OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1943, to June 30, 1944
LETTER OF TRANSMITTAL

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 1, 1944.

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)

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<th>NAME</th>
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<tr>
<td>ABRAM P. Staples</td>
<td>Roanoke city</td>
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<td>Edwin H. Gibson</td>
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<td>W. W. Martin</td>
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<td>*D. Gardiner Tyler, Jr.</td>
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<td>¶Walter F. Rogers</td>
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<td>Nerhea S. Evans</td>
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<td>Mary Owen Pettigrew</td>
<td>Halifax</td>
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Attorneys General of Virginia  
(From 1776 to 1936)

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<td>John Garland Pollard</td>
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<td>§J. D. Hank, Jr.</td>
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<td>John R. Saunders</td>
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<td>°Abram P. Staples</td>
<td>1934-1936</td>
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<td>Abram P. Staples</td>
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*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


Cases Decided in the Supreme Court of Appeals of Virginia


27. Rhodes, Joseph v. Commonwealth. From Circuit Court of Elizabeth City County. Obstructing an officer in discharge of his duty. Reversed and dismissed.


Cases Decided in the Supreme Court of the United States


Cases Decided in the United States Circuit Court of Appeals


Cases Decided in the United States District Court


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


27. Safeway Stores, Inc. v. Commonwealth of Virginia. Law and Equity Court of City of Richmond. Merchant's license tax.


General Statement

In addition to preparing briefs and submitting arguments in the foregoing cases, and in preparing the written opinions which appear later in this report, the Office of the Attorney General has been engaged in much other legal work for the State. The office is constantly called upon for advice by the several departments and agencies of the State with respect to the various problems confronting them.

Also, numerous legal papers, contracts, deeds, etc., are prepared for the various departments of the State, some of the more important items during the past year being the closing of various contracts whereby the Alcoholic Beverage Control Board acquired its additional supply of alcoholic beverages.

This office also supervises the transactions whereby the Department of Highways acquires the rights of ways for roads and prepares or approves architects' and engineers' contracts in connection with the planning of various buildings erected by the State.

Many of the important laws enacted by the General Assembly were drafted, including the War Voters Legislation providing for absentee voting by members of the armed forces.

In addition to appearances in the judicial courts, the office has also represented the Commonwealth at hearings before the State Corporation Commission, the Industrial Commission, and other administrative tribunals. Many matters involving Federal Commissions, Bureaus, etc., have been handled by the office, such as the liability of State hospitals and educational institutions for the oleomargarine taxes.

At the request of His Excellency, the office has conducted numerous hearings incident to extradition proceedings pending in the Governor's office.
OPINIONS

ADVERTISING—Posters on Privately Owned Land in View of Highway.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 30, 1943.

HONORABLE H. P. BOATRIGHT,
Clerk Circuit Court of Scott County,
Gate City, Virginia.

My dear Mr. Boatright:

This is in reply to your letter of September 28 in which you asked for my opinion as to whether or not it is lawful to place political posters upon private property within view of a public highway if consent is secured from the owner of the land upon which the posters are to be placed.

Chapter 333 of the Acts of Assembly of 1938, as amended by Chapter 234 of the Acts of Assembly of 1940 (section 2154(238)-2154(253) of Michie's Code of Virginia of 1942) prohibits the posting of any outdoor advertisement, outside of municipalities visible from any highway or any public place, without first obtaining a permit therefor from the State Highway Commissioner and paying the annual fee specified by the Act. By paragraph (a) of section 1 of the Act, the word "advertisement" is defined as including any writing, printing, picture, etc., which is posted or displayed for the purpose of drawing attention to any political party or the candidacy of any individual for any nomination or office.

It is, therefore, my opinion that it is unlawful to post a political advertisement which can be seen from a public highway without first securing a permit therefor from the State Highway Commissioner and paying the fee specified by the Act regulating outdoor advertising.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AGRICULTURE AND IMMIGRATION—Fees to Be Charged to Chain Store Importing Nursery Stock Into State.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 19, 1944.

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

My dear Mr. French:

Your letter of May 17 presents the situation of a chain store shipping nursery stock into Virginia from several States, such nursery stock being sold in Virginia through a number of retail outlets in this State. The ques-
tion is what registration fee, if any, should be charged such chain store as a dealer and what registration fee, if any, should be charged for its agents, all under the provisions of section 882 of the Code. You also direct attention to the fact that the Commissioner of Agriculture and Immigration, pursuant to the authority of section 882-a of the Code (Michie, 1942), has entered into reciprocal agreements with some of the States from which the nursery stock is being shipped into Virginia by the chain store.

A case of this type is not very satisfactorily covered by the sections I have mentioned, and the situation is further complicated by the reciprocal agreements. However, after careful consideration I have reached the conclusion that a proper solution of the problem is that, if a chain store ships nursery stock into Virginia from any State with which Virginia does not have a reciprocal agreement, such chain store should pay a $10 registration fee as a dealer and should pay the $1 fee for each store in this State from which it sells such nursery stock. I do not think, however, that a chain store, no matter from how many States it may be shipping nursery stock into Virginia, should pay more than one $10 registration fee nor more than one $1 fee for each store from which such nursery stock is sold.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Wholesaler’s Interest in Retail Establishment Prohibited.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 9, 1944.

HONORABLE CHARLES K. HUTCHENS,
Member House of Delegates,
Newport News, Virginia.

MY DEAR MR. HUTCHENS:

In response to your communication of May 4, I will quote you an excerpt from the ABC laws of Virginia:

"Section 53(a). If any manufacturer, bottler, or wholesaler of alcoholic beverages, whether licensed in this State or not, or any officer or director of any such manufacturer, bottler or wholesaler of alcoholic beverages, whether licensed in this State or not, or any officer or director of any such manufacturer, bottler or wholesaler shall have any financial interest, direct or indirect, in the business for which any retail license is issued, under the provisions of this act, or in the premises where the business of any person to whom such retail license has been issued is conducted, or either directly or indirectly shall sell, rent, lend, buy for, or give to any person who holds any retail license issued under the provisions of this act, or to the owner of the premises on which the business of any such person so licensed is conducted, any money, equipment, furniture, fixtures or property, with which the business of such retailer is or may be conducted, he shall be guilty of a misdemeanor."

From this you will see that persons engaged in the business of a wholesaler of alcoholic beverages may not have any interest, direct or indirect, in the premises where the business of any person who sells alcoholic beverages at retail is being conducted.

Very truly yours,

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

ALCOHOLIC BEVERAGE CONTROL—Liquors Legally Possessed May Not Be Confiscated Because of Other Crime.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 5, 1944.

HONORABLE CHARLES H. FUNK,
Attorney for the Commonwealth,
Marion, Virginia.

MY DEAR MR. FUNK:

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

"A person who is legally in possession of or transporting ardent spirits purchased from an A. B. C. Store is arrested by an officer for some offense which does not involve the legality of the ardent spirits. Should the ardent spirits, after his case is disposed of either by conviction or acquittal, be returned to him?"

It seems to me that the ardent spirits in question, being legally acquired, possessed and transported, occupy the status of any other personal property, and I know of no authority for confiscating the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—What Constitutes Illegal Possession; Amount to Be Confiscated.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 18, 1944.

HONORABLE FERDINAND F. CHANDLER,
Attorney for the Commonwealth,
Westmoreland County,
Montross, Virginia.

MY DEAR MR. CHANDLER:

This is in reply to your letter of March 14, 1944, in which you set out certain facts in connection with the arrest of a man in your county in whose possession were found over two gallons of whiskey bearing the required federal revenue stamps, and also Maryland tax stamps showing its purchase in the State of Maryland. You then ask my opinion on three questions as follows:

"FIRST: Would this whiskey be deemed to have been illegally acquired under the provisions of the third paragraph of Section 50 of the Alcoholic Beverage Control Act? (The point has been made that this paragraph only applies to whiskey on which there is due a tax to the Commonwealth of Virginia, and does not apply to whiskey which shows on the face of the bottle in which it is contained that there is no tax due to the Commonwealth of Virginia.)
This question is now before the Supreme Court of Appeals of Virginia in two cases argued at its recent session, to-wit: J. H. Smith v. Commonwealth, and Ashley Powers v. Commonwealth, in which opinions will be rendered, no doubt, on May 1, 1944. I may say that the Commonwealth has taken the position in these two cases that unless either the Virginia tax or the A. B. C. Board's mark-up has been paid, then the whiskey is deemed to be illegally acquired under section 50 of the A. B. C. Act.

"SECOND: Should this whiskey be so deemed to have been illegally acquired, would this be a conclusive presumption, or could the presumption be rebutted by the defendant taking the stand and testifying that he purchased it from a duly licensed dealer in the State of Maryland, and would the defendant also be required to show that he did not transport it into Virginia in quantities of more than one gallon at a time?"

Section 50 of the A. B. C. Act states that such whiskey is "deemed to have been illegally acquired." This creates at most a prima facie presumption, and is rebuttable, or as stated in Miller v. Commonwealth, 172 Va. 639, "* * * requires a satisfactory explanation or evidence to overcome it." It is my opinion, therefore, that the possessor of such whiskey can overcome such presumption by proof that it was lawfully purchased outside the State for the purpose of lawful consumption in Virginia and not for the purpose of illegal resale. I do not believe he would have to prove that it was transported in quantities of less than one gallon; however, proof by the Commonwealth that the transportation was made in violation of the law would, in my opinion, be a pertinent fact for the court to consider in determining the original purpose of the defendant in making the purchase.

"THIRD: Should this whiskey be found by the Court to have been illegally acquired, what, if any, part of it should be confiscated under the provisions of Section 36 of the Alcoholic Beverage Control Act? (The point has been made that, as contemplated by this section, no part of this whiskey should be confiscated, but even conceding that any of it should be confiscated, only that part of it which exceeds one gallon should be, as the third paragraph of section 50 only applies to alcoholic beverages in excess of one gallon.)"

The first paragraph of section 50 of the A. B. C. Act prescribes no limitations as to amounts. If the proof be that the entire quantity is one lot of whiskey, then, in my opinion, the entire quantity would be subject to confiscation. The act of acquisition by the defendant, if all the whiskey were acquired at the same time, would be indivisible.

In view of the fact that your first question will be answered in the opinions of the Supreme Court of Appeals in the two cases mentioned above, I submit for your consideration the possibility of continuing the case now pending in your county until after May 1st.

Very sincerely yours,

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

ALCOHOLIC BEVERAGE CONTROL—Seizure of Contraband; Posting of Officer's Return on Premises.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 9, 1944.

Honorable W. R. Broaddus, Jr.,
Commonwealth's Attorney,
Henry County,
Martinsville, Virginia.

My dear Mr. Broaddus:

I acknowledge receipt of your letter of February 7, 1944, in which you set out certain factual circumstances respecting the finding of large quantities of sugar stored on certain premises, and then you state:

"* * * the inference is that the sugar was going to be used for illegal manufacture of alcoholic beverages."

You then ask:

"Please advise—if under these circumstances this sugar could be confiscated and if so to whom should the notice of the confiscation be given."

Confiscation of "* * * materials used in the manufacture of alcoholic beverages, * * * which are kept stored, possessed, or in any manner used in violation of the provisions of this Act, * * *" is authorized under Section 36 of the Alcoholic Beverage Control Act (Section 4675(36) of Michie's Code of Virginia).

Before materials commonly used in the manufacture of alcoholic beverages may be confiscated, the statute requires that they be "materials used" in such manufacture, which, in my opinion, would include any supply from which portions had already been taken for use. I do not believe that a mere inference as to their use drawn from the finding of large stores of sugar, in the absence of some basis for the inference, such as their proximity to a still, would justify their confiscation. The goods might perchance be stolen goods, or might be used in "black market" transactions. However, these are all questions of fact upon which a court would have to pass in the particular case and upon which it would be improper for me to express an opinion.

In event of seizure, Sections 37 and 38 of the Act (Sections 4675(37) and (38) of Michie's Code) provides the procedure to be followed. Where the materials have been found on premises which are not in the possession of anyone, a copy of the return of the officer seizing the same shall be posted on the door of the building or room in which the materials were found. If the premises are without a building, the copy of the return should be "in any conspicuous place upon the premises," which provision would be satisfied, in my opinion, by mailing a copy of the return to a gate post or to a post set upon the premises by the officer.

Very sincerely yours,

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

ARRESTS—Civil Liability of Officer for False Arrest Is Not Determined by Outcome of Criminal Prosecution.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 2, 1944.

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

MY DEAR MR. GRAYBEAL:

I am in receipt of your letter of January 28, in which you refer to a case where police officers of Buena Vista arrested and placed a man in jail charged with violating section 4525 of the Code making it a misdemeanor for a person to obstruct justice by threats or force. You state that the defendant was found guilty by your mayor, but that on appeal to a court of record he was acquitted by a jury. You desire the opinion of this office on whether or not this man may "sue the police" who arrested him.

While, of course, there is nothing to prevent the man from instituting an action against the police as individuals, I must advise that I do not feel that I should attempt to give you an official opinion on the liability of the police in question. Manifestly, the question of whether or not there could be a recovery from an officer in a suit for false arrest or false imprisonment depends upon whether the officer's action was justified under the facts existing in any particular case. This question can only be determined by a court or by a jury under instructions from a court after a full presentation of the facts from the standpoint of both sides to the controversy. Certainly the single fact that a defendant was acquitted in a court of record on an appeal from a conviction in a mayor's court or a trial justice's court would not conclusively establish the liability of the officer. If this were the law, the position of police officer would be a hazardous one indeed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ARRESTS—May Be Made on Election Day.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 16, 1943.

MR. A. A. FLEMING,
Sheriff of Dickenson County,
Clintwood, Virginia.

MY DEAR MR. FLEMING:

I am in receipt of your letter of July 14, in which you ask the following question:

"Will you please further interpret section 29 of the Virginia election law as to arrest under a civil process. Should violations of the law be allowed on the election ground or does section 29 apply to offenses that have been committed previously? Very often we have disturbance and drunkenness on election grounds which may lead to worse crimes. I ask this question that I may know how to handle these cases in the future."
REPORT OF THE ATTORNEY GENERAL

That part of section 29 of the Constitution to which you refer provides that "no voter shall be subject to arrest under any civil process during his attendance at election or in going to and returning therefrom." In my opinion, this section does not prohibit the enforcement of the criminal laws of the State, since it in terms prohibits only arrests under any "civil process."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BAIL AND RECOGNIZANCES—Procedure for Forfeiting Cash Bond.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 14, 1944.

HONORABLE W. L. CARLETON,
Commonwealth’s Attorney,
Newport News, Virginia.

MY DEAR MR. CARLETON:

This is in reply to your letter of April 5, 1944, in which you request my opinion as to the procedure which should be followed in forfeiting a cash bond given in a criminal case in the Corporation Court of Newport News. From the facts outlined in your letter it appears that the father of a defendant convicted of a felony deposited the sum of $3,000 as cash security to effect bail of the defendant pending a contemplated appeal to the Supreme Court of Appeals. The appeal was not perfected and the defendant refused to surrender, and only recently was captured by police authorities in Richmond after a gun battle. You state that the Court has ordered the recognizance forfeited and the same has been noted of record by the Clerk.

Section 4973a of the Code, which deals with cash security, provides in the last paragraph thereof as follows:

"If there be default in any such recognizance, and if the case be not tried in the absence of the defendant and the money disposed of as hereinafore provided for, the forfeiture thereof shall be noted of record, and proceedings had thereon, as provided by law, and the money so deposited shall be held subject to the order of the court upon the final disposition of such proceedings."

In my opinion it would be proper to proceed as is customary in surety bond cases, i.e., by scire facias, and if no valid defense is interposed, the Court would then order the $3,000 cash security forfeited to the Commonwealth.

You state that the Clerk issued the receipt to the father of the defendant, and that the father is in Atlanta. The first paragraph of Section 4973a of the Code reads as follows:

"When a person charged with a criminal offense is admitted to bail he may 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."

