwealth,
Richmond, Virginia.*

DEAR MR. WILKINS:

This office is in receipt of a letter from you under date of October 15,

enclosing an application for trade-mark registration from Esquire, Incorporated, whose principal place of business is in Chicago, Illinois. The mark sought to be registered is the name of "Esquire" written in a distinctive manner, and is to be used on prints and publications. Your letter accompanying the application states that you have some doubt as to whether or not the application is a proper one under our law in as much as the applicant should have protection under the Federal copyright law.

It appears to me that the applicant has rights to be protected under both the copyright laws and the trade-mark statutes. It is my impression that the copyright laws are designed to protect the exclusive literary property of an author, whereas the trade-mark laws are designed to protect the applicant in the use of his arbitrary mark so that the general public will not be deceived into thinking that the goods of his rival or competitor are the same as his. Therefore, the fact that "Esquire" as a publication is registered under the Federal copyright laws does not prevent the registration of the title "Esquire" under trade-mark statutes.

From an examination of the case law precedents I believe the above propositions are firmly established. For instance, I find that such publications as "Life," "Popular Mechanics," "National Geographic Magazine," "Aviation" and "Modern Screen" have been registered under State or Federal trade-mark statutes.

In *Gannert v. Rupert*, 2 Cir., 127 F. 962 (1904), this is said:

" * * * A person publishing a newspaper or a magazine may give it a name by which it is known and by which its authenticity is attested. *The name is entitled to the same protection as if it were affixed to other articles of merchandise.* * * * The name is a badge of origin and genuineness. * * * " (Italics supplied.)

For the above reasons, it is my opinion that the application of Esquire, Incorporated, for the registration of the trade-mark "Esquire" to be attached to prints and publications is a proper one. As to the classification in which it should be placed, the only appropriate one established by your office appears to be No. 48—merchandise not otherwise classified.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS—Renewal of Registrations.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 5, 1942.

HONORABLE RALPH E. WILKINS,
Secretary of the Commonwealth,
Richmond, Virginia.

DEAR MR. WILKINS:

This office is in receipt of a letter from you under date of August 27, in which you request an opinion as to several matters concerning the trade-mark statutes. You first state:

"Section 1458 of the Trade Mark Law of Virginia provides that trade-marks registered prior to July 1, 1923, *may* be renewed on or before July 1, 1943. Kindly advise me if, in your opinion, this is mandatory."

The relevant portion of the statute, as amended by the Acts of 1938 (Acts 1938, chapter 303, pages 436, *et seq.*), is as follows:

" * * * Except, as hereinafter provided, the registration of trade-marks registered under the provisions of chapter one hundred and eighty-seven of the Acts of the General Assembly of nineteen hundred and two-three-four, approved April thirtieth, nineteen hundred and three, and amendments thereof, or under the provisions of this chapter, shall expire upon the expiration of twenty years from the date of registration, but, if registrable under the provisions of this chapter as hereby amended, may be renewed in like manner and upon payment of like fees as herein required for original registrations; provided, however, that any such trade-mark registered prior to July first, nineteen hundred and twenty-three, shall remain in full force and effect until, and may be renewed, as herein provided, on or before, July first, nineteen hundred and forty-three. * * * "

The purpose of this statute seems to have been to put a limitation upon the life of a trade-mark and at the same time fix a definite date to which the limitation would be applied as to trade-marks that would be barred as soon as the statute took effect; thus to allow them, so to speak, so many days of grace. It is, therefore, my opinion that all trade-marks which have been registered for twenty years or more on July 1, 1943, will automatically expire on that day unless on or before that date the owners of such trade-marks shall have renewed the same as provided by section 1458 of the Code.

Your next inquiry is thus:

"On many of the old registrations which were in effect before the classes of merchandise were established as provided by the 1938 trade-mark law, the applicant listed about every commodity which would be carried in a general store. When these applications are renewed, should classifications be established for the various commodities? In some cases this would require six or seven separate applications."

You will notice that the provisions for renewal of registration provide that the registration may be renewed if the application is "registrable under the provisions of this chapter as hereby amended." The chapter, as amended, provides that the "Secretary of the Commonwealth shall establish classes of merchandise for the purpose of trade-mark registration, and shall determine the particular descriptions of goods comprised in each class." I, therefore, think that on renewal of these trade-marks classifications should be established for the various commodities.