Literally this contemplates that the receipt be issued to the defendant regardless of who deposited the money. If this were done there would be no occasion to have the scire facias issued against anyone other than the defendant. I understand, however, that it is the general practice to issue the
report to the person who actually deposits the money. Even so, there is no necessity for serving such person with the *scire facias*, however, it would certainly be proper to do so, and in case of doubt it would, in my opinion, be the best procedure to follow.

In view of the fact that the receipt was issued to the father in this case, it would, in my opinion, be proper as a cautionary matter to cause order of publication to be had against him in the *scire facias* proceeding. The principal defendant would, of course, be served in person in the Penitentiary.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General*.

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**BOARDS OF SUPERVISORS—Authority to Invest General Fund Surplus in United States Bonds.**

**COMMONWEALTH OF VIRGINIA.**  
**Office of the Attorney General,**  
**Richmond, Va., June 19, 1944.**

**Honorable George T. Tyson,**  
*Clerk,*  
*Circuit Court Northampton County,*  
*Eastville, Virginia.*

MY DEAR MR. TYSON:

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

"I am writing you, on behalf of the Board of Supervisors of this County, to inquire whether or not it is legal for them to invest a part of the balance due them in the hands of the County Treasurer, and belonging to the General Operating Fund, in United States Bonds."

Chapter 15 of the Extra Session of 1942 provides that for the duration of the war the Board of Supervisors may direct the Treasurer of a County "to purchase out of any monies available out of the general fund, or any sinking fund, or any special fund of such county" bonds or other evidences of debt of the United States of America, the amount of the purchase to be prescribed in the resolution directing the same.

In view of this statutory provision, it is my opinion that your question should be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,  
*Attorney General.*
BOARDS OF SUPERVISORS—No Authority to Lease Quarters for Federal Agency.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 12, 1944.

HONORABLE HUGH B. MARSH,
Attorney for the Commonwealth,
Fairfax, Virginia.

MY DEAR MR. MARSH:
I am in receipt of your letter of June 9, in which you raise the following question:

"The Agricultural Adjustment Agency, generally designated here as the Three-A, the same being, from the information given to me, a Federal agency, created relative to assisting the farmers of the United States, has an agency located in the town of Fairfax, Virginia, and the same serves all of the farmers in Fairfax County, Virginia.

"There is no room in any of the county-owned buildings within which to allocate space for this agency. The Board of Supervisors of this county have been requested by the farmers of the county to lease space in a privately owned building and pay the rent therefor for this agency.

"All of the employees in the local office of the said Three-A are employed by and paid by the Federal Government. The county, as you know, has no control or jurisdiction over the Three-A Agency here.

"I have advised the Board that in my opinion they cannot appropriate county funds for this purpose."

I concur in your opinion. During the past few years this office has on several occasions expressed the opinion that the board of supervisors of a county did not have authority to make an appropriation and pay the expenses of a purely Federal agency which is not a purely emergency war activity and over which the board has no jurisdiction and all of whose employees are employees of the Federal government.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority to Appropriate Money to Establish or Operate a Lime Grinding Plant.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 16, 1944.

HONORABLE H. PRINCE BURNETT,
Attorney for the Commonwealth,
Galax, Virginia.

MY DEAR MR. BURNETT:
I am in receipt of your letter of March 30, from which I quote as follows:

"A number of people are interested in the establishment of a lime grinding plant in this county and want the board of supervisors to purchase the land and equipment and operate same, or if this cannot be
done, to have the board make an appropriation out of the general county funds to help get the project in operation."

From my examination of the statutes I can find no authority for the board of supervisors to undertake the project you describe and to make the appropriation therefor. Section 2734 of the Code authorizes the board of supervisors of a county to expend annually a sum not exceeding $1,000 for the purpose of promoting agriculture in said county, but I do not think that this section is broad enough to cover the case you present.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority to Borrow Temporarily from Sinking Funds for Current Expenses.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 26, 1944.

HONORABLE ROBERT B. ELY,
Attorney for the Commonwealth,
Jonesville, Virginia.

My dear Mr. Ely:

This is in further reply to your letter of January 11, in which you ask if your board of supervisors may temporarily borrow from other county funds for the purpose of meeting expenses chargeable to the general county fund. It appears from the funds listed by you that all of them are sinking funds, so that the effect of your question is to inquire if the general county fund may for the purpose of paying current expenses borrow from county or district sinking funds.

In my opinion, your question must be answered in the negative. Section 2741a of the Code (Michie 1942) authorizes the board of supervisors of a county to invest the sinking funds of the county or any district thereof in other obligations of the county or any district thereof, provided said obligations are supported by sinking funds which have been provided and maintained in accordance with all legal requirements, and even then such investment must be first approved by the circuit court and then by the attorney for the Commonwealth. Obviously obligations of the general county fund are not supported by sinking funds which have been provided and maintained in accordance with all legal requirements. Section 2741a is the only section I have been able to find authorizing the investment of sinking funds in obligations of the county and, since this section does not cover such an investment as you describe, I do not believe there is any authority for the loans mentioned by you.

Very sincerely yours,

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

BOARDS OF SUPERVISORS—Authority to Adopt Ordinance Requiring Inoculation of Dogs Against Rabies.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 21, 1944.

HONORABLE CHARLES F. HARRISON,
Attorney for the Commonwealth,
Leesburg, Virginia.

MY DEAR MR. HARRISON:
I am in receipt of your letter of February 19, from which I quote as follows:

"I am seeking your opinion on the powers of the Board of Supervisors to adopt an ordinance requiring all dog owners in the county to have their dogs inoculated for rabies or other contagious diseases and requiring the payment of the expenses of the same to be made by the dog owners."

Since I do not know what "contagious diseases" you have in mind other than rabies, my reply is confined to that disease.

Chapter 330 of the Acts of 1936 (Michie's Code of Virginia, 1942, section 3305(70a)) provides as follows:

"The governing body of any county, city, or town may adopt such ordinances, regulations or other measures as may reasonably be deemed necessary to prevent the spread within its boundaries of the disease of rabies, and to regulate and control the running at large within its boundaries of vicious and/or destructive dogs, and may provide penalties for the violation of any such ordinances."

In my opinion, the quoted Act clearly gives to the Board of Supervisors of your county the authority to pass an ordinance requiring dogs to be inoculated for rabies and for the expense thereof to be paid by the dog owners if such Board considers the inoculation to be reasonably necessary to prevent the spread of rabies in Loudoun county. Obviously, if such an ordinance were challenged, the question of whether or not the measure adopted is reasonably necessary to effectuate the desired purpose would be one of fact to be determined by the court in the light of the evidence presented.

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., May 2, 1944.

HONORABLE JOSEPH WHITEHEAD, JR.,
Attorney for the Commonwealth,
Chatham, Virginia.

MY DEAR MR. WHITEHEAD:
I am in receipt of your letter of May 1, in which you ask the following question:

"The local trial justice appeared before the Board of Supervisors and requested that they furnish him with a Virginia Code.

"The Supervisors would like to know whether or not the State should furnish this Code, since all the fees, costs, etc., are paid into the State."

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

Under the quoted language, and I have heretofore so expressed an opinion,
I think that, if the board of supervisors feels it is necessary to furnish the
trial justice with a Virginia Code, it is the responsibility of the board of
supervisors and not the State to pay for same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority to Erect Memorial Plaque
to War Veterans.

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., October 15, 1943.

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

MY DEAR MR. BROWN:
I am in receipt of your letter of October 14, in which you ask if the Board
of Supervisors of Fairfax County has authority to appropriate money for the
purpose of "preparing and erecting a memorial plaque or 'service board' list-
ing the names of all of those residents of Fairfax County who are now serving
in the various military branches of the United States."

I can find no statute authorizing the Board of Supervisors to make
such an appropriation and, therefore, agree with your opinion that the Board
does not have such authority. By section 2742 of the Code the Board of
Supervisors was under certain conditions authorized to appropriate money to
erect or to assist in erecting a monument to the Veterans of the Confederate
or World War. The fact that this section was enacted indicates that specific
legislative authority is necessary for the Board of Supervisors to make the ap-
propriation described by you.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Salary of Clerk.

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

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

MY DEAR MR. BUTLER:
This has reference to our recent correspondence concerning the maximum
salary that may be legally paid the clerk of the Board of Supervisors of
Alleghany County.
Section 2773 of the Code, as amended, provides that a county clerk, as clerk of the board of supervisors, for his general services as clerk of such board may receive not exceeding $150 in any year.

Section 20 of Chapter 159 of the Acts of 1928 provides that the clerk of each board of supervisors may receive for the duties to be performed by him under the provisions of that chapter not less than $100 and not exceeding $300 per annum. This latter section is codified as section 2039(21) of Michie's Code of 1942.

Section 2002 of the Code provides for compensation of clerks of boards of supervisors for their services in connection with the construction, establishment and operation of county roads, but this office has heretofore expressed the opinion that this section is no longer in effect. I enclose a copy of the opinion of this office on this question written to Honorable John H. Powell, Clerk of the Circuit Court of Nansemond County, under date of October 23, 1934. Furthermore, this section 2002 carries a special provision concerning the salary of the clerk of the Board of Supervisors of Alleghany County, which provision is probably unconstitutional. See Smith v. Board of Supervisors, 159 Va. 304.

I might add in connection with section 2002, especially as it relates to the pay of the clerk of the Board of Supervisors of Alleghany County, that it is provided that the salary under that section shall "be paid out of the tax levied under section nineteen hundred and eighty-six," which section was repealed by the aforesaid Chapter 159 of the Acts of 1928, with the result that there can be no fund out of which any compensation may be paid the clerk of the Board of Supervisors of Alleghany County under section 2002.

My conclusion is that the maximum salary which may be paid the clerk of the Board of Supervisors of Alleghany County, as provided in section 2773 of the Code and section 20 of Chapter 159 of the Acts of 1928, referred to above, is $450 per annum.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Vacancy Caused by Death; How Filled.

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

HONORABLE PRESTON MOSES,
Member House of Delegates,
Chatham, Virginia.

MY DEAR MR. MOSES:
This will acknowledge receipt of your letter of December 11, from which I quote as follows:

"I would like to get an opinion on this situation: Dudley McNeally, Supervisor from Callands district, was re-elected for a second term. On Tuesday, December 7, 1943, he died, of course, without taking oath for his second term, but he attended the last meeting of his present term on Monday, December 6, 1943. What I would like to know is what method must be followed in getting a successor for him. The people of Callands district want a special election called in order to name their representative. Will it be possible for the Judge of the circuit court to call a special election, or MUST he make the appointment, or is it optional as to which course he follows?"
Section 136 of the Code provides that "when a vacancy occurs in any county, city, town or district office, and no other provision is made for filling the same, it shall be filled by the circuit court of the county in which it occurs, or the judge thereof in vacation."

There is no other statutory provision for filling a vacancy on the board of supervisors and I am, therefore, of opinion that the vacancy to which you refer should be filled by the circuit court of Pittsylvania County or the judge thereof in vacation. I know of no authority for calling a special election in this case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONDS—When Referendum Necessary to Refund School Loan.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 9, 1944.

HONORABLE W. TAYLOE MURPHY,
Treasurer of Virginia,
Richmond, Virginia.

My dear Mr. Murphy:

I am in receipt of your letter of February 8, in which you ask the following question:

"Is it necessary for a county or a school district to submit to the people the refunding of an existing liability? I am particularly interested in the refunding of school loans to counties by the literary fund, which would be done under Chapter 135, page 180, Acts of 1942."

I am of the opinion that under the authority of the Act to which you refer a county may anticipate the payment of money borrowed from the literary fund out of funds on hand available for the purpose without a referendum. However, if to anticipate the payment of such a loan it is necessary for the county to borrow the money by the issuance of bonds, then in accordance with previous opinions of this office I am of opinion that the making of such a loan must be authorized by a vote of the people.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

BONUS BILL OF 1944—Professors Paid From Endowment Funds of University of Virginia Are Eligible.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 1, 1944.

HONORABLE HENRY G. GILMER,
State Comptroller,
Richmond 15, Virginia.

My dear Mr. Gilmer:

This is in reply to your letter of April 10, in which you request my opinion upon the question whether or not certain professors and other per-
sons rendering services to the University of Virginia, who are compensated from income on endowments of that institution, are entitled to be paid the bonus provided for State employees under chapter 284 of the Acts of 1944.

I have delayed replying to your letter as I desired to ascertain more accurately the facts concerning the relationship of these persons to the University of Virginia as a State agency. On last Friday I had a conference with Honorable John S. Battle, who represents the University of Virginia in matters involving its endowment funds, and, after making an investigation of the matter himself, he informs me that the employees involved, and which are referred to in a letter from E. I. Carruthers, Bursar, addressed to you under date of April 7, 1944, occupy exactly the same status, in so far as the manner of their employment is concerned and the supervision over them by the University authorities is concerned, as all other employees. The only difference between these employees and others is the source from which the funds are derived to compensate them for their services.

Section 3 of the Bonus Act above referred to provides that "All additions to regular cash compensation authorized by this act for persons employed by * * * State institutions of higher education, shall be paid out of the amounts appropriated by section four of this act, * * * ."

Obviously the only question necessary to be decided in order to determine the answer to your question is whether or not the persons compensated out of the endowment funds are employees of the University of Virginia. From what I have stated above, it seems clear to me that they are such employees. Section 4 of said Bonus Act carries an appropriation out of the general fund of the treasury of a sum sufficient to carry out the provisions of the Act, including the six months period ending June 30, 1944, and extending to December 31, 1945.

It follows, therefore, that it is my opinion that the additional compensation provided by said Act should be paid to the said employees of the University of Virginia who have received their compensation from the income from endowment funds of the University, and that said additional compensation should be paid out of the appropriation contained in section 4 of said Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BONUS BILL OF 1944—All Employees Other Than Those Mentioned in Constitution §83 Are Eligible For Bonus.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 16, 1944.

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

MY DEAR MR. GILMER:

This is in reply to your letter of March 4, from which I quote as follows:

"Section 83 of the Constitution of Virginia, states that the salary of each officer of the Executive Department shall be fixed by law and shall not be increased or diminished during his term of office. "I should like for you to advise me whether those officers in the Executive Department whose compensation is less than $6,300 may be paid the bonus as provided for in Senate Bill No. 26—'Bonus Bill.'"
This is the language of section 83 of the Constitution:

"The salary of each officer of the executive department shall be fixed by law, and shall not be increased or diminished during his term of office."

Our Supreme Court of Appeals has held in Bottom v. Moore, Auditor, 119 Va. 372, that the prohibition contained in section 83 "applies only to such public officers as are specifically mentioned in Article V of the Constitution as comprising the executive department of the State government. The officers "specifically mentioned" in Article V of the Constitution are the Governor and Lieutenant Governor (to whom the so-called "Bonus Bill" by its terms does not apply), the Secretary of the Commonwealth, the State Treasurer and the Auditor of Public Accounts.

While the Bill (Senate Bill No. 26) provides "for a temporary addition to the regular cash compensation" of certain State officers and employees, the appropriation is made covering the entire calendar years 1944 and 1945. Throughout the Bill the payments authorized are referred to by such expressions as "additional compensation," "additional cash compensation" and "addition to regular compensation." It seems to me that there can be no question but that the Bill, in effect for the calendar years 1944 and 1945, increases the salaries of the officers and employees included within its scope. My conclusion is, therefore, that the additional compensation provided by the Bill may not be paid to the State Treasurer, the Auditor of Public Accounts and the Secretary of the Commonwealth, since the effect of so doing would be to increase the salary of these officers during their terms of office, contrary to the provisions of section 83 of the Constitution. See Moore v. Moore, 147 Va. 460; Jackson v. Hodges, 176 Va. 89.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE E. B. DENTON,
Treasurer of Washington County,
Abingdon, Virginia.

MY DEAR MR. DENTON:

This is in further reply to your letter of April 17, in which you ask for the opinion of this office on the question of whether or not there should be distributed to a town constituting a separate school district, and operated as such, any part of the funds which the county in which such town is located receives from the distribution of the profits of the Alcoholic Beverage Control Board and from the recently imposed tax on wine, in a case where the county appropriates such funds for school purposes.

A specific portion of the profits of the Alcoholic Beverage Control Board is distributed "to the several counties, cities and towns of the Commonwealth on the basis of the population of the respective counties, cities and towns of the Commonwealth." However, two-thirds of the proceeds from the wine tax is distributed only to the several counties and cities of the State according to population, except that where a town in a county constitutes a separate school district it is provided that such town shall receive from the treasurer of the county in which it is located that proportion of the county's share of the wine tax which the population of the town bears to the population of the entire county. Thus it will be seen that both in the case of Alcoholic Beverage Control Board profits and in the wine tax a town constituting a separate school district receives a share of the funds coming from these sources.

You are, of course, aware of the fact that neither that portion of the profits of the Alcoholic Beverage Control Board nor the proceeds of the wine tax which goes to the localities is dedicated by State law to the public schools, but such funds constitute a part of the general fund of the county, city, or town, as the case may be.

The section of the Code primarily dealing with your question is 653-a-3 as enacted by Chapter 422 of the Acts of 1942. The pertinent portion of this section reads as follows:

"For the use and benefit of each town school district operated by a school board of three members, the county school board shall require the county treasurer to pay over to the town treasurer if and when properly bonded, from the amount derived from the county levy or any appropriation for school purposes a sum equal to the pro rata amount from such levy or appropriation derived from such town; and the county treasurer shall also pay over to the town treasurer a proportionate amount of all school funds determined by the ratio of the average daily attendance for the preceding school year in the town district and in the county."

I think it is reasonably clear that the General Assembly by the quoted language intended to make sure that a town constituting a separate school district and operated as such (1) should receive from the proceeds of county school funds from local sources an amount equal to the pro rata amount of such funds as was paid by residents of the town, and (2) should also receive a portion of State school funds based upon the average school attendance for the preceding year in the town and in the county. You will recall that State school funds are distributed directly by the State Comptroller to cities and counties and, were it not for section 653-a-3, a town constituting a separate school district would not receive any portion of State school funds going to the county in which such town is located. When the reason for section 653-a-3 is considered, therefore, I conclude that that portion of the quoted language down to the semi-colon refers primarily to funds coming from local sources, and the remaining portion of the quoted language refers to (school) funds coming from State sources, from which the towns constituting separate school districts do not otherwise receive any share.

From the above consideration of section 653-a-3 it is my opinion that a
town constituting a separate school district is not entitled to receive under said section any portion of the funds received by the county in which it is located from the distribution of Alcoholic Beverage Control profits or the wine tax, even where such funds are appropriated by the Board of Supervisors for school purposes. No part of these funds can be said to be "derived from such town" nor has any of these funds been earmarked by State law as school funds. This construction of section 653-a-3 as applied to the funds involved certainly carries out what appears to be the intention of the General Assembly in enacting the section, since the General Assembly has adopted other means to provide that a town constituting a separate school district shall receive a pro rata portion of such funds. If, therefore, such a town, in addition to its own share, was entitled also to some of the county's share, it would in a sense be receiving a double share of the wine tax as well as of the general Alcoholic Beverage Control funds.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Criminal Ordinances; Authority to Enact Intoxicating Liquor Ordinance.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., June 23, 1944.

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

MY DEAR MR. GILMER:
I am in receipt of your letter of June 1, relative to the authority of the town of Waynesboro to adopt a criminal ordinance relating to distribution, drinking, or use of alcoholic beverages in certain public places in the said town.

Section 4675(65) of the Code (Michie 1942), which is a part of the Alcoholic Beverage Control Act, reads as follows:

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

Pursuant to the above quoted language I have heretofore expressed the opinion that, unless the charter of a particular town specifically authorizes it to adopt ordinances coming within the scope of this section of the Code, it has no power to do so. Therefore, unless the town of Waynesboro has such specific authority in its charter, I am of opinion that the ordinance to which you refer is invalid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CITIES AND TOWNS—Authority to Establish Parks and Playgrounds.

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

MY DEAR MR. REARDON:

I am in receipt of your letter of October 13, with regard to the authority of the Council of the City of Winchester to make an appropriation for parks and playgrounds in said city. You state that there is no such authority given by the city charter, but direct my attention to section 3032-b of the Code (Michie 1942).

If this section stood alone, I would be inclined to agree with your opinion that a referendum is necessary before the Council could make provision for parks and playgrounds in the city. However, I call your attention to section 3032 of the Code, expressly authorizing the councils of cities and towns "* * * in their discretion, to establish and maintain parks, playgrounds and boulevards * * * ".

I think the two sections can be reconciled upon the theory that section 3032-b makes it mandatory upon the Council to establish a system of public recreation and playgrounds and to levy a specified annual tax therefor where the voters of the city so direct as a result of an election held on the question, whereas section 3032 simply gives to the Council the general authority to establish and maintain parks and playgrounds in their discretion.

In view of the provisions of section 3032, I believe that both of your questions must be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Authority to Appoint Guardians.

HONORABLE JUNIUS W. PULLEY,
Commonwealth Attorney for Southampton County,
Courtland, Virginia.

MY DEAR MR. PULLEY:

I am in receipt of your letter of March 1, in which you refer to an opinion of this office given under date of April 2, 1943, to Honorable E. F. Hargis, Clerk of the Circuit Court of Russell County, to the effect that under section 5316 of the Code the clerk of the circuit court of a county does not have authority to appoint a guardian for a minor except when his court is in vacation. The section, as it now reads gives the authority to appoint a guardian to "the clerk such court or judge thereof in vacation."

I have again considered the matter and must advise that, if the question depended entirely upon the construction of the language as it now appears in the section, I am still inclined to think that my opinion given to Mr. Hargis represents the better view. But, when the legislative history of the section is considered, I very much doubt if it was the intention of the General Assembly to limit the authority of the clerk to the period during which the court is in vacation.
Section 5316 as it was adopted by the revisors of the Code in 1919 did not give to the clerk of the circuit court any authority to appoint the guardian of a minor. The authority to the clerk was first given by an amendment to the section in 1926 (Chapter 320 of the Acts of 1926). In that amendment complete authority was given to the clerk of a circuit court to appoint a guardian, the language being "the circuit court of any county or the clerk thereof, * * * or judge thereof in vacation * * *" may make the appointment.

The authority was continued in the clerk by two amendments to the section in 1928 (Chapters 29 and 420 of the Acts of 1928), the first amendment simply providing that "or the clerks of said courts" may appoint a guardian, and the second amendment using the language "or the clerk of such court, or judge thereof in vacation" may make the appointment. The insertion of the comma in the last quoted language, in my opinion, plainly had the effect of making the words "in vacation" apply only to the judge.

The section was again amended in 1930 (Chapter 420 of the Acts of 1930), the purpose of the amendment apparently being to conform the section to an amendment of section 5314 authorizing a mother as well as a father to appoint a testamentary guardian. There was no change in the language dealing with the authority of the clerk to appoint a guardian, except the comma appearing in the last amendment of 1928, to which I have already referred, was omitted. When it is considered that section 5316 was amended in 1930 for the specific purpose I have mentioned, I cannot believe that the General Assembly by the mere omission of the comma intended to limit the power of the clerk to appoint a guardian to the period during which his court is in vacation. If the General Assembly had intended to take away the broad power which it had heretofore given the clerk, I feel sure it would have done so in more specific language.

The section was again amended in 1938 and 1942 (Chapter 2 of the Acts of 1938 and Chapter 161 of the Acts of 1942). Both of these amendments, however, were for purposes other than changing the authority of the clerk, the language in this respect remaining the same as it was in 1930, the comma still being omitted. If, therefore, I am right in my view that it was not the purpose of the General Assembly to limit the authority of the clerk by the omission of the comma in 1930, the amendments of 1938 and 1942 using the 1930 language cannot have been intended to so limit his authority.

From the history of the section as I have outlined it and for the reasons I have indicated, I now conclude that my opinion given to Mr. Hargis is not in accord with the intention of the General Assembly, and that the more tenable view is that clerks of circuit courts still have the power to appoint guardians for minors both in term time and vacation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 8, 1944.

HONORABLE ROBERT H. OLDHAM,
Clerk Circuit Court of Accomack County,
Accomac, Virginia.

MY DEAR MR. OLDHAM:
I am in receipt of your letter of February 3, from which I quote as follows:

"The Governor of the Farm Credit Administration brings to my office
for docketing during the year several hundred crop liens, for which I receive the fee of 25 cents each. I, of course, place a certificate on each lien showing time and place of docketing which is covered by the 25 cent fee. The Government now requests that I give an additional certificate on a form of their own, which form I will have to complete by giving certain information. This will, of course, mean quite a bit of extra work considering the number of liens which I will have to docket.

"Section 3484 of the Code, paragraph 38, states that the clerk can make a charge of 25 cents for making out any paper to go out of his office other than a copy. In your opinion could I charge this fee for the additional certificate asked for? The Government makes the lienee pay the lien fee and the agent advises me that if I am permitted to make the charge for the additional certificate the lienee will also pay this."

If the clerk is not required to furnish the certificate to which you refer in docketing the crop liens presented to you, I am of the opinion that you would be justified, under paragraph 38 of section 3484 of the Code, in charging the 25 cent fee for furnishing this additional certificate.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

CLERKS OF COURT—Fees: When Entitled to Fee on Funds Realized From Sale of Confiscated Property.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 24, 1944.

Mr. S. C. DAY, JR.,
Assistant State Comptroller,
Finance Building,
Richmond, Virginia.

My dear Mr. Day:
I am in receipt of your letter of February 23, from which I quote as follows:

"Under the provisions of the Alcoholic Beverage Control Act provision is made for the disposition of confiscated property. The law requires the sheriff of a county or sergeant of a city to sell said property and after certain costs are deducted the residue, if any, is to be paid into the Literary Fund.

"We find in some instances the proceeds from the sale of such confiscated property is being paid to the clerk of the court and, although he has received the fees prescribed by law for entering orders, etc., when he reports the money to the Treasurer he is claiming commissions prescribed for clerks for collecting other monies due the Commonwealth. We will thank you to advise, whether or not, in your opinion, the sheriff or sergeant is required to turn this money over to the clerk for transmission to the State Treasurer in order that the clerk may receive a commission, or if the sheriff or sergeant should pay the money directly to the State Treasurer."

Section 4675(38a) of the Code (Michie 1942) provides in the case of an automobile forfeited to the Commonwealth for violation of the Alcoholic Beverage Control Act that "an order shall be made for the sale of said property by the sheriff * * * in the manner prescribed by law. Out of the pro-
ceeds of such sale shall be paid the costs, and the residue shall be paid into the Literary Fund." You will observe that it is not stated how the sheriff shall pay the residue into the Literary Fund. However, unless the order of the court directing the sale provides otherwise, in my opinion, the sheriff is not required to transmit the residue to the Literary Fund through the clerk of the court, but may pay it direct. I am, therefore, of the opinion that the clerk of the court is not entitled to a commission on the money collected by the sheriff from the sale of a forfeited automobile unless the order of the court directs the sheriff to pay the money to the clerk, in which case I think the clerk would be entitled to his regular commission on money collected for the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Reports to Compensation Board; Method of Accounting.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 25, 1944.

HONORABLE ROY K. BROWN,
Clerk of Roanoke County,
Salem, Virginia.

MY DEAR MR. BROWN:

I am in receipt of your letter of January 2, with regard to your fee report to be made to the State Compensation Board. You state that:

"Every year since I have been in office as Clerk, beginning with January 1, 1936, I have paid excess fees to the State, without the benefit of the fees from the trial justice for filing civil papers, except for the year 1943, and for the year 1943 I had no excess fees, even though I received a sizeable amount from the trial justice in the year 1943.

"Should this money that the trial justice paid me in 1943 be prorated over each of the previous years for which it was collected by the trial justice, and then, by me, paid to the State as additional excess fees for those years for which said amount was collected by the trial justice? From a consideration of section 3516 of the Code, I feel that I am entitled to this money as part of my fees collected for the year 1943, being the year in which same was paid or collected by me. I am unable to find any law requiring said collections to be prorated through each of the previous years as part of excess fees for each of those years."

I think that the answer to your question depends in large measure on the method you have followed in making your reports in the past. If your reports have been made on a cash receipts and disbursement basis, I think it would be permissible for you to follow this plan for the year 1943, which would mean that your fees which you collected from the trial justice during that year would not have to be prorated over prior years. If, on the other hand, your reports have been made on an accrual basis and your excess fees have been determined in this way, I think that you should continue to follow this plan, which would mean that your fees from the trial justice covering prior years would have to be prorated. For obvious reasons I do not think that an officer could from time to time at his own election change from one basis of reporting to another.

On account of the facts in your particular case it would appear that it would be immaterial whether your report for 1943 was made on a cash
receipts and disbursement basis or on the accrual basis. If your reports in
the past have been made on an accrual basis, you have already accounted
for the fees that you collected from the trial justice in 1943, and so
your excess fees for prior years would not be affected, and, if your reports
have been made on a cash basis, you will have no excess fees for 1943.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—No Duty to Issue Certain Types of Farm Credit
Administration Certificates.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 14, 1944.

HONORABLE HARRY BURNETT,
County Clerk,
Staunton, Virginia.

MY DEAR MR. BURNETT:
I am in receipt of your letter of April 12, from which I quote as follows:

"I am requested from time to time by local representatives of the
Governor of the Farm Credit Administration to give certificates on deeds
of trust securing personal property in the name of a given citizen of this
county. A copy of this certificate I herewith enclose for your infor-
mation. I am also asked to give certificates of a similar nature on crop
liens.

"I know of no statute requiring the Clerk of the Court to do this
kind of work. It appears to me to be practicing law. I may say for your
further information that I receive no compensation for these requests.

"Will you be good enough to advise me under the law whether I am
required to perform this service with or without compensation for the
Governor of the Farm Credit Administration, his agents, employees, etc."

The certificate to which you refer reads as follows:

"I hereby certify that, on the .... day of ............, 1944, at ... m., I
filed, registered, or recorded in book 2, page 273, of the records of my office, a
lien instrument to secure present and/or future advances, which instrument
was given by the above-named person(s) to the Governor of the Farm Credit
Administration; and that I have carefully examined the proper lien records
of this county and have found as at the date and hour written above no
prior liens or encumbrances on the livestock covered by said lien instrument,
which have not been waived in favor of the lien created by said instrument,
or otherwise made subordinate thereto."

I know of no statute which has the effect of making it the duty of the
clerk of a court to search the records in his office and execute such a certifi-
cate as that quoted above.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE E. O. RUSSELL,
Clerk of the Circuit Court,
Loudoun County,
Leesburg, Virginia.

My dear Mr. Russell:
This will acknowledge receipt of your letter of December 9, in which you ask the following question:

"Is it now the duty of the Clerk of the Court, under Section 4987-f7, in appeals from the Trial Justice Court, to serve a notice upon the appellee as provided in Section 6036 of the Code relative to Justices of the Peace?"

Section 4987-f7 of the Code provides that, except as provided therein, the provisions of law in force governing appeals in civil cases relating to civil and police justices and civil justices in cities shall apply to trial justices. The section goes on to prescribe some of the procedure governing appeals from a trial justice in civil cases, but does not require the clerk of the court of record in which the appeal is taken to serve any notice upon the appellee, as provided in section 6036 of the Code relative to justices of the peace. Nor do the sections of the Code relating to appeals from civil and police justices and civil justices require the notice described by you to be served upon the appellee. See sections 3106 and 3113 of the Code.

It is my opinion, therefore, that it is not mandatory upon the clerk of a circuit court in the case of appeal from a trial justice court in civil cases to serve upon the appellee the notice which the clerk was formerly required to serve by section 6036 in case of appeal from judgments of a justice of the peace.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Section 2707 of the Code provides in part that no "paid officer" of a county shall be directly or indirectly interested in "the sale or furnishing of supplies or materials to such county." The commissioner of the revenue is in part paid by the county and I am, therefore, in view of the provision I have mentioned of section 2707 of the Code, of opinion that your question must be answered in the negative. I may add that this is in accord with previous rulings of this office in similar cases.