Your third inquiry is:

"When assignments have been made since the date of the original registration, should the date of registration begin with the original registration or the assignment?"

Since in legal parlance the assignee of a chose in action stands in the shoes of an assignor, the date of registration should properly begin with the original registration at the instance of the assignor.

Lastly you ask:

"When assignments have been made since the original registration, should this office require the establishment of classifications of merchandise when the registration is renewed?"

In accordance with what has been said under your second inquiry and consistently therewith, I think classifications of merchandise should be estab-

lished when renewal of a trade-mark is sought on a right which has been assigned.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Fees That May be Charged.

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 14, 1943.

HONORABLE C. G. QUESENBERY,
*Member of House of Delegates,
Waynesboro, Virginia.*

MY DEAR MR. QUESENBERY:

I am in receipt of your letter of January 12, in which you ask several questions concerning fees which may be charged by a trial justice for his services in civil cases.

Your first question is:

"Can the cost of trial of a civil warrant be required to be paid in advance of trial of the suit; and if so required and the case is settled prior to a hearing, is the trial fee retained by the court or refunded to the litigants?"

This office has heretofore expressed the view that a litigant cannot be required to pay in advance the trial fee of a trial justice. Section 4987-m of the Code specifying fees of a trial justice provides that "the trial fee shall be paid at or before the time of hearing." I am of opinion, therefore, that the plaintiff has the option of postponing the payment of the trial fee until the actual day of the trial. If the trial fee has been paid in advance of the trial and the case is settled and the warrant dismissed prior to a hearing, I am of opinion that the trial fees should be refunded to the plaintiff.

Your second question is:

"What fees can the trial justice properly charge litigants in the trial of a civil case on the usual civil warrant, and what additional fees can be charged for a garnishment proceeding?"

The fees of a trial justice are, as I have stated, fixed by section 4987-m of the Code. It would be difficult for anyone to attempt to enumerate which of these fees a trial justice may charge without knowing just what services have been rendered. Certainly the trial justice is entitled to his fee for issuing the warrant and to a trial fee where a trial takes place. As to whether or not he would be entitled to the additional fees provided by the section would depend upon whether or not he rendered the services for which the fees are allowed. In a garnishment proceeding the trial justice would be entitled to his fee for issuing the summons and the fee for the trial in the garnishment proceeding, and his other fees in this proceeding would depend upon what services he rendered.

Your last question is:

"What requirement, if any, can a trial justice make in connection with the traveling expenses of officers serving civil warrants?"

I know of no authority that a trial justice has over traveling expenses of officers serving civil warrants. The State Compensation Board has ruled that it will allow five cents a mile for the necessary mileage of sheriffs and their deputies in performing the official duties of their offices, which would include mileage traveled in serving civil warrants, but this is a matter to be handled with the officers by the State Compensation Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**TRIAL JUSTICES—Fees Collected Irrespective of on Whose Behalf May
be Remitted to Clerk of Court.**

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 21, 1942.

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

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of July 17, in which you refer to Chapter 376 of the Acts of Assembly of 1942 amending several sections of the Trial Justice Act, with special reference to sections 4987-c(2) and 4987-m(d).

The first mentioned section provides that on and after July 1, 1942, fees and commissions collected by the Trial justice on behalf of his county and city combined "shall continue to be collected and paid by the said trial justice into the State treasury * * *."

The second mentioned section provides that fees paid to and collected by the trial justice, not including fees which belong to other officers, "shall be paid promptly to the clerk of the circuit court, who shall pay the same into the State treasury."

Your question arises because of the fact that the first section provides that the trial justice shall pay the fees and commissions "into the State treasury" and the second section provides that the fees shall be paid to the clerk of the circuit court, "who shall pay the same into the State treasury."

You state that "it would be preferable for the trial justice to make such remittances to the clerk of the circuit court since this would be the normal flow of such monies, and if the trial justice were to remit direct to the State treasurer it would require the setting up of separate accounts with each trial justice of the Commonwealth in the State comptroller's office."