You also ask this question:

"Since the Tribune is the only weekly newspaper in Pittsylvania, will I be allowed to insert advertisements for the commissioner of the revenue office at our regular local rate of charge?"

I presume that you are referring to the advertising of the places where the commissioner of the revenue will be in the county to receive tax returns from taxpayers, which advertising is required by section 308 of the Tax Code. I do not think that section 2707 prohibits you from placing such advertising in your newspaper provided, of course, the expense of this advertising is approved and allowed by the State Compensation Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONERS OF REVENUE—Interest in County Contracts Respecting Printing Prohibited.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., March 2, 1944.

MR. PRESTON MOSES,
Commissioner of the Revenue,
Chatham, Virginia.

MY DEAR MR. MOSES:
I am in receipt of your letter of February 28, from which I quote as follows:

"I am publishing one of two newspapers in Chatham (I have recently begun the Pittsylvania STAR), and I am also the Commissioner of the Revenue.

"Should the County Board of Supervisors choose to publish the annual budget, as required by law, in my newspaper rather than the other, would it be in violation of any section of the law?"

Section 2707 of the Code provides in part that "no *** paid officer of the county shall become interested, directly or indirectly, in any contract, made by or with *** " the Board of Supervisors.

In my opinion, under the circumstances stated by you this provision of section 2707 prohibits you from entering into an agreement with the Board of Supervisors for printing for compensation the annual county budget in your newspaper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COMMONWEALTH ATTORNEYS—Compensation for Representing County in Tax-Collection Case.

HONORABLE A. D. JOHNSON,
Commonwealth's Attorney,
Isle of Wight County,
Windsor, Virginia.

MY DEAR MR. JOHNSON:
This will acknowledge receipt of your letter of December 23, from which I quote below:

"Several weeks ago the Treasurer of this County sought to collect certain personal property taxes by warrant in the Trial Justice Court. Both the Treasurer and the defendant appeared and during the course of the evidence some matters developed which prompted the Trial Justice to continue the case. Fearing that the defendant was seeking to avoid a judgment being obtained against him, the Treasurer asked me to appear when the case was called and handle the case. We obtained judgment and have collected same, the amount thereof being some over $200.00. I did not appear when the case was first called and the Board of Supervisors never instructed me to handle this tax matter.

"Under the foregoing circumstances please advise me whether or nor the Board of Supervisors has authority to pay me a fee for handling this tax case."

Since the Board of Supervisors did not employ you to collect the taxes in question, I doubt whether the Board could be required to pay you for the work that you have done. However, under the authority of section 403 of the Tax Code, I am of the opinion that the Board unquestionably may pay you for the services which you have actually rendered.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH ATTORNEYS—Duty to Prosecute Fire-Fighting Proceedings.

HONORABLE WILLIAM A. WRIGHT, Chairman,
Virginia Conservation Commission,
Richmond 19, Virginia.

MY DEAR SENATOR WRIGHT:
I am in receipt of your letter of December 8, in which you ask if, where an attorney for the Commonwealth institutes and prosecutes the necessary proceedings to collect the costs of fire fighting from the persons responsible for the origin of the fire, as provided in section 541 of the Code (Michie 1942), he may be compensated therefor out of public funds.

The section to which I have referred makes it the duty of the Common-
REPORT OF THE ATTORNEY GENERAL

wealth's Attorney to institute and prosecute the necessary proceedings to collect such costs, and, therefore, this being prescribed as a duty of his office, I am of the opinion that the officer is not entitled to any extra compensation, his compensation in this respect being covered by his salary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMPENSATION BOARD—Appeal to Court's From Board's Decision Contemplates a Hearing De Novo.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 11, 1944.

HONORABLE E. R. COMBS, Chairman,
State Compensation Board,
Richmond 19, Virginia.

My dear Mr. Combs:

I am in receipt of your recent communication, from which I quote as follows:

"Enclosed you will find notice in the matter of the appeal of A. O. Lynch, Attorney for the Commonwealth of the County of Norfolk, from the action of the Compensation Board in fixing his salary for the calendar year 1944. The motion to hear this appeal will be made on February 7, 1944, at 10:00 A. M.

"The salary of Mr. Lynch for the calendar year 1944 was fixed by the Compensation Board at $5,500. This is the maximum provided by law.

"It is believed that Mr. Lynch will contend at the hearing that the actual population of Norfolk County has greatly increased since the census of 1940 and that the County of Norfolk should be placed in a higher bracket.

"In this connection, your attention is invited to section 8 of the Compensation Act as amended by the Acts of 1938, page 337. This section contains a proviso, ' * * * that whenever it is made to appear to the satisfaction of the Compensation Board that the population of any county has, since the last preceding United States census, increased so as to entitle such county to be placed in a higher bracket prescribing the minimum and maximum salaries, then such county shall be considered as being within such higher brackets in fixing the salaries provided by this act.' From the foregoing it is seen that the fact in question must be 'made to appear to the satisfaction of the Compensation Board.' This language indicates that the decision rests with the Compensation Board and that the placing of a county in a higher bracket cannot be ordered by a court on appeal by the officer from the decision by the Compensation Board declining to place the county in the higher bracket.

"The increase in the population of Norfolk County has been caused by war conditions. These the Compensation Board has considered as temporary and, for this reason, the Compensation Board has not acted under the proviso above quoted in any case. The Board has taken the position that it should not act under the proviso except in cases where the increase in population seems to be of a permanent character."

You desire my opinion on the question of whether or not the court on an appeal taken under section 12-a of the Compensation Act (Chapter 364 of
the Acts of 1934) may review the action of the State Compensation Board in refusing to place Norfolk County in a higher bracket on account of the alleged increase in population of such county.

The aforesaid section 12-a provides that on such appeal "all questions involved in said decision shall be heard de novo by the judge of said court * * *." The decision referred to in the quoted language is the decision of the Board in fixing the salary or expenses of office of the officer taking the appeal. Unquestionably the action of the Board in determining that Norfolk County was not entitled to be placed in a higher bracket by reason of the increase in population in such county was a factor involved in the Board's decision. In my opinion, therefore, it follows that from the broad language of the appeal section to the effect that "all questions involved in said decision shall be heard de novo" the court may review the action of the Board in passing on the question of whether Norfolk County should be included in the higher bracket.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONCEALED WEAPONS—Court May Prescribe Extent to Which Right to Carry Concealed Weapon Extends.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., August 16, 1943.

MR. ARTHUR S. LOCKE, Assistant Director,
Division of War Veterans' Claims,
State Capitol Building,
Richmond, Virginia.

MY DEAR MR. LOCKE:

This is in reply to your request for my opinion upon the question whether or not a permit to carry concealed weapons granted by an order of the Circuit Court of one county extends only within the boundaries of that county, or includes the area of the entire State. Section 4534 of the Code contains this provision:

"* * * the circuit court of any county in term time, and any corporation court in term time, upon a written application and satisfactory proof of the good character and necessity of the applicant to carry concealed weapons, may grant such permission for one year. The order making same shall be entered in the law order book of such court."

The answer to your question would depend upon the nature of the order entered by the court. In my opinion, it is within the power of the court to grant the permit for the entire State, or such parts thereof as the court deems proper.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 3, 1944.

HONORABLE STUART B. CAMPBELL,
House of Delegates,
Richmond, Virginia.

MY DEAR MR. CAMPBELL:
I have just received your letter of March 3, from which I quote as follows:

"I will be very much obliged if you will give an opinion as to the constitutionality of an amendment to Senate Bill No. 168."

"The Bill, a copy of which is attached, levies a tax on wine sold in the State of Virginia and provides that the amount so collected shall be paid into the State Treasury and credited to the General Fund. The amendment in question is 'and two-thirds of the said amount shall be disbursed to the counties, cities, and towns of the Commonwealth at the same time and on the same basis as the profits of the A. B. C. Board are distributed to such counties, cities and towns and the same is hereby appropriated for that purpose.'"

"I am certain several questions will suggest themselves to you as to the validity of this amendment. Two of them to which I especially direct your attention are: First, the right of the State to levy a tax that is not for the purpose of paying the expenses of the Government or paying the public debt. This, of course, will apply to the two-thirds of the tax which is to be returned to the localities; Second, this Bill purports to levy a continuing tax and to make a continuing appropriation. Does it or not contravene the constitutional provision that all appropriations must be payable within two years and six months of the adjournment of the General Assembly at which the appropriation is made?"

The Bill as introduced is modeled after Chapter 144 of the Acts of 1940, adding section 17-a to the Alcoholic Beverage Control Act, imposing a State tax (since repealed) upon certain alcoholic beverages sold by or through the Alcoholic Beverage Control Board. As a tax-levying measure it is in my opinion a valid Bill.

You first ask for my opinion, however, concerning the effect of section 188 of the Constitution upon a proposed amendment to the Bill which appropriates two-thirds of the tax for disbursement to the counties, cities and towns of the Commonwealth on the same basis as the profits of the Alcoholic Beverage Control Board are distributed. Section 188 reads as follows:

"No other or greater amount of tax or revenue shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the State."

To hold that the Bill as amended violates section 188 that section must be construed as if it prohibited a greater amount of tax to be levied than may be required for the "necessary expenses of the State government." But this is not the language of the section, for it only prohibits the levying of a greater amount of taxes than may be required for the "necessary expenses of the government." The counties, cities and towns are arms of the State through which the State in part carries out its functions. The expenses of these political subdivisions of the State are expenses of government and in my opinion, when the General Assembly makes an appropriation to the political
subdivisions out of the revenue from State taxes, these appropriations are made for the expenses of government within the meaning of section 188 of the Constitution. As I have stated, counties, cities and towns are arms of the State and as such are agencies through which the State carries out many of its governmental functions and only exercise such functions, in large measure, as may be specified by the General Assembly. If these functions were not delegated to the localities, they would normally be performed by the State.

To now hold that the amount of State taxes which may be levied is limited to the amount of expenses incurred in the operation of the State government through State agencies and departments, as those terms are generally understood, would represent a complete departure from precedents long established and recognized. A conspicuous example is the first Act levying a tax upon motor vehicle fuels (Chapter 107 of the Acts of 1923) expressly providing for distribution of a part of the tax to the political subdivisions of the State. The statutes are replete with provisions in the general appropriations Act and independent Acts making appropriations from State tax revenues to the political subdivisions of the State.

My conclusion is that the amendment about which you write is not contrary to section 188 of the Constitution.

While I am convinced of the soundness of my conclusion, I suggest for your consideration that, rather than provide for the appropriation to the localities in the Bill levying the tax, this appropriation be incorporated in the general appropriation Act. This seems to be the prevailing procedure in such cases and, if it be that I am wrong in my opinion concerning the constitutionality of the amendment, the validity of the tax would not be affected.

In your second inquiry you refer to the fact that the amendment constitutes a "continuing appropriation" and ask if such an appropriation does or does not violate that provision in section 186 of the Constitution forbidding any appropriation "which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same."

In my opinion, if the Act is construed as making an appropriation contrary to that portion of section 186 which I have quoted, it is invalid to the extent that an appropriation is made for a period beyond the prescribed limitation, but it is further my opinion that the appropriation made by the amendment for a period of two years and six months is good. I do not think that that portion of the appropriation which the General Assembly can make under section 186 of the Constitution is affected by the invalid portion of the appropriation. I need not remind you, of course, that before a period of two years and six months have expired from the effecting date of the Act, if passed, the General Assembly will have convened again. I might add, however, that, if the suggestion I have made relative to making the appropriation in the general appropriation Act is carried out, no such difficulty as you have pointed out.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CORONERS—When Authorized to Issue Death Certificate.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JULY 31, 1943.

HONORABLE EARL FITZPATRICK,
Member House of Delegates,
ROANOKE, VIRGINIA.

MY DEAR MR. FITZPATRICK:

Your letter of July 17 (which absence from the office has prevented my sooner answering) requests my opinion on the following questions:

Section 4806 of the Code imposes upon "the physician, undertaker or other
person in attendance" the duty "to notify the coroner hereinafter required to view the body of any sudden *** death." The coroner is required by said Code section to "view the body and make inquiry into the circumstances of said death," to determine whether there will be in his mind "a reasonable belief that the person whose body he has been called to view came to his or her death by murder, manslaughter *** or other misconduct of any person or persons."

If the coroner of the city of Roanoke, after viewing such a body and conducting such inquiry, finds no reason to believe there has been any foul play or misconduct involved in the death of such a person, who at the time of his death was attended by a physician:

1. What is the duty and authority of said coroner with respect to notifying the undertaker or other person having custody of the body that he does not believe the inquest or hearing provided for by said Code section is necessary or proper to determine the cause of such death?

While the statute contains no specific provision on this subject, it does, in my opinion, carry the necessary implication that the coroner shall promptly give such a notice of this finding on his part. Otherwise there probably would result an unreasonable delay in the burial of the body.

2. Is said coroner authorized in such a case, where there was an attending physician, to sign the death certificate or the medical certificate provided for by section 1567 of the Code which is necessary in order to obtain from the local registrar of vital statistics the burial permit required by Code section 1565?

In my opinion, where there is an attending physician, it is his duty, and he alone is authorized, to sign the medical certificate required by item 17 of section 1567 of the Code, which medical certificate is an essential part of the death certificate provided for by said section. Item 15 calls for the signature of the local registrar, and item 20 for the signature of the undertaker. In cases of deaths in cities occurring without medical attendance section 1568 of the Code provides for their investigation and certification by the coroner. Section 1569 of the Code makes it the duty of the undertaker to obtain the statistical and personal information required in the statutory form of death certificate (section 1567, supra) "from persons best qualified to supply them." He is required to present the certificate to the physician, if any, for his signature, and if none, then to the health officer or coroner as directed by the local registrar.

I have referred herein specifically to the coroner of the city of Roanoke because the duty and authority of the coroner may be different in other cities by reason of the following provision contained in section 1565 of the Code:

"In incorporated cities, certificates of death shall be obtained and burial or removal permits issued according to the ordinances of such city."

I am advised that the only Roanoke City ordinance on the subject is section 1 of chapter 62 of the Roanoke City Code, which is as follows:

"The commissioner of health shall be the local registrar of vital statistics. He shall keep a full and accurate record of vital statistics in accordance with the provisions of the state law governing vital statistics. He shall issue the necessary permits and shall make the necessary reports to state and federal authorities."

The above ordinance, having adopted for the city of Roanoke the State laws governing vital statistics (Virginia Code, Chapter 66) in my opinion the statutes I have referred to control the issuance and signing of death and medical certificates as a condition precedent to the issuance of burial permits.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COSTS AND FEES—Bail and Recognizance: No Fee to Be Taxed Upon a Recognizance Where Bail Is Not Required.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 22, 1944.

HONORABLE P. B. PORTER,
Trial Justice Louisa County,
Louisa, Virginia.

MY DEAR MR. PORTER:

I am in receipt of your letter of June 19 from which I quote as follows:

"There has arisen in the Trial Justice Court of this County the question whether there should be taxed, as part of the cost in cases, a fee for recognizing a party to appear at a future date, especially in cases of Commonwealth vs. accused, when he or she is bailed to appear."

The fees which should be taxed in criminal cases for services rendered by a Trial Justice are listed in Section 4987n of the Code. You will observe from the 4th item that the Trial Justice should charge a fee of $1.00 for admitting any person to bail. There is no fee provided simply for recognizing a party to appear. Since the Section to which I have referred provides that the listed fees are the only fees that may be taxed for the services of a Trial Justice, I am of opinion that unless the party to which you refer was admitted to bail by the Trial Justice, no fee may be charged for merely recognizing him to appear at some future date.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Costs of Jury Where Only One Criminal Case Tried at the Term.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 25, 1944.

HONORABLE ROBERT D. HUFFMAN,
Clerk Circuit Court of Page County,
Luray, Virginia.

MY DEAR MR. HUFFMAN:

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

"At the current term of this court a jury of forty-eight was summoned to try the case of the Commonwealth against a certain defendant charged with murder.

"Since this is the only case to be tried at this term, should the cost of the entire jury of forty-eight be taxed as a part of the costs in the one case?"

This office had occasion to pass on the principle involved in your question under date of September 30, 1936, in an opinion given to Mr. M. H.
Willis, Clerk of the Corporation Court of Fredericksburg, and I enclose a copy of that opinion. If there is only one criminal case at any term of court and the defendant is convicted, I am of opinion that the cost of assembling and compensating the jurors for the trial of the case should be taxed to the defendant.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Two Cases Tried at Same Time; Joint Defendants; Contempt Cases.

HONORABLE V. L. Sexton, Jr.,
Trial Justice for Tazewell County,
Tazewell, Virginia.

MY DEAR MR. Sexton:
Honorable L. McCarthy Downs, Auditor of Public Accounts, has asked me to reply to a letter written by you to him, in which you ask several questions.

Your first question is:

"Where a defendant is in court under two separate criminal warrants arising from the same general facts, and both warrants are tried together, is it proper to tax a trial fee of $2 on each of the warrants, or only one trial fee?"

This office has previously expressed the view that only one trial fee should be charged in such a case.

Your next question is:

"Where a criminal warrant has been issued against two or more defendants, is it possible to tax as a part of the costs a warrant fee against each defendant? It is my contention that only one trial fee is chargeable for all the defendants, one warrant fee, one mileage fee, but that a separate clerk's fee and arrest fee should be chargeable against each defendant. Would a Commonwealth's attorney fee be chargeable against each, in case of a felony?"

I agree with you that there should be only one warrant fee charged, but I am of opinion that, inasmuch as each defendant is actually tried, there should be a trial fee in the case of each defendant. I also agree with you that a separate clerk's fee and arrest fee should be charged in the case of each defendant.

As to the fee for the Commonwealth's attorney, in the case of a felony, section 3505 of the Code provides for a fee for the Commonwealth's attorney for each person prosecuted by him at a preliminary hearing before any court or justice of his county upon a charge of felony.

Your third question is:

"In the issuance of a rule for contempt of court, is it proper to tax all regular and usual criminal costs against the defendant?"

For the purpose of taxing costs I am of the opinion that a contempt of court case should be treated as a criminal case.

Your last question is:
“In the matter of cases under the A. B. C. Act, where the A. B. C. investigator makes the arrest and appears, is it proper to tax mileage and an arrest fee, both when the prisoner is taken to jail and when he gives bond and is not taken to jail? Also, is it proper to allow the A. B. C. investigator his attendance and mileage as a witness where he appears to prosecute the case?”

I am informed that the prevailing practice throughout the State, in which practice I concur, is for witness fees and mileage to be taxed for the A. B. C. officer who makes the arrest where he appears at the hearing, and that witness fees and mileage should be taxed for other A. B. C. officers who are summoned as witnesses and appear. The amounts so taxed are not retained by the A. B. C. officers, but are turned over to the Alcoholic Beverage Control Board and by that Board paid into the treasury. I do not know of any authority to tax mileage for an A. B. C. officer for taking a prisoner to jail.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Taxing of Commonwealth Attorney’s Fees; Cases Not to Be Dismissed Upon Payment of Costs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 18, 1944.

HONORABLE V. L. SEXTON, JR.,
Trial Justice for Tazewell County,
Tazewell, Virginia.

MY DEAR MR. SEXTON:

I am in receipt of your letter of April 14, in which you ask the following question:

“Where a defendant pleads guilty to a felony or to a violation of the A. B. C. laws, and is fined, is it proper to tax as a part of the costs the regular $5 Commonwealth’s Attorney fee? I have been doing this, but in several instances an objection was raised. It seems to me that the Commonwealth’s Attorney fee is just as much a part of the costs as the arrest, warrant fees, etc.”

This office has heretofore expressed the opinion that, where the attorney for the Commonwealth is required by law to prosecute and does actually prosecute before a trial justice in misdemeanor cases, a fee of $5 should be taxed as a part of the costs on conviction of the defendant. This fee should be taxed in cases of violations of alcoholic beverage control law, since the Commonwealth attorney is required to prosecute in such cases. I have heretofore advised you (March 14, 1944) that, where the attorney for the Commonwealth prosecutes before a trial justice at a preliminary hearing, in the case of a felony, an attorney’s fee of $5 should be taxed. The fee should not be taxed in either case, however, unless the Commonwealth attorney actually prosecutes.

Your next question is:

“Where a defendant is in court on a felony charge and the same is dismissed on motion or agreement of counsel, with costs, is it proper to tax a $5 Commonwealth’s Attorney fee?”
You further state in connection with your second question that the Commonwealth attorney was not present when the case was dismissed. In such a case I do not think that the Commonwealth attorney's fee should be taxed as a part of the costs.

While you do not ask the question, I think it proper for me to advise you that I know of no authority that a trial justice has to dismiss a charge of felony "with costs against the defendant." Generally speaking, costs can be only taxed against a defendant in a criminal case where there is a conviction, and, as you know, a trial justice has no authority to convict a defendant charged with a felony, even though the defendant pleads guilty, the trial justice's jurisdiction in the case of a felony being limited generally to dismissing the charge or sending the case on to the grand jury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Criminal Trial Where Hung Jury Results.

COMMONWEALTH OF VIRGINIA,
Office of the ATTORNEY GENERAL,
RICHMOND, VA., October 18, 1944.

HONORABLE W. E. NEBLETT,
Attorney for the Commonwealth,
Lunenburg, Virginia.

MY DEAR MR. NEBLETT:

I am in receipt of your letter of October 15, in which you ask if the costs of a mistrial due to a hung jury should be taxed against a defendant who at a subsequent trial was convicted.

Section 4964 of the Code provides that the clerk of a court in a criminal case where an accused is convicted shall "make up a statement of all the expenses incident to the prosecution * * *."

I do not see any escape from the conclusion that the trial which resulted in a mistrial is a part of the prosecution of the accused and that, therefore, the expenses incident to such trial should be taxed against the accused pursuant to section 4964.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—No Duty on Trial Justice to Advance or Collect Sheriffs' Execution Fees.

COMMONWEALTH OF VIRGINIA,
Office of the ATTORNEY GENERAL,
RICHMOND, VA., September 10, 1943.

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

MY DEAR MR. DOWNS:

I am in receipt of your letter of September 7, in which you quote the following from a letter received by you from Trial Justice R. O. Garrett, of Cumberland County:
"Sheriff J. S. Smith of this county refuses to take executions from me unless I pay him his fee. I cannot always tell, when I issue a civil warrant that execution will be issued, because the execution is stayed or the judgment is paid at or before trial.

"If I collect fee for execution with my costs and do not issue it, I will have the trouble of refunding the fee and put it thru my books.

"The law says I have to issue execution on each judgment rendered unless I am ordered by the plaintiff not to do so.

"Very often I am requested by mail to issue a warrant and have to write for my fees—and it seems to me when I give the sheriff an execution, he should be required to write for his fee.

"I am not paid any postage and I cannot see it is my duty to be his collecting agency.

"Please advise me about this."

I know of no statute which places upon a trial justice the duty of collecting the sheriff's fee for making a return on an execution issued by the trial justice in a civil case. Where such fee is not collected by the trial justice, it would appear that this is a matter between the sheriff and the plaintiff.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Clerks of Court—Fees for Special County Policemen Should Not Be Taxed, But Clerk of Court Has No Authority to Question the Matter.

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

HONORABLE T. C. MATTHEWS,
Clerk Circuit Court of Henry County,
Martinsville, Virginia.

MY DEAR MR. MATTHEWS:
I am in receipt of your letter of November 4, in which you refer to an opinion of this office to the effect 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 appointed pursuant to section 4797 of the Code, either in a civil or criminal case. You also state that the trial justice of your county is taxing arrest fees and mileage for the benefit of these officers in criminal cases, and you then ask the following questions:

"I recognize the fact that I am not personally concerned with the disposition the trial justice makes of arrest fees and mileage which he collects and pays to these special police officers, but the primary question which I desire to have answered is that in many instances cases are appealed from the trial justice court to the circuit court, and in other instances the fines and costs are paid after they are reported to my office; therefore, is it proper for me to collect from the defendants arrest fees
REPORT OF THE ATTORNEY GENERAL

and mileage for the personal use of special county police officers which was taxed by the trial justice as a part of the cost against the defendant before the case was appealed to the circuit court or was reported to my office by the trial justice; although the law does not provide for the said fees, and if collected, should the fees be paid direct to the special police officers or should they be paid into the county treasury; one hundred per cent to the use of the general fund of the county or should they be paid into the county treasury to be divided between the county and Commonwealth?"

While I am satisfied that there is no authority for the taxing of these fees for the benefit of these special county policemen, I do not think that the clerk of a court has authority to pass on the validity of the action of a trial justice, but that he should go through with the regular procedure prescribed by sections 2550 to 2553 of the Code for the collection of costs taxed by a trial justice in criminal cases. I am further of opinion that, if these fees are collected and paid to the clerk, they should be distributed by that officer as provided in the judgment entered by the trial justice, unless the action of the trial justice in taxing these fees is reversed by court order.

I might add that the problem before you would not be presented in the future if the trial justice would discontinue taxing these costs.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

COUNTIES—Publication of Ordinances.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 11, 1943.

Honorable A. S. Harrison, Jr.,
Attorney for the Commonwealth,
Lawrenceville, Virginia.

My dear Mr. Harrison:

This is in reply to your letter of October 9, from which I quote as follows:

"The General Assembly of 1942 adopted an Act to provide for the abatement of penalties and interest on certain taxes assessed against persons in the armed forces of the United States, and provided that the Act should not be effective in any county until the Board of Supervisors should adopt same by ordinance. (Chapter 199, 1942 Acts of Assembly, page 250.)

"The Board of Supervisors of Brunswick County desires to adopt this ordinance, but wishes to avoid the expense of publication unless such publication be necessary.

"It is my opinion that publication of the intention to propose such ordinance for passage will have to be published for two weeks, and then again published for two weeks after its adoption, in accordance with section 2743 of the Code of Virginia.

"I shall thank you to advise me if you concur in my opinion, or if you feel that the provisions of the Act can be made effective by a simple resolution of the Board."

The Act to which you refer, as you say, is not effective in any county
"until the board of supervisors * * * shall adopt the same by ordinance.” Section 2743 of the Code is a general section applying to all ordinances of the board of supervisors, and it is my opinion, therefore, that since Chapter 199 of the Acts of 1942 does not dispense with the necessity of publication the provisions of said section 2743 relating to publication are applicable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Contributing to Disruption of Marital Relations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 26, 1913.

Mr. W. P. Parsons,
Attorney for the Commonwealth,
Wytheville, Virginia.

My dear Mr. Parsons:

I acknowledge receipt of your letter of July 23, 1943, which reads as follows:

"I wish you would please advise—whether, in your opinion, that one who knowingly contributes in any way to the disruption of marital relations, or of a home, is guilty of a criminal offense.

"Can there be a conviction under a warrant which has this charge, without giving a specific offense?

"I refer you to sections 1950 and 1953e of the Code."

Sections 1950 and 1953e of the Code set out the jurisdiction of the judges of Juvenile and Domestic Relations Courts, and subsection (5) of each of the forementioned sections respectively provides jurisdiction involving—

"The prosecution and punishment of persons, male or female, who knowingly contributes in any way to the disruption of marital relations or of a home."

These subsections do not in themselves make such acts punishable, but merely confer jurisdiction upon the judge in cases where the acts complained of are punishable criminally, either as common law crimes or by statute.

I have been unable to locate any statute in Virginia making it a criminal offense to contribute to the disruption of marital relations, nor does such an act appear to be a crime at common law.

A husband is, of course, guilty of a crime if he fails to support his wife and family, and it would appear that any person who solicited, aided and abetted him in such an offense would be an accessory thereto.

Also, the crime of conspiracy being defined at common law as not only a plan to commit a crime, but also as, " * * * an evil scheme or conspiracy to cause a civil injury," 15 Corpus Juris Secundum, p. 1058, note 4, it would seem broad enough to cover any scheme whereby a third person and one of the spouses interfere with the conjugal rights of the other spouse.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CRIMINAL LAW—Indecent Acts Punishable, as Common Law Crime of Lewdness.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., July 6, 1943.

HONORABLE JOHN W. RICE,
Asst. Civil and Police Justice,
Winchester, Virginia.

MY DEAR MR. RICE:
This will acknowledge receipt of your letter of July 2, from which for the purpose of answer, I quote as follows:

"On June 28th, a man was arrested here on a charge of indecent exposure. Briefly stated, these are the facts: On several occasions while driving his car in a residential section of this city, this man has stopped his car and called little girls over to the car, telling them he wanted to show them something, and would then expose himself; while he did not attempt to harm the children or try to get them in the car, there is a question as to what he might have done had the children not run away frightened and screaming."

You then continue:

"I have been unable to find any specific section in the Code to cover this charge, and I would appreciate it if you will advise if there is any section under which this man can be properly charged and prosecuted. At the present time he is being held under Section 1923, however, we are doubtful if this would apply; at the present time he is out on bond in the penalty of $1,000, returnable on July 15th, and I would appreciate it if you could reply before that date."

I seriously doubt whether the facts which you set forth are sufficient to constitute an offense under Section 1923 of the Code (Michie), nor do I find any other statute which punishes the specific acts outlined in your letter. In my opinion anyone committing the acts outlined in your letter is guilty of the common-law crime of "lewdness," which offense is punishable as a misdemeanor in Virginia today. You will find the offense described and the procedure for punishing same fully discussed in Johnson v. Commonwealth, 152 Va. 965, which cites the English common-law case of Reg. v. Holmes, 6 Cox's Criminal Cases, covering precisely the facts in the case now pending before you. The form of warrant used in the Johnson Case is set out in the Court's opinion at 152 Va. at page 967, and as you will observe, it simply sets out the overt acts followed by an allegation of corruption of public morals.

Very sincerely yours,

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

CRIMINAL LAW—Weapons Used in Commission of Crime Are Not Forfeited.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 26, 1943.

Senator Harvey B. Apperson,
Boxley Building,
Roanoke, Virginia.

My dear Senator Apperson:

I acknowledge receipt of your letter of October 21, 1943, in which you state that upon the conviction of a person in the City of Roanoke for unlawfully shooting and wounding a policeman with a shotgun, the said gun has been held in the custody of the Police Department of the City of Roanoke. You then say:

"I understand that it is contended by the Commonwealth's Attorney's office and the Police Department that it has been a custom in Roanoke City for years to confiscate and turn over to the Police Department weapons which had been used for an unlawful purpose—in this instance the shooting of the Police Officer."

You then ask for my opinion on the validity of such confiscation.

Under the common law doctrine of "deodand," any personal chattel becoming the immediate instrument by which the death of a human being was caused, was forfeited to the Crown. This doctrine, limited however, to those cases in which death resulted, and based upon the superstition that the chattel was morally affected from having caused the death, belonged to an age in which no civil action for a death negligently or tortiously caused was allowed against the person responsible therefor. The doctrine never gained a foothold in this country and apparently is not included in that part of the common law now in force. It was expressly abolished in England by the Statutes of 9 and 10, Victoria, chap. 62.

Likewise, under the common law, when a person was convicted of a felony (the derivation being from "fee" signifying the feud or land, and "lon" signifying forfeiture) the consequences of such conviction placed the person in a state of attainder from which three principal consequences followed, viz., (1) forfeiture of the offender's lands and goods to the Crown, (2) corruption of blood which prevented the offender from transmitting his estate to his heirs, and (3) extinction of civil rights. Under this doctrine of attainder the weapons used in committing crimes were forfeited to the Crown.