Since the fees mentioned in both sections ultimately reach the State treasury, the first section not providing specifically for the method of payment into the treasury, while the second section does provide specifically for the method of payment into the treasury, I am of opinion that it is reasonable to hold that the method provided in the second section may be followed, that is, the fees paid to the clerk of the circuit court, who in turn shall pay the same into the State treasury. To hold otherwise would mean that some money collected by the trial justice would be paid into the State treasury

in one manner and some in another and, in my opinion, the Legislature did not intend that.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICES—Disposition of Fees Collected on Behalf of Commonwealth's Attorney.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 31, 1942.

HONORABLE J. ROBERT SWITZER,
*Clerk Circuit Court of Rockingham County,
Harrisonburg, Virginia.*

MY DEAR MR. SWITZER:

This will acknowledge receipt of your letter of July 30, from which I quote as follows:

"With reference to an Act on trial justices, passed by the 1942 Legislature, attention is called to the bottom of page 577 and particularly to 581, paragraph (d). The question upon which I desire information is whether the trial justice shall pay in to the clerk the whole of the Commonwealth's attorney's fees and should then the clerk divide said fees, paying one-half thereof to the State and one-half thereof to the county, or whether the trial justice shall pay direct to the county treasurer one-half of said fees and pay the other one-half into the hands of the clerk."

The paragraph to which you refer provides that, if the fee is collected for services of the attorney for the Commonwealth, "one-half of such fee shall be paid into the treasury of the county or city in which the offense for which warrant issued was committed, and the other one-half of the fees collected for the services of the attorney for the Commonwealth shall be paid promptly to the clerk of the circuit court, who shall pay same into the treasury of the State." Literally construed, this language would seem to mean that the one-half of the Commonwealth's attorney's fee which goes to the county or city should be paid directly into the treasury of such county or city by the trial justice.

However, I am advised by Honorable L. McCarthy Downs, Auditor of Public Accounts, that the general practice of the trial justices throughout the State has been to pay the whole of the Commonwealth's attorney's fee to the clerk and the clerk in turn pays one-half thereof into the treasury of the county or city and the other half into the treasury of the State. Mr. Downs further states that this is much the better system for handling the matter. Since the purpose of the statute is accomplished by this plan, I am of opinion that the trial justices may continue to pay the whole of the Commonwealth's attorney's fee to the clerk of the court, who in turn will distribute it as provided by the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Collection and Disposition of Sergeant's Fees.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *January 14, 1943.*

HONORABLE JAMES H. BARGER,
Trial Justice,
Clifton Forge, Virginia.

MY DEAR MR. BARGER:

I am in receipt of your letter of January 12, in which you inquire as to the disposition which should be made of fees collected by you for the sergeant of the City of Clifton Forge.

This office has heretofore expressed the opinion that under the Sheriffs' and Sergeants' Salary Act (Chapter 386 of the Acts of 1942) these fees when collected by you should once a month be paid over to the treasurer of your city, which officer will credit one-third of the amount thereof to the general fund of the city and two-thirds thereof to the Commonwealth. See section 1, subsection (b) of the Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Disposition of Unclaimed Funds.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 23, 1942.*

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of October 7, which I quote as follows:

"There have accumulated, in the custody of the trial justice courts throughout the State, sums in varying amounts which are being held for individuals who are unknown and who cannot be located.

"We shall appreciate it if you will advise us whether the trial justices can dispose of such funds—in accordance with the provisions of sections 6311 and 6312 of the Code of Virginia—in those instances where they have held the amounts for a period of five years or more."

In my opinion, the funds in question may be disposed of as provided in the sections of the Code referred to by you. While these sections originally may have referred only to courts of record, it is my view that the language thereof is broad enough to include the present system of trial justice courts. Certainly it would seem that there should be some way for the disposition of these funds.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Report of Convictions for Speeding to O. P. A.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 20, 1943.

HONORABLE W. A. METZGER,
*Trial Justice for Loudoun County,
Leesburg, Virginia.*

MY DEAR MR. METZGER:

This will acknowledge receipt of your letter of April 19, in which you ask the following question:

"I will thank you to advise me if it is compulsory for the trial justices to make reports of the speed violations and convictions to the O. P. A. or is it optional with them as to whether they will do so."

I am not advised as to the form of request that the O. P. A. has made that trial justices make reports of "speed violations and convictions," but I may say that I know of no statute requiring that such reports be made. However, since the papers in cases of convictions of violations of the speed laws are public records, where the O. P. A. feels that such information requested of the trial justices would be helpful in discharging the duties of this Federal war agency, I am of opinion that the trial justices would be authorized to furnish it.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Dispositions of Records in Civil and Criminal Cases.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 14, 1942.

HONORABLE HAROLD F. SNEAD,
*Trial Justice for Henrico County,
22nd and Main Streets,
Richmond, Virginia.*

MY DEAR JUDGE SNEAD:

This will acknowledge receipt of your letter of July 9, in which you refer to section 4987-j of the Code as amended in 1942 (Acts 1942, p. 13), relating to the keeping and disposition of papers in proceedings before a trial justice.

This section provides generally that all papers connected with any of the proceedings before a trial justice, except such as relate to cases appealed or removed or which by general law are required to be sooner returned to the clerk's office of the circuit court, shall remain in the office of the trial justice for six months after final disposition by judgment or otherwise. There is an exception for any county adjoining a city having a population in excess of 175,000 which provides that all such papers shall remain permanently in the office of the trial justice. At the end of the six-months' period such papers are to be returned to the clerk's office of the circuit court, and the section provides that the clerk shall receive a fee of 25 cents for filing and indexing the papers in each case.

In connection with the section and the exception you ask four questions, which I shall attempt to answer *seriatim*.

"1. Whether or not the court should continue to tax the twenty-five cent fee in civil matters, which fee is paid to the clerk of the circuit court, for filing and indexing said papers."

I am of opinion that the clerk of the trial justice court should not tax the 25 cent fee for the clerk of the circuit court in civil cases in a county coming within the exception. The fee is only to be taxed for the clerk of the circuit court where the papers are returned to his office, and in Henrico county, the papers not being returned to the office of the clerk of the circuit court, it is clear that this fee should not be taxed.

"2. What disposition should be made of civil warrants now in possession of this office for which the twenty-five cent fee has been taxed and collected under the law prior to June 27, 1942, the effective date of the above amendment, and if you rule that the said civil warrants should not be filed with the clerk of the circuit court, what disposition should be made of the fees accumulated for that purpose. The amount now on hand is \$1,139.50."

In my opinion the papers in civil cases tried and disposed of prior to the effective date of the 1942 amendment should continue to be sent to the office of the clerk of the circuit court in accordance with the statute as it existed before the amendment. In other words, I am of opinion that the exception for Henrico county in the section as amended in 1942 is not effective as to papers in cases tried before the incorporation of the exception in the section.

"3. What costs should be taxed by this court for the clerk of the circuit court in criminal cases and what disposition should be made of criminal warrants."

It is clear from a reading of the section that the exception applicable to Henrico county does not include papers in criminal cases because the first part of the section only includes papers in such cases which are not required by general law to be sooner returned to the clerk's office of the circuit court. The general law (section 4989 of the Code) does require papers in criminal cases to be "forthwith" returned to the office of the clerk of the circuit court. I am, therefore, of opinion that in Henrico county the papers in criminal cases should be promptly returned to the clerk of the circuit court as in the past. Section 4987-j not being applicable to the papers in criminal cases, I am of the opinion that it makes no change in the law with reference to the costs to be taxed for the clerk of the circuit court in criminal cases.

"4. Whether the clerk of the trial justice court should continue to make a monthly report in criminal matters to the clerk of the circuit court of cases disposed of by the trial justice."

In my opinion the clerk of the trial justice court of Henrico county should continue to make the monthly report to the clerk of the circuit court required by section 2550 of the Code, since neither the amended section 4987-j nor the exception for Henrico county makes any change with reference to criminal cases in the trial justice court or to the papers in connection with such cases.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Appointment of Substitute Clerk.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 24, 1942.

HONORABLE JOHN H. BOOTON,
Trial Justice,
Luray, Virginia.