Section 58 of the Constitution of Virginia prohibits the enactment of any bill of attainder, and Section 4762 of the Code of Virginia provides that "no attainder of felony shall work a corruption of blood or forfeiture of estate."

It follows, therefore, that the disabilities imposed by the common law upon attainder of felony are abolished in Virginia, and that no consequences follow conviction and sentence except such as are declared by law. A search of the statutes fails to reveal any authority in Virginia justifying the confiscation of a weapon used by the offender in committing an assault.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.
CRIMINAL LAW—Former Jeopardy; Reckless Driving Through Two Counties.

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

JUDGE GEORGE F. WHITLEY, JR.,
Trial Justice,
Smithfield, Virginia.

MY DEAR JUDGE WHITLEY:

This is in reply to your letter of August 13, in which you request my opinion upon the question whether or not a person who is guilty of reckless driving over an area embracing parts of two counties is guilty of a separate offense in each county.

Since the offense is in violation of the State law, it is my opinion that it is immaterial whether the reckless driving extends across the county line, and that, if the accused is guilty of only one continuous driving in a reckless manner, it should be treated as only one offense.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Alleging Prior Conviction in Prosecutions For Second Offense.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 7, 1944.

MR. CLAUDE F. BEVERLY,
Game Warden,
Freeling, Virginia.

MY DEAR MR. BEVERLY:

I acknowledge receipt of your letter of June 3, from which for convenience I quote as follows:

"The Law, as you know, provides that any person convicted a second time for violating the game and fish laws shall be required to give bond in the sum of $100.00 for his good behavior for one year or go to jail for 30 days. Is it necessary that it be alleged in warrant charging second offense of game and fish laws that defendant has been previously convicted of violating said laws, when record of first conviction is a matter of public record in the county in which he is to be tried for alleged second offense?"

The section to which you refer, to-wit, section 3305(60) of Michie's Code, provides for increased punishment upon a second conviction for violation of the game and fish laws. The section does not provide for an allegation of the prior conviction in the warrant.

In cases where a second conviction carries an increased punishment, it is necessary to allege in the warrant the fact of the prior conviction in order that the accused may be clearly informed of the charge he is called upon to meet. Shiflett v. Commonwealth, 114 Va. 876, 77 S. E. 606. This type of case, i. e., where the second offense carries increased punishment, is to be distinguished from a case in which certain consequences, not deemed to be a part of the punishment, follow automatically upon conviction, e. g., revocation of an automobile.
driver's license upon a second conviction of certain offenses. In this latter type of case the prior conviction need not be alleged. Commonwealth v. Ellett, 174 Va. 403, 4 S. E. (2d) 762.

In those cases where the prior conviction must be alleged, the authorities are not in accord as to how particular the description of the former conviction must be. The stricter rule requires that the date, the name of the court, and the judgment rendered therein be set out. See 25 Am. Jur. 272. I recommend for your guidance, in order to avoid any uncertainty in the matter, that the stricter rule described above be followed should any cases arise under Code section 3305(60).

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Warrant or Bill of Particulars Should Show That Offense Is Not Barred by Statute of Limitations.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 28, 1944.

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

MY DEAR MR. PRINCE:

I acknowledge receipt of your recent letter, from which I quote the following:

"According to Section 4768, the limitation of prosecution for a misdemeanor, shall be commenced within one year next after there was cause therefor, etc. What I wish to know is this: If a warrant is sworn out for a person who has committed a misdemeanor within the past twelve months and is brought to trial and the defense counsel shall ask for a bill of particulars in which he wishes stated what day, on or about, or some definite time within the past year, the misdemeanor was committed and it is impossible to state the day or period within the past twelve months when it was committed, is the failure to be able to answer such bill of particulars sufficient cause for dismissal of the original warrant charging the commitment of a misdemeanor within the past twelve months?"

While it is true that a warrant need not state the date upon which the alleged misdemeanor was committed, but may allege in general terms that it was committed within twelve months next prior to the date of the warrant, nevertheless the Commonwealth must prove that the offense was committed within that period before a conviction may be had.

In discussing bills of particulars in criminal cases, the Supreme Court of Appeals in Casper v. City of Danville, 160 Va. 929, said:

"* * * The State has no desire to leave one of its citizens in doubt or uncertainty as to any offenses charged against him. Prosecuting attorneys know, or ought to know, in advance, what they can prove, and ordinary justice demands that they should give the accused a fair statement of the offense for which he is to be prosecuted."

If the Commonwealth's proof is going to show that the offense was committed on or about some date within the preceding twelve months, it should
be required to so specify in its bill of particulars. If the proof of the Commonwealth will not show such approximate date and for that reason it cannot give a bill of particulars, it would seem that the trial justice would be justified in dismissing the warrant.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Prosecution For Misdemeanor in Absence of Defendant Must Be By Jury Trial.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 20, 1944.

HONORABLE CHARLES B. GODWIN,
Commonwealth’s Attorney,
Nansemond County,
Suffolk, Virginia.

MY DEAR MR. GODWIN:

This is in reply to your letter of April 19, 1944, in which you ask my opinion on two somewhat related questions. Your first question is:

"Can a defendant in a misdemeanor case, who is in default of his bond to appear in the Circuit Court on the date set for trial, be tried by the Judge in his absence, or does he, in his absence, have to be tried by a jury?"

Section 4883 of the Code provides generally:

"No capias to hear judgment shall be necessary in any prosecution for a misdemeanor, but the court may proceed to judgment in the absence of the accused; * * * ."

Section 4889 of the Code provides for the procedure in such cases, and except on indictments or presentments for offenses contained in Chapter 183 of the Code, or for violation of laws relating to the public revenue, in which two instances the court may convict the accused summarily in his absence, the section provides as follows:

"* * * But on indictment or presentment for any other misdemeanor, after the summons has been executed ten days, the court may either award a capias or proceed to trial, in the same manner as if the accused had appeared and pleaded not guilty, * * * ."

If the defendant had appeared and entered a plea of "not guilty," it would have been necessary to impanel a jury to try the case, unless the defendant consented of record, as provided in section 4927 of the Code, to be tried by the court without a jury. The Supreme Court of Appeals has held that this consent may be waived, but that "Something more than simple silence must appear." Boaze v. Commonwealth, 165 Va. 786, 792.

It is my opinion, therefore, that an absent defendant, on whose behalf the court has entered a plea of "not guilty," cannot be deemed by his absence to have consented by waiver to be tried without a jury, and it would be necessary, therefore, to impanel a jury to hear and determine the case.

Your second question is:
“In Circuit Courts where misdemeanors have been appealed and the defendant fails to appear in default of his recognizance, does a jury have to be empaneled and the absent defendant tried before the jury and then sentenced by the Court, or can the Judge, without a jury, hear the evidence and sentence the defendant?”

An appeal taken from the judgment of a trial justice, annuls such judgment, and the proceeding in the Circuit Court, although on the same warrant, is a proceeding de novo. Malouf v. Roanoke, 177 Va. 846.

Section 4990 of the Code provides as follows:

“The appeal shall be tried without formal pleadings in writing, and the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in said court.”

It follows, therefore, that on such appeals the same rules of construction would prevail as if the proceeding had been initiated by indictment or presentment in the Circuit Court under section 4889 of the Code (supra). I am of the opinion, therefore, that a jury is likewise necessary in this instance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DENTISTRY—Practice of Through Use of the Mails.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 16, 1944.

DR. JOHN M. HUGHES,
Secretary Virginia State Board of Dental Examiners,
715 Medical Arts Building,
Richmond, Virginia.

MY DEAR DOCTOR HUGHES:

This is in reply to your letter of June 6, in which you request my opinion upon the question whether or not a dentist engaged in the practice of sending orders directed to a mail order dental plate company, requesting the mailing of dental plates to a person living in Virginia under the circumstances hereinafter set forth, would be in violation of the Virginia State Dental Law, being chapter 184 of the Acts of 1930 which amended certain sections of the Code of Virginia.

It seems that the dentists you have in mind would not make any actual examination of the persons to whom the plates are supplied, but that the mail order company would send such persons a wax mat upon which to make a dental impression, which upon being made would be returned to the mail order house. The scheme provides for the mailing of the sum of one dollar by the purchaser to some dentist, who, without any examination or any further contact, would send an order directing the mail order house to furnish the plates.

Section 1640 of the Code provides that any person shall be deemed to be practicing dentistry who shall “take impressions, or shall supply artificial teeth as substitutes for natural teeth, or shall place in the mouth and adjust such substitutes, * * *.” The Act of Congress to which you refer was designed to prevent the furnishing of dental plates by these mail order houses, and provides that it is unlawful to supply dentures from cast or impressions sent through the mails or in interstate commerce, without the authorization
or prescription of a person licensed under the laws of the State in which
same are sent to practice dentistry.

It seems to me the practice you refer to is in obvious attempt to evade
the dental laws of Virginia, and, if the facts are sufficiently flagrant, it would
seem to be a violation of section 1649 of the Code prohibiting any conduct
likely to defraud or deceive the public, or it might be regarded as wilful negli-
gence in the practice of dentistry. Of course, each case would depend upon
the evidence and fact proved.

The authority of the Attorney General is restricted to interpreting laws
of the State, and I would not, therefore, be justified in expressing any opinion
upon what violations, if any, of the Federal Act would result from the course
of conduct above outlined.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voting; Not the Duty of Registrar to Determine
Eligibility of a Registered Voter to Vote.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., June 2, 1944.

HONORABLE PHILIP P. BURKS,
Treasurer of Bedford County,
Bedford, Virginia.

My dear Mr. Burks:

I am in receipt of your letter of May 29, in which you ask if a registrar,
upon receipt of an application for an absentee ballot, may refuse to send
such ballot to the applicant where the name of such applicant does not appear
upon the treasurer’s list made out pursuant to the provision of section 109
of the Code. In the particular case which you have in mind you state that
the applicant did not pay the required capitation taxes within the time pre-
scribed by law.

In my opinion, it is not the duty of the registrar under the absent voters’
law to pass upon the question of whether or not an applicant for an absentee
ballot is qualified to vote in the election in which the ballot is to be cast. If
the application for the ballot complies with the requirements of section 203
of the Code, I am of the opinion that the registrar should mail the ballot. The
election laws, in my opinion, place upon the judges of election the duty of
passing upon the eligibility of a voter to cast his vote. See section 214 of the
Code. You will observe that the absent voters’ statutes make ample pro-
vision for passing upon the eligibility of voters to vote by this method. See
sections 205, 212, 213 and 214 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Absentee Voting: Application To Be Made By Applicant In Person Or By Mail; Registrations On Sunday Are Valid.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 23, 1944.

Honorable Albert V. Bryan,
Attorney for the Commonwealth,
Alexandria, Virginia.

My dear Mr. Bryan:
I am in receipt of your letter of May 22, in which you ask a number of questions with regard to absent voting and registration.

Your first question is:

"Under the absent voters' law, section 202, et seq., Virginia Code, is it necessary that the applicant for a ballot, if in the city at the time of the application, in person apply to the registrar for the ballot, or may he send the application, with the accompanying affidavit, to the registrar by a third person other than the mail?"

In my opinion, section 203 of the Code contemplates that the application for a ballot must be forwarded to the registrar by mail or delivered to him in person by the applicant. I do not think that the section makes provision for the application to be delivered to the registrar by a third person.

Your second question is:

"If the applicant is in the city at the time he desires the ballot, is it necessary for him in person to apply for the ballot or may he send in the application by mail?"

It is my opinion, and I have heretofore expressed this view, that, if the applicant is in the city at the time of the application, he may either apply to the registrar in person or send the application by mail.

Your last two questions are:

"May the registrar receive such applications on Sunday or make delivery of the ballots on Sunday under the absent voters' law?"

"May a registrar register a qualified voter on Sunday; and, if not, is such registration to be invalidated upon challenge?"

While I do not think that a registrar may be required to receive applications for ballots or make delivery of the same on Sunday, or that he may be required to register a person on Sunday, I know of no provision of law which would prohibit him from thus accommodating the electorate, and, in my opinion, these acts performed on Sunday would be valid.

Very sincerely yours,

Abram P. Staples,
Attorney General.
ELECTIONS—Absentee Voting; Application for Ballot.

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

HONORABLE VIVIAN L. PAGE,
National Bank of Commerce Building,
Norfolk, Virginia.

MY DEAR SENATOR PAGE:
I am in receipt of your letter of August 21, in which you ask the following question:

"Under the Absent Voters' Law, Chapter 14, Section 203, 'letter of application for ballot, when and how forwarded.'

"He shall make application in writing for a ballot to the Registrar, etc.'

"Please give me your opinion as to whether or not this application in writing means that the applicant himself shall write the application or if the application is made on a printed form, must it be signed by the applicant himself, or would it be legal if someone signed it for him with or without authority?"

Section 203 of the Code, dealing with absent voters, provides in connection with the application for a ballot that the voter "shall make application in writing for a ballot to the registrar of his precinct * * *." The section does not prescribe that the voter shall personally sign the application. I am of opinion, therefore, that the application may be signed for the applicant by a person who has been duly authorized by the applicant so to do. Clearly the application could not be signed for the applicant by a person not authorized so to do, for then it would not in any sense be the application of the voter himself.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voting; Mailing Address.

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

MR. C. P. HARRELL,
Registrar East Luray Precinct,
Luray, Virginia.

MY DEAR MR. HARRELL:
In your letter of September 16, you request my opinion upon the legality or propriety of a registrar mailing an absent voter's ballot in care of another person who is known to you to be a Notary Public, where the application signed by the voter requests the said ballot to be mailed to such address.

There is no statutory provision prohibiting this, nor do I know of any reason why the request of the voter should not be complied with.

Sincerely yours,

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

ELECTIONS—Absentee Voting; Duties of Registrar to Forward Ballot.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 27, 1943.

Mr. W. M. Abbitt,
Attorney for the Commonwealth,
Appomattox, Virginia.

My dear Mr. Abbitt:
I am in receipt of your letter of July 26th, from which I quote as follows:

"Under the absent voters' law among other things the registrar is directed upon receiving a proper application from a registered voter to register to the applicant his ballot along with certain enclosures. Is it necessary that the Register take the Envelope with the proper enclosurers therein in person to the Post Office and personally mail them?

"If the Registrar properly fixes up the ballot with all the necessary forms, etc., enclosed therein, seals the envelope, addresses same properly, then as a matter of convenience, the Registrar living out in the County some distance from the post office, send the envelope to the post office by a third person, who registers same to the applicant, applicant receives same in due course, marks same according to law before a notary public and mails same back to the registrar according to law, IS THE BALLOT VOID AND NOT TO BE COUNTED OR IS IT A LEGAL BALLOT."

Section 205 of the Code provides that the registrar upon receipt of the application for the ballot shall enroll the name and address of the applicant on a list to be kept by him for the purpose "and forward to the applicant by registered mail * * * the following * * * :"

If the registrar, as you state, "properly fixes up the ballot with all the necessary forms, etc., enclosed therein, seals the envelope, addresses same properly," I know of no reason why he may not send the envelope containing the enclosures to the post office by a third person. I do not think that the language "forward to the applicant by registered mail" has to be construed to mean that the registrar must personally place the envelope in the post office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballot: Stickers May Not Be Used to Mark Ballot; When Use of Rubber Stamp May Invalidate Ballot.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 18, 1943.

Honorable H. O. Pratt,
Chairman Electoral Board of Russell County,
Cedar Bluff, Virginia.

My dear Mr. Pratt:
This is in reply to your letter of October 13, 1943, in which you request my opinion upon six questions relating to the interpretation of the election laws.
1. Your first question is whether it is permissible for a voter to use a sticker, consisting of a small strip of paper, upon which has been written or printed the name of a candidate for office for whom he desires to vote, and insert same by pasting it on the ballot at the appropriate place. I find that I had occasion to express my views on this question in an opinion given October 6, 1936, to the chairmen of the electoral boards of the cities of Norfolk and Portsmouth, and of the county of Norfolk. Since that opinion answers your question I quote the same as follows:

"The third question is whether or not it is permissible for a voter to use a small sticker with the name of the candidate already checked which the voter may paste on the ballot.