MY DEAR MR. BOOTON:

This will acknowledge receipt of your letter of August 18, in which you ask the following question:

"Will you please advise me as to the proper construction of the provision for the appointment of a substitute clerk of the trial justice court. This provision is found in section 4987-g, fourth paragraph (Acts of 1942, p. 579) and reads in part as follows:

"In the event of disability of such clerk * * * by reason of sickness, absence, vacation or otherwise, the trial justice may appoint a substitute clerk who, having qualified and given bond as required of the clerk hereunder, shall perform all the duties of the office during such disability, * * *. While acting as such, the clerk or substitute clerk may perform all acts with reference to proceedings or duties of the other in the same manner and with the same effect as if they were his own.'"

"Does this mean that a substitute clerk may be appointed only 'in the event of disability' and that another appointment must be made—and bond given—each time such disability necessitates the services of a substitute clerk?"

While the language you quote is not as clear as it might be, I am of opinion that it is susceptible of the construction that the trial justice may appoint a substitute clerk who shall serve as such substitute clerk at the pleasure of the trial justice.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—When Improper to Represent Parties Before Circuit Court.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 8, 1943.

HONORABLE L. BROOKS SMITH,
Trial Justice for Accomack County,
Accomack, Virginia.

MY DEAR MR. SMITH:

I am in receipt of your letter of February 4, in which you ask if "a trial justice who happens to be a lawyer should defend anyone in a criminal case in the circuit court after the party had a hearing before the trial justice and had his case sent on to the grand jury which in turn indicted the man."

Section 4987-a of the Code provides that a trial justice shall not appear as counsel in any criminal case "pending in his court or on appeal or re-

moval therefrom * * * ." While it might be argued that the quoted language does not literally cover the case you present, when the reasons for and the nature of the prohibition are considered, it is my opinion that a trial justice should not appear in the circuit court in any criminal case that has been before him as trial justice.

You also ask if "a trial justice who is also juvenile and domestic relations judge should represent anyone in divorce proceedings where the parties in question have appeared before the domestic relations court on a question of support, etc., say six months before."

Section 4987-a also provides that a trial justice who is a lawyer shall not appear "as counsel in any civil case which involves substantially the same evidence and circumstances as were involved in a criminal case tried in his court * * * ." The husband who without just cause deserts or fails to support certain named dependents is by section 1936 of the Code guilty of a misdemeanor. It is my opinion, therefore, that section 4987-a of the Code prohibits a trial justice from acting as counsel in the divorce proceedings to which you refer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Salary of City Justice to be Fixed by City Council.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 20, 1942.

HONORABLE JAMES H. BARGER,
*Trial Justice for Clifton Forge,
Clifton Forge, Virginia.*

MY DEAR MR. BARGER:

I am in receipt of your letter of July 17, in which you state that you have been appointed trial justice for the city of Clifton Forge, pursuant to the provisions of chapter 137 of the Acts of Assembly of 1942 amending the charter of the said city.

You desire the opinion of this office on the question of whether your salary should be fixed by the council of the city of Clifton Forge, pursuant to the Act referred to, or whether it should be fixed by the committee of three judges appointed by the Governor under section 4987-e of the Code, as amended in 1942 (Acts 1942, p. 574).

In my opinion, your salary should be fixed by the city council of Clifton Forge, as expressly provided by section 53-a of the charter of the said city as enacted in 1942 (Acts 1942, p. 181). You will observe that section 4987-e of the Code provides for the said committees of judges to fix the salaries of trial justices for counties and also where a trial justice acts as such for a county and city combined.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Compensation of Substitute Trial Justice.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *December 9, 1942.*

MR. WILLIAM A. COOKE,
Substitute Trial Justice,
Louisa, Virginia.

MY DEAR MR. COOKE:

This will acknowledge receipt of your letter of December 7, in which you ask "whether a Substitute Trial Justice is entitled to two weeks' pay each year for the period that is allowed in the Trial Justice Act as a vacation period for the Trial Justice."

Section 4987-b of the Code (Michie 1942) provides, in part, that, in the event of the inability of the trial justice to perform the duties of his office, by reason of his vacation, the "substitute trial justice shall perform the duties of the office during such inability and shall receive for his services a per diem compensation equivalent to one-twenty-fifth of the monthly installment of the salary of the trial justice." I think it is plain from the quoted language that as a substitute trial justice you are entitled to the per diem compensation provided while you are performing the duties of the office of the trial justice during that officer's two weeks' vacation. However, if the trial justice does not take a vacation, I do not think that the substitute trial justice is entitled to compensation for the two weeks' vacation which the trial justice might take but does not elect to do so.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA STATE BAR—Authorized to Defray Costs in Disbarment Proceedings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *April 24, 1943.*

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

DEAR MR. BOOKER:

I am in receipt of your letter of April 21, in which you inquire if the Virginia State Bar may from its funds advance costs in the case of disbarment proceedings under section 3424 of the Code commenced by a verified complaint filed in the clerk's office by a District Committee of the Virginia State Bar. The costs to which you refer in the particular case before you are those covering an order of publication, the whereabouts of the attorney involved being unknown.

The Virginia State Bar is a State agency and under Rule 13(c) of the Supreme Court of Appeals, setting up the organization and government of the agency, it is provided that, if the District Committee decides that a charge

of disbarment is merited in any case, it *shall* make such report of its proceedings as it may deem advisable and file the same with the verified complaint in the clerk's office of the court which has jurisdiction in the premises. Further proceedings on such complaint and report are in accordance with section 3424 of the Code.

Thus in appropriate cases it is the duty of the District Committee to initiate in effect disbarment proceedings, the filing of the verified complaint being the first step. It is, therefore, my opinion that, if the advancement of court costs is necessary to the effective discharge of this duty of a committee of the Virginia State Bar, available funds of the Bar may be used to defray these costs. In the case about which you wrote, there being no other source from which the necessary funds can be obtained to pay the costs of the order of publication, I am of opinion that the State Bar may advance such costs and such other costs incident to the proceedings as may be necessary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WARRANT CHECKS—Subject to Tax Setoff.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 14, 1942.*

HONORABLE E. R. LAINE,
Treasurer,
Isle of Wight, Virginia.

DEAR MR. LAINE:

This will acknowledge receipt of your letter of October 10, requesting my opinion as to whether or not county taxes may be deducted from warrants drawn on the county funds when presented to the treasurer for payment by the taxpayer who is payee of the warrant.

It is my opinion that when the taxpayer presents a warrant to you for payment from the county funds you may deduct from the amount due the payee of the warrant whatever county taxes he owes, or, if the taxes exceed the amount of the warrant, then the amount due under the warrant may be credited as a payment on the taxes.

This result follows naturally from an application of the equitable principles of setoff and further appears to me to be a necessary implication from the terms of section 356 of the Tax Code, which provides:

“ * * * if the warrant has been transferred, it shall be subject to any county levy owing by the taxpayer in whose favor the same was issued. * * * ”

If the warrant is subject to deduction for taxes due by the original payee of the warrant after it has been transferred by the taxpayer, *a fortiori* the warrant would be subject to offset for taxes in the hands of the original payee of the warrant.

You next ask who issues the summons provided for by section 382 of the Tax Code where the amount of taxes exceeds \$20.00.

It is my opinion that this summons should be secured from the clerk of the circuit court as provided for by the statute. This is a special statutory

proceeding, and I do not believe a summons for an amount in excess of \$20.00 would be affected by the general civil jurisdiction statutes relating to the trial justice.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

WARRANTS—May Not Be Issued by Forest Wardens.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., *October 7, 1942.*

HONORABLE F. C. PEDERSON,
*State Forester,
University Station,
Charlottesville, Virginia.*

DEAR MR. PEDERSON:

This will acknowledge receipt of your letter of October 2, containing the following inquiry:

"Does a duly commissioned forest warden have the authority to issue a summons for appearance at court to a violator of the forest fire laws? If so, what is the legal procedure for him to follow?"

Section 540 of the Code, dealing with forest wardens, provides in part:

" * * * Forest wardens thus appointed shall * * * possess and exercise all the authority and power held and exercised by constables at common law and under the statutes of this State, so far as arresting and prosecuting persons for violations of any of the forest fire laws or of any of the laws or rules or regulations enacted or made, or to be enacted or made, for the protection of the State forestry reserves, or for the protection of the fish and game contained therein, are concerned."

The usual procedure in Virginia for the apprehension of law violators is by a warrant of arrest. The only important exception to that which has come to my knowledge is section 2154(167) of Michie's Code, 1936, permitting the use of summonses in certain instances where the Motor Vehicle Code has been violated.