"It is my opinion that the addition of a sticker to the ballot constitutes adding thereto other material in the form of paper in addition to the actual ballot itself. No such practice has ever prevailed in Virginia. The pasting on of the additional strip of paper might not be permanent, as it is frequently the case that papers pasted together come apart and that stamps often come off envelopes. I am further of the opinion that the pasting of a sticker could be readily detected by the judge of election at the time the ballot is handed to him, as is required by law, to be deposited in the ballot box, and that voting in this manner would be in violation of the provision of the State Constitution providing for the secrecy of the ballot."

2. Your second question I quote as follows:

"Should an elector, after he has been delivered his official ballot by one of the judges of the election, request information from one of the judges, clerks or a by-stander, with reference to how to use the rubber stamp, would any of these officers or persons be permitted under the law to advise such voter, and if they should advise the voter, what penalty does the law prescribe for such action?"

Such advice and assistance is permitted by section 166 of the Code of Virginia to be given to persons who are blind or otherwise physically disabled, or persons registered prior to January 1, 1904. Except as to such persons section 163 of the Code provides that "no person shall advise, counsel or assist any elector, by writing, word or gesture, as to how he shall vote or mark his ballot after the same has been delivered to him by the judges of election. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $500.00 nor more than $1,000.00 and confined in jail six months."

It is my opinion that the above quoted provisions apply to election judges and clerks as well as all other persons.

3. You next inquire as to the effect of stamping or writing a name over the printed heading or title of an office contained on an official ballot. Section 179 of said Code provides that "if the title of the office is erased, the said ballot shall be considered void as to all the names designated to fill said office, but no further." Webster's dictionary defines the word erase as meaning to blot out or to expunge. In my opinion, stamping a name over or otherwise obliterating the title of the office as printed on the ballot constitutes an erasure thereof within the meaning of the statute and renders the ballot void as to all candidates for said office so erased.

I am further of opinion that a name so stamped cannot be counted as a vote for the office the title of which immediately precedes the erased title. Section 162 of the Code authorizes a voter to insert on the ballot the
name of a person for whom he desired to vote, but such insertion, in my opinion, must be made in the space between the titles for office as printed on the ballot.

4. Your next question is whether the name of a person inserted on the ballot must be placed in due and orderly succession to the names printed thereon, or whether it may be placed on the margin, back, or side of the ballot.

In my opinion the statute clearly contemplates that a name inserted should be placed in the space directly beneath the title to the office and in orderly succession to the names printed thereon. Section 155 of the Code provides that the electorate board shall furnish a ballot which shall "contain the names of all the candidates complying with the provisions of the law, printed in black ink, immediately below the office for which they have so announced their candidacy, in due and orderly succession, and the names on said ballot shall be in clear print, in the same order and each name in a separate line."

The requirement that the names be placed "each name in a separate line" "in due and orderly succession" "immediately below the office," in my opinion, applies equally to the place of insertion of a name on the ballot by a voter.

5. Your next question is as follows:

"If the stamp is placed over the name of any candidate whose name appears on the official ballot, does this spoil the ballot as to such candidate—as to the entire ballot?"

In my opinion a ballot so marked is void only as to the candidates whose names are involved by the stamping; that is, the candidate whose printed name has been obliterated and also the candidate whose name is placed over said printed name. It is true that section 153 of the Code provides that "any voter may erasure any name on the ballot voted by him and insert another." However, this provision was carried over from the Code of 1887 and the Acts of 1902-3-4 and was applicable to the former, but now obsolete, method of voting whereby the names of all candidates not voted for were erased, usually by striking a line through them and leaving only the name of the candidate voted for. In my opinion this section has been superseded by section 155, providing for the printing of a square preceding the name of each candidate, and by section 162 prescribing the method of voting by placing an appropriate mark in the square opposite the name of the candidate voted for. Section 162 provides for inserting a name by the voter and making the mark immediately preceding same, but does not provide for erasing the names of any other candidates. On the contrary it provides that the voter shall leave "the square preceding the name of each candidate he does not wish to vote for unmarked."

6. You also request my opinion upon the question whether where a name is written or stamped on a ballot and the proper mark is made following the name instead of preceding it, the election judges should count this as a vote for the person whose name is so marked.

In my opinion the ballot should not be counted as a vote for such person. Section 192 of the Code provides that the mark shall be made "immediately preceding the name inserted." I think this requirement is mandatory and must be complied with, otherwise the attempted vote for such person is void.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Ballot: Form of Ballot in Local Election to Determine Form of Local Government.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., FEBRUARY 4, 1944.

MR. J. W. BOLEN,
Chairman City Electoral Board,
Harrisonburg, Virginia.

MY DEAR MR. BOLEN:

I am in receipt of your letter of February 3, and since you desire a prompt reply I shall not attempt to repeat in detail the situation set out in your letter.

I have carefully considered your letter, however, and am of the opinion that, section 197a of the Code having been last amended in 1942 (Chapter 64 of the Acts of 1942) and it being specifically provided therein that the section supersedes "any provision of any other statute or act, or the charter of any city or town," said section 197a controls insofar as the form of the ballot and the method of marking the same are concerned. As to the verbiage which should be used in stating the question to be submitted, I am also of opinion that section 197a of the Code controls and that the ballot should "state briefly the question or proposition submitted to the electors." Merely as a suggestion, it seems to me that the following language will comply with the requirement:

"Question: Shall the City Manager forms of government be adopted?"

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Person Holding Public Office May Be Candidate For An Incompatible Office.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 8, 1944.

SENATOR EDWARD L. BREEDEN, JR.,
Bank of Commerce Building,
Norfolk, Virginia.

MY DEAR SENATOR BREEDEN:

This is in reply to your request for my opinion upon the question arising under the election laws of this State which I quote as follows:

"A person, who has been duly elected and has heretofore been serving as Clerk of Court, but due to his holding a Reserve Naval Commission, he is called to active duty and thereafter vacates his office under existing provisions of law and an Acting Clerk is named in his stead. Thereafter his term of office is about to expire while he is out of the Continental United States in connection with his Naval duties, but is otherwise qualified to hold office. The question is, can such a person, by mail, sign the necessary Declaration of Candidacy, attend to other formalities and have his name submitted to the Electorate in a Democratic Primary Election? Further, if he was the successful candidate in such Primary, could he have his name printed on the General Election ballot as the Democratic Party candidate and be validly elected?"
REPORT OF THE ATTORNEY GENERAL

"The request for this ruling is made without regard to such candidate being subsequently able to qualify for his office and further, disregarding any Naval Regulations preventing his candidacy."

In my opinion, there is no doubt about the right of the clerk of the court to qualify as a candidate both in the primary and in the general election. You will note that, under the provisions of chapter 259 of the Acts of 1944 adding a new section number 276a to the Code, affidavits and oaths may be made before any commissioned officer in the Army or Marine Corps with the rank of second lieutenant, or with the rank of Ensign or higher in the Navy or Coast Guard. There will, therefore, be no difficulty in the candidate executing the proper qualification papers.

I have frequently had occasion to express the view that the fact that a person may hold an office at the time he is a candidate which he could not hold at the same time as the office for which he is a candidate if he is elected thereto does not disqualify him as such candidate, for the reason that when the time comes to qualify he may no longer hold the incompatible office.

The foregoing is not intended as an implication that a person holding a naval reserve commission is thereby disqualified from qualifying as clerk of the court.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

ELECTIONS—Candidates: Eligibility of Members of Armed Services to Be Member of General Assembly Is Question for General Assembly.

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

HONORABLE H. W. HUFF,
Member House of Delegates,
Pulaski, Virginia.

MY DEAR MR. HUFF:

I have before me your letter of August 11, which is as follows:

"At the general election to be held on November 2, 1943, members of the General Assembly will be elected. A number of candidates for election to the General Assembly are serving with the armed forces of our country and some question has arisen as to their eligibility to be elected and hold office as members of the assembly.

"I will very, much appreciate an opinion by you on the question of eligibility set out above, with particular attention to Section 44 of the Constitution of Virginia."

Section 44 of the Constitution of Virginia, to which you refer, contains this provision:

" * * * no person holding any office or post of profit or emolument under the United States government or who is in the employment of such government, shall be eligible to either house."

The language quoted raises the question of the proper interpretation of the words "office or post of profit or emolument"; that is, whether a person who risks life and limb in the armed forces of his country, in time
of war, holds such an office within the contemplation of the Constitution. It is a question, however, concerning which I do not think it would be proper for me to express an opinion, for the reason that the Constitution reserves to the Senate and House of Delegates, respectively, the sole prerogative of deciding all questions relating to the qualification of their members. Section 47 provides that "Each house shall judge of the election, qualification, and returns of its members." The Courts are given no jurisdiction whatever to determine any such question, thus carrying into effect the major governmental policy expressed in section 5 of the Bill of Rights, "That the legislative, executive and judicial departments of the State should be separate and distinct." This policy is later emphasized in the Constitution by devoting an entire article to its further declaration. Article III provides:

"Except as hereinafter provided, the legislative, executive and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

Since the Courts have no jurisdiction to decide this question, it seems clear that the Attorney General, who by Article VI, section 107, of the Constitution is classified as a part of the Judiciary Department, should express no official opinion with respect to same.

I may add that at the 1942 extra session of the General Assembly a number of members of the armed forces, who were members of the House and Senate, were present and performed their legislative duties without any question as to their eligibility to do so being raised.

I feel sure that, in view of the foregoing provisions of our Constitution, you will agree with me that the question of eligibility of a member of the General Assembly to serve is one which is exclusively within the province of the Senate and House of Delegates to judge, and that the Attorney General should not inject his views into the matter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Notice of Candidacy Must Be Properly Witnessed.

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

ELECTORAL BOARD OF RUSSELL COUNTY,
Mr. H. O. Pratt, Chairman;
Mr. W. S. Banner, Secretary;
Mr. Arthur Williams, Member,
Lebanon, Virginia.

GENTLEMEN:

This is in reply to your letter of September 6, 1943, with which you enclose a copy of a notice of candidacy together with the accompanying petition of Ryland R. Musick, a candidate for clerk of the Circuit Court of Russell County, and also a copy of the county clerk's certificate transmitting same to you. The clerk does not certify that the notice was "duly filed" or was a proper notice, but transmit same to you with the request that you decide this question. You request my opinion upon the question of whether said notice and petition comply with the requirements of law so as to authorize you to have the name of said candidate printed upon the official ballot to be used in the November election. The copy of said notice of candidacy dis-
closes that it was signed by Ryland R. Musick. It is attested by only one witness, L. S. Owens, and this witness also acted in the capacity of a notary public in certifying that said candidate acknowledged before him his signature to the notice.

Section 154 of the Code of Virginia provides with respect to the form of notice of candidacy required to be given ninety days before the election by candidates for offices elected by the electors of the State at large, or of a Congressional District, that it shall be "signed by the said candidate," if he is capable of writing his proper signature, shall be "in writing" and "attested by two witnesses." The section provides that in the event a candidate "be incapable of writing his proper signature" he may adopt a mark as his signature, in which case he shall acknowledge such adoption of the mark "before some officer authorized to take acknowledgments to deeds and in the same manner."

Said section also provides that all other candidates (among which the county clerk is one) shall, sixty days before a general election, give notice to the county clerk * * * whose electors vote for such office, which notice shall in all respects be in the same form as that above described" for State-wide and Congressional candidates. I have heretofore expressed the view, in an opinion given to the clerk of Lee County, that this section requires a candidate for a county office (other than a party primary nominee) to file with the clerk of said County "at least sixty days before the election a written notice of candidacy signed by the candidate and attested by two witnesses, designating the office for which he is a candidate." See Annual Report of the Attorney General, 1939-1940, p. 88. Such a candidate, if he is not a party nominee, is required by said section to file along with his notice of candidacy "a petition therefor signed by fifty qualified voters" of his county, "each signature to which has been witnessed by a person whose affidavit to that effect is attached to such petition."

Referring again to the notice of candidacy and petition filed with the clerk by the candidate, Ryland R. Musick, in my opinion the petition is in substantial compliance with the statute if the signers of same are qualified voters of Russell County, which I assume to be the case. However, the notice of candidacy seems to me to be fatally defective, in that it is attested by only one witness. Instead of having two attesting witnesses, as the statute above referred to requires, the candidate acknowledged the notice before said one witness in said witness' capacity as notary public. The statute does not provide for such an acknowledgment by the candidate except in cases where the candidate is "incapable of writing his proper signature" and is required to acknowledge "some mark adopted by him as his signature." Since the notice here involved was actually signed by the candidate, the statutory provision as to acknowledgment of a mark as having been adopted as a signature obviously has no application. The certificate of acknowledgment must, therefore be treated as surplusage and without legal effect. But even in cases where a candidate adopts a mark and acknowledges same, such acknowledgment does not eliminate the requirement that his notice be also attested by two witnesses. Said Code section provides that the entire writing by which the clerk is notified of the candidacy must be attested by two witnesses, not merely that the signature thereto be so attested. On the contrary the requirement that the writing be signed, or a mark acknowledged in lieu of signing same, is contained in a subsequent sentence in this section. It is clear that the mark and its acknowledgment are provided as a substitute for the signature only, and not as a substitute for the attestation by two witnesses of the writing itself. A mere acknowledgment of a mark as a signature by an illiterate person would not be conclusive evidence that he knew he was announcing his candidacy for office. In such a case it would seem to be appropriate for the two attesting witnesses to read the writing to such person and make sure that he understands that he is giving notice of his intention to become a candidate for a particular office at the election therein designated.

Returning then to the precise question presented, i. e., the authority of the
electoral board to have this candidate's name printed on the ballot for the November election,—in my opinion said section 154 provides the answer to same in express terms. After requiring the signing of the written notice of candidacy by every candidate capable of signing same, and that the notice be attested by two witnesses, the said section continues with the following: "No person not announcing his candidacy as above * * * shall have his name printed on the ballots provided for such election unless he be a party primary nominee." This language of the statute is clear and unequivocal. Since the candidate here involved is not a party primary nominee and did not comply with the plain provision of the statute requiring two attesting witnesses to his notice of candidacy, it would be a clear violation of said section 154 for the electoral board to have his name printed on the ballot. It follows that in my opinion the said board is manifestly without authority so to do.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Notice of Candidacy by Party Nominees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 11, 1943.

HONORABLE CHARLES H. HARPER,
Chairman Electoral Board,
Winchester, Virginia.

MY DEAR MR. HARPER:

This is in reply to your letter of September 10, 1943, requesting my opinion upon the authority of the electoral board to have printed on the ballot for the November election the name of James M. Dawson. You state that Mr. Dawson did not file any notice of candidacy with the Clerk of the Court, nor did he file any petition for his candidacy signed by fifty qualified voters; that the only action taken by Mr. Dawson was to file with you, as chairman of the electoral board, a paper as follows:

"Winchester, Va.,
"Sept. 1, 1943.

"To Whom It May Concern:
"C. Arthur Robinson having resigned as chairman of Winchester Republican Committee phoned me to prepare endorsement papers for James M. Dawson, Jr., for candidate for State Senate and A. C. Halvosa, City Secretary being away I hereby act in Mr. Robinsons' capacity in his duty as chairman as Mr. Dawson wishes to act immediately in order to get his papers filed without delay.

"Very truly yours,

"(Signed) H. R. POTTS, Vice-Chairman,
"City of Winchester, Va."

Section 154 of the Code has been frequently interpreted in the official opinions of this office as follows:

1. A party primary nominee is not required to notify the clerk of the court or anyone else of his candidacy, in order to have his name printed on the ballot used in the following general election.
2. A party nominee, other than a primary nominee, in order to have his name printed on said ballot, is required to give notice in writing to the clerk, attested by two witnesses of his intention to become a candidate for a specified office at said election. Such a party nominee is not required to accompany his notice with a petition signed by fifty qualified voters as provided in said section must be done by candidates who are not party nominees.