Therefore, I am of the opinion that forest wardens do not have the power to issue summonses for persons violating the forest laws.

With best wishes, I am

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

WARRANTS—Trespass Warrants Should be Sworn Out by Landowner.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 6, 1943.

HONORABLE T. E. CLARKE,
Executive Director Commission of Game and Inland Fisheries,
305 Travelers Building,
Richmond, Virginia.

DEAR MR. CLARKE:

Your letter of December 28 is received.

You request my opinion as to the proper legal procedure for instituting prosecutions for unlawful trespasses under the provisions of chapter 327, Acts 1942. And you ask specifically "Is it the obligation of the land owner to swear out the warrant or the duty of the law enforcement officer?"

This Act (chapter 327 of Acts of Assembly 1942) is a re-enactment of section 49 of the Game, Inland Fish and Dog Code. The game wardens are the enforcement officers of the regulative provision of the Code, and they are required to carry out the provisions of this section 49.

It is plain, however, from reading the whole section that the principal purpose of the section is to protect private property from trespassers. A violation of the provisions of the Act is, therefore, more an offense against a private right than a public one. A land owner can give one person a written permission to do the acts as to which the public generally is prohibited from doing; and even after a prosecution has been begun by the arrest of a trespasser, the land owner or his agent may in writing request that the prosecution be dismissed.

While the Act authorizes the arrest of one who hunts or fishes on "posted" property who does not have a written permit from the owner, it would seem more reasonable that the land owner should be required to procure a warrant against the trespasser in the first instance. Then only actual trespassers will be arrested and not the friends and licensees of the land owner, who might be released at his request. This method of procedure will save the time and labor of the warden and unnecessary embarrassment of sportsmen. Persons hunting on property are presumed to have authority or permission from the land owner so to do. They should not be subject to inquisition by the Game Warden or have their authority called in question except by the land owner or his agent thereunto authorized.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WITNESSES—Fees in Disbarment Proceedings.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 14, 1942.

HONORABLE ROBERT H. OLDHAM,
Clerk Circuit Court of Accomack County,
Accomack, Virginia.

MY DEAR MR. OLDHAM:

I am in receipt of your letter of July 9, from which I quote as follows:

"At a special term of the June Circuit Court just closed the case of *First District Committee of the Virginia State Bar v. Elmer W. Somers* was disposed of. C. Lester Drummond, Attorney for the Commonwealth of this County, represented the Committee and he had me issue subpoenas for a good many witnesses to testify for the said Committee. Several witnesses have proven their attendance."

You then ask "if the Commonwealth will pay for the witnesses summoned for the Committee or will the prosecutors have to pay them."

A proceeding under section 3424 being in the nature of a civil proceeding, in my opinion, the First District Committee having prevailed, the defendant is primarily liable for the allowances to the witnesses in question. If collection cannot be made from the defendant, then I am of opinion that the said witnesses should be paid by the party for whom the witnesses were summoned, which in this case is the Virginia State Bar, a State agency.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WITNESSES—Fees; Proof of Attendance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 16, 1943.

HONORABLE L. BROOKS SMITH,
Trial Justice,
Accomac, Virginia.

MY DEAR MR. SMITH:

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

"On April 30, 1943, as Trial Justice, I tried a misdemeanor case in which the defendant was convicted and later noted an appeal to the Circuit Court. There were two witnesses duly summoned and present to testify on behalf of the Commonwealth in this case and they neglected to prove their attendance on the day of trial. Today they have returned for the trial in the Circuit Court in this matter and wish to prove their attendance in my court in this matter and I am wondering if I can do this and certify same to the clerk so that the Commonwealth will pay them their regular fee and mileage in view of the last clause of section 3552 (3532) of the Virginia Code."

I see no reason why the attendance of these witnesses in the case when it was before you may not now be certified. Even if the limitation set out in section 3532 is applicable, it would appear that the time has not yet expired, since sixty days from April 30 will not elapse until June 30.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WORKMEN'S COMPENSATION ACT—Temporary Fire Fighters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 18, 1942.

HONORABLE WILLIAM A. WRIGHT,
*Chairman Virginia Conservation Commission,
Richmond, Virginia.*

MY DEAR SENATOR WRIGHT:

This will acknowledge receipt of your letter of September 15, in which you inquire as to whether or not the Virginia Conservation Commission may carry compensation insurance covering temporary fire fighters employed by forest wardens pursuant to the provisions of sections 541 and 541-a of the Code (Michie 1936).

The answer to your question depends upon whether or not these fire fighters are within the coverage of the Workmen's Compensation Act. In view of the recent decision (1940) of the Supreme Court of Appeals in the case of *Board of Supervisors of Amherst County v. Boaz*, 176 Va. 126, I think it extremely doubtful whether these fire fighters would be held to come within the scope of the Act. However, my information is that the State Industrial Commission had decided in a number of cases prior to the decision in the Boaz case that these employees were covered by the Act. Whether or not the Industrial Commission will reverse itself in view of the Boaz case I, of course, cannot say, but, as stated, I am strongly inclined to be of the opinion that this case is controlling.

It thus appears that the present situation is uncertain and, in view of this fact, I am of opinion that the Virginia Conservation Commission would be justified in carrying compensation insurance on fire fighters (as it has in the past for a number of years), or the Commission might feel as a matter of policy that it should become a self-insurer under the Workmen's Compensation Act and test the matter out in the next case that arises. I do not feel that I would be justified in advising you that the Commission should not carry compensation insurance, in view of the situation as it is herein set out, for, as you know, the opinion of this office would in no way be binding upon the Industrial Commission. In short, under existing conditions, I am of opinion that whether or not the Commission should carry this insurance is a matter of policy to be determined by the Commission.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WORKMEN'S COMPENSATION ACT—Oath of State Militia Does Not Waive Benefits of the Act.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., September 10, 1942.

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

MY DEAR GENERAL WALLER:

This will acknowledge receipt of your letter of September 9, from which I quote as follows:

"On August 25, 1941, Administrative Order No. 716 was released by the State Corporation Commission of Virginia, reading in part as follows:

"It is ordered that the procedure set forth herein in connection with treatment of home guard units—Virginia Protective Force, be, and it is hereby, approved to become effective as of the date of this order,

"That the V. P. F. or other home guard units, covered under a Workmen's Compensation policy, be assigned to Classification 7720 (Detective or Patrol Agencies) and their payroll for any week or fraction thereof during which they may perform active duties shall be based on an average weekly wage of \$30.00, provided, however, that in no case shall the remuneration of V. P. F. or other home guard members be taken at less than \$100.00 per year per member and \$200.00 per year for each commissioned officer."

"I am informed that the Industrial Commission has ruled that members of the Virginia Reserve Militia (Minute Men) must be embraced within the provisions of the Workmen's Compensation Act, and that the Virginia Rating Bureau has promulgated a rate of \$1.57 per \$100.00.

"I enclose a copy of the Enlistment and Descriptive Record of the Virginia Reserve Militia, and refer you to the marked paragraph of the Oath of Enlistment, which was designed to absolve the Commonwealth of Virginia from all liability whatsoever consequent to the operation and training of such forces. I have been requested to secure from you an opinion as to whether the clause referred to in this Oath is binding upon those who subscribe to same or whether it is invalid. It seems to me that the ruling of the Corporation Commission and the Industrial Commission makes the State liable for injuries received by the Minute Men when on active duty by order of the Governor. If this is true, it would be prudent for the State to take out the same insurance that it now has on members of the Virginia Protective Force."

I observe that the State Industrial Commission has ruled "that members of the Virginia Reserve Militia (Minute Men) must be embraced within the provisions of the Workmen's Compensation Act." Assuming this ruling to be correct, concerning which you ask and I express no opinion, I am of opinion that the waiver in the Oath of Enlistment to which you refer does not have the effect of estopping the members of the Virginia Reserve Militia (Minute Men) from claiming the benefits provided in the Workmen's Compensation Act. The effect of the ruling of the Industrial Commission is to hold that these men are employees of the State within the meaning of the definition of "employee" found in section 2, subsection (b), of the Act, and section 8 of the Act provides that "neither the State * * * nor any employee of the State * * * shall have the right to reject the provisions of this Act relative to payment and acceptance of compensation * * *."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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