3. A candidate who is not a party nominee, in order to have his name printed on said ballot, must notify the clerk as set out in the preceding paragraph, and, in addition thereto, must "file along with his notice of candidacy a petition therefor, signed by fifty qualified voters of his city, county or district, as the case may be, * * * each signature to which has been witnessed by a person whose affidavit to that effect is attached to such petition."

It does not appear from your letter whether Mr. Dawson is a party primary nominee or not. If he is, his name should be printed on the ballot, as no notice or petition is required of any such candidate.

On the other hand, if Mr. Dawson is not a party primary nominee, he having failed to give the required notice to the clerk as provided by said section 154, the electoral board is without authority to have his name printed on the ballot for the general election in November.

The statute makes no provision for a candidate's notifying the electoral board instead of the clerk, but even if it did, the paper above quoted would not constitute such a notice. It does not even state that Mr. Dawson is a nominee of the Republican party, and in my opinion has no legal effect upon the candidate's right to have his name printed on the ballot. In my opinion he clearly has no such right.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Notice of Candidacy by Persons Other Than Party Nominees.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 10, 1943.

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

MY DEAR MR. FRIEND:

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

"It seems from section 154, page 48, of Virginia Election Laws in effect June 27, 1942, that a candidate for a county office at the general election who is not a party nominee shall file a petition of fifty qualified voters together with his declaration or notice of candidacy.

"It seems that no one here including myself knew that the above mentioned petition had to be filed, as this is the first time that we recollect that an independent candidate has run in the general election in this county.

"Please advise as soon as possible if this can be remedied by filing said petition now or are there any further steps that can be taken to correct this."
Section 154 of the Code requires in effect that any person who intends to be a candidate for a county office at a general election shall file his notice of candidacy "at least sixty days before such election." The section further provides that such candidate for office shall "file along with his notice of candidacy a petition therefor signed by fifty qualified voters of his county." There are certain exceptions in the section for a party primary nominee and for a party nominee nominated by some other method than a primary, but these exceptions are not pertinent here, since you state that the candidate involved is not a party nominee.

The section further expressly provides that, unless such notice of candidacy is filed accompanied by the petition, the name of such candidate shall not be printed on the ballot. Therefore, since the independent candidate to whom you refer did not file the petition along with his notice of candidacy at least sixty days before the coming election, I am of opinion that the name of such candidate may not be printed on the ballot. The provisions of the statute to which I have referred being mandatory and the time having now expired within which the notice of candidacy and petition may be filed, I am of opinion that the filing of a petition at this time would be of no legal effect, nor do I know of any way by which the situation can now be corrected.

The views expressed herein are in accord with frequent prior rulings of this office.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Filing of Petition Unnecessary By Party Nominee Unopposed; Notice of Nomination to Electoral Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 13, 1943.

HONORABLE GEORGE H. DAVIS, JR.,
Commonwealth's Attorney,
Washington, Virginia.

MY DEAR MR. DAVIS:

This is in reply to your letter of August 11, in which you request my opinion upon the two following questions:

1. If a candidate in the Primary had no opposition and was declared the Democratic Nominee by the Democratic Committee, is it necessary for him to file a petition signed by fifty qualified voters in order that his name be placed on the ballot in the November General Election?

I have repeatedly expressed the opinion that it is not necessary for any party nominee to file the petition signed by fifty qualified voters in order that his name may be printed on the ballot in the general election by reason of the following provision contained in section 154 of the Code:

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

"* * * other than a party nominee, nominated by such method as his political party may have chosen for nominating candidates, * * * ."

It is immaterial, therefore, to undertake to determine whether or not a person declared the nominee of the party without the primary being actually held, by reason of the fact that he was the only person qualifying with the Democratic Committee, is a primary nominee. In either event, it is not necessary for him to file such a petition. I have, however, expressed the view that it is safer for such person to file the notice or declaration of candidacy required of other candidates.

2. Is it necessary for the Chairman of the Democratic Committee to certify to the Electoral Board the name of the party nominee in order that his name be placed on the ballot in the general election?

There is no express provision of the statutes requiring any such certification. However, it seems to me it would be an implied duty on the part of the party chairman to certify the names of the party nominees to the electoral board, so that the electoral board may be thus officially advised of the names of such nominees. This certification, therefore, would be sufficient in my opinion to authorize the electoral board to dispense with the requirement for the filing of the petition along with the notice of candidacy.

I do not believe, however, that this is the only source of information of the fact that a person is a party nominee upon which the electoral board may rely. Any reliable information is sufficient which satisfies the electoral board that a candidate is a party nominee, whether the same be oral or written.

Section 154 of the Code provides that the election commissioners shall certify the names of the party nominees to the secretary of the electoral board where there has been an actual primary election. But, the statute makes no provision for any particular method of informing the electoral board where the candidate is nominated otherwise than by a primary.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Eligibility to Have Name Printed on Ballot.

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

HONORABLE LITTLETON H. Mears,
COMMONWEALTH'S ATTORNEY,
EASTVILLE, VIRGINIA.

MY DEAR MR. MEARS:

This is in reply to your letter of September 22, in which you state that the county electoral board has requested your opinion upon the question of the authority of said board to print upon the ballots to be used in the November election the name of a candidate for county treasurer, who has filed the proper notice and petition of fifty qualified voters, but who has not paid six months prior to November 2, 1943, the capitation taxes which have been assessed or were properly assessable against him for the years 1940, 1941, and 1942. You state that such candidate is not a party primary nominee of any party.
The answer to your question is found in the language of section 154 of the Code, which, in referring to the procedure necessary to be taken by a candidate in order to have his name printed upon a ballot at a general election, provides 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 candidatee, shall have his name printed on the ballots provided for such election, unless he is a party primary nominee * * * ."

Since under the Constitution and statutes of Virginia a person who has not paid all capitation taxes assessed or assessable against him for the years 1940, 1941, and 1942, is not entitled to vote in the November election, it follows from the language quoted that he is likewise not entitled to have his name printed on the ballots for such election.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Party Nominee; Status of a Candidate Defeated in the Primary.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 21, 1943.

Honorable Walter L. Hopkins,
Member House of Delegates,
Richmond, Virginia.

My dear Mr. Hopkins:

I have before me your letter of August 17, in which you request my opinion upon the question whether a defeated candidate in a Democratic primary for a local office is eligible to have his name printed upon the ballot for the succeeding general election as a candidate for the same office for which he was a candidate for nomination in the primary in cases where the successful primary candidate dies or withdraws.

Your question depends upon a determination of the legislative intent with which the following provision contained in section 229 of the Code was enacted:

"The name of no candidate shall be printed upon any official ballot used at any primary unless * * * he make and file a written declaration of candidacy, * * * substantially in the following form: 'I, ................., of the county of (or town or city of) ................., a member of the ................. party, declare myself to be a candidate for nomination to the office of ................. to be made at the primary to be held on the ................. day of .................. If I am defeated in the primary I hereby direct and irrevocably authorize the election officials charged with the duty of preparing the ballots to be used in the succeeding general election not to print my name on said ballots.'"

It is an elementary and cardinal rule of statutory construction that effect must be given to the intention of the legislature in enacting a statute, and that in arriving at such intent other relevant statutory provisions must be taken into consideration. Section 229, above quoted from, is contained in chapter 15 of the Code, which chapter relates solely to primary elections. The preceding section, 228, prescribes as a test for eligibility to vote in a primary
the requirement that the person offering to vote must have supported the nominees of the party at the last election in which he voted where the party nominees had opposition, or, if such person be a new voter, it is a sufficient compliance with the requirement if he is a member of the party and will support its nominees in the ensuing election.

The obvious and sole purpose of the provision above quoted from section 229 is to prevent a candidate in a primary election, who is defeated therein, from later becoming a candidate in the general election against the party nominee. To construe it as a prohibition against his candidacy under all circumstances would have the effect of depriving the party itself of the right to nominate a defeated primary candidate in cases where the party finds itself without any nominee at all because of the death or withdrawal of the successful primary candidate. No such unreasonable intent can be imputed to the legislature, when the clear purpose of the quoted provision is given consideration.

It is my opinion, therefore, that the answer to your question depends upon whether, after the death of the primary nominee, the party nominates another candidate who is not the defeated primary candidate. If it does, it is my view that the name of the defeated primary candidate cannot be printed upon the ballot as a candidate in opposition to such nominee in the ensuing general election. On the other hand, if there is no party nominee for the general election, or if he be the nominee, it is my opinion that the name of such defeated primary candidate may be printed on such ballot if he complies with section 154 of the Code requiring notice of candidacy, filing of a petition of voters, etc., as a condition to the printing of the names of candidates on the ballot in general elections.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, VA., August 26, 1943.

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

MY DEAR MR. GOFF:

This is in reply to your letter of August 24, from which I quote as follows:

"An article was printed in The Roanoke Times on or about July 31 styled 'Political Ban is Explained—Policy Relating to Service Termed Essential—Washington, July 31.' It read in part '(2) No member of the military forces on active duty will hereafter become a candidate for or seek or accept election to any public office not held by him when he entered upon active duty.'

"We have a person who was nominated for a county office some time in the early part of April and filed his notice of candidacy in my office on April 20, 1943, and on or about June 5, 1943, was inducted into military service and assigned to the Navy. This person never has held the office to which he filed his notice of candidacy.

"In view of the War Department policy as quoted above in part, a question has arisen in my mind as to whether it is my duty to certify this person's name as a candidate to the Electoral Board or refuse to
certify same. The law requires the clerk to certify a list of candidates for the respective offices immediately after the last filing date, which is September 2, this year. Therefore, I shall appreciate very much an opinion from you on this matter at the earliest date possible."

Section 154 of the Code makes it the mandatory duty of clerks of courts to notify the secretary of the electoral boards of their respective counties "the names of each and every candidate which has been duly filed" with him. Therefore, where a candidate has "duly filed" his notice of candidacy for a county office pursuant to section 154 of the Code, I am of opinion that the clerk should comply with the aforesaid duty placed upon him. I do not think that the statute contemplates that it is within the discretion of the clerk to determine whether or not a candidate is eligible for the office to which he aspires under a regulation of a Federal agency.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

ELECTIONS—Eligibility to Vote: Last Date For Payment of Poll Taxes; Last Date For Qualification of Congressional Primary Candidates.

HONORABLE JOHN G. WALLACE, II,
Treasurer of Norfolk County,
P. O. Box 487,
Portsmouth, Virginia.

MY DEAR MR. WALLACE:

Replying to your letter of April 4, you are advised that in my opinion Saturday, the 6th of May, is the last day on which capitation taxes may be paid in order for a person to be eligible to vote in the November, 1944, election.

It is also my opinion that Wednesday, the 10th day of May, is the last day on which a candidate may qualify in the congressional primary to be held on August 8.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

ELECTIONS—Eligibility to Vote: New Resident; Payment of Poll Tax.—Absentee Voting: When Ballot Must Be Returned.

MR. G. L. SMITH,
Registrar,
South Hill, Virginia.

MY DEAR MR. SMITH:

In your letter of July 6, you request information upon the question whether a person who became a resident of Virginia in September, 1942, but
who has not paid any poll taxes since his coming into the State, is eligible
to vote in the August primary.

Our Constitution (sections 18 and 21), as you no doubt know, requires
as a prerequisite to a person's right to vote the payment six months before
the election of all capitation taxes assessed or assessable against such person
for the three years next preceding that in which he offers to vote.

Section 22 of the Tax Code, as amended by Acts of 1942, page 337, pro-
vides that every person moving into Virginia at any time during any calendar
year, including 1942 and subsequent years, is assessable with a capitation
or poll tax for the year in which he becomes a resident, regardless of whether
or not he was a resident on the first day of January of said year. Since the
person you refer to was assessable with a capitation or poll tax for the year
1942 and has not paid the same, it follows that he is not eligible to vote in
the general election in November, and, therefore, is not eligible to vote in
the August primary. It is too late for him to pay such tax now, as it is less
than six months before the November election.

Replying to your further inquiry, you are advised that an absentee ballot
May be counted if received by the registrar at any time prior to the closing
of the polls on election day:

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Eligibility to Vote; Payment of Poll Taxes By Persons Just
Becoming of Age.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 17, 1943.

Senator John S. Battle,
Charlottesville, Virginia.

My dear Senator Battle:

You request my opinion with respect to the following question:

Is a person who became twenty-one years of age during the year 1942
but after the first day of January of said year, and who pays his or her State
poll tax for the year 1943 at a time which is less than six months prior to
the November, 1943, election, eligible to register and vote in said election and
in the August, 1943, primary?

Section 20 of the Virginia Constitution provides that every person other-
wise qualified, who has paid "all State poll taxes legally assessed or assessable
against him for the three years next preceding that in which he offers to
register; or if he come of age at such time that no poll tax shall have been
assessable against him for the year preceding the year in which he offers to register,
has paid one dollar and fifty cents in satisfaction of the first year's poll tax
assessable," shall be entitled to register. Section 21 of the Constitution pro-
vides that a person who has registered under the above section and has paid
six months prior to the election all State poll taxes assessed or assessable
against him during the three years next preceding that in which he offers to
vote shall be entitled to vote in said election.

The answer to your question, therefore, depends upon whether the per-
son you refer to was assessable with a State poll tax for either of the years
1940, 1941, or 1942.

Section 22 of the Tax Code levies the State poll tax, but only upon per-
sons "not less than twenty-one years of age." This provision, therefore, makes
it clear that the person you refer to was not assessable with a poll tax for
either of the years 1940 or 1941, leaving only the question of assessability for
the 1942 poll tax. Section 424 of the Tax Code requires that "except where otherwise specifically provided" the tax year shall begin on the first day of January of each year, "and all assessments shall be made as of the first day of January of each year." Therefore, unless otherwise provided with respect to poll taxes, a person who was less than twenty-one years of age on the first day of January, 1942, was not assessable with a poll tax for that year. Not only is there no contrary provision as to poll taxes, but the fact that such a person was not assessable with a 1942 poll tax is clearly recognized in the following quotation from section 420 of the Tax Code:

"Any person assessable with capitation taxes for any year or years, who has not been assessed therewith, and any person who will be assessable with such taxes for the ensuing year by reason of his becoming of age after the first of January in any year, may apply to the commissioner of the revenue for the county or city in which he resides and have himself assessed with such omitted capitation taxes or with such capitation taxes as shall become assessable against him for the ensuing year by reason of his becoming of age after the first of January in any year, and it shall be the duty of the commissioner of the revenue to assess such person with such omitted capitation taxes or with such capitation taxes as will become assessable against him for the ensuing year by reason of his becoming of age after the first of January in any year, and to give such person a certificate of such assessment, and thereupon the treasurer of the county or city in which the person so assessed resides shall receive from such person the capitation taxes set out in such certificate. * * *

It seems clear from the foregoing constitutional and statutory provisions that the person referred to in your question was not assessable with a poll tax for any of the three years preceding 1943, and upon payment of his or her 1943 poll taxes at any time prior to the closing of the registration books is entitled to register and to vote in the November, 1943, election.

Since the person you refer to is qualified to vote in the 1943 November election, if he or she registers in time said person is also entitled to vote in the August, 1943, primary. "All persons qualified to vote at the election for which the primary is held * * * may vote at the primary." Virginia Code section 228.

Sincerely yours,

ABRAM P. STAPLES.
Attorney General.

ELECTIONS—Eligibility to Vote: Change of Residence Depends Upon Intent of Voter.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1943.

Honorable J. Livingstone Dillow,
Attorney for the Commonwealth,
Pearisburg, Virginia.

My Dear Mr. Dillow:

This will acknowledge receipt of your letter of October 21, from which I quote as follows:

"A Virginia voter has moved out of the precinct in which he is registered and has lived for quite a long time in another precinct in the same county and has purchased property and lives and resides in the pre-
cinct to which he has moved. The wife of the voter, prior to her marriage was registered and voted in another county. The wife has transferred to the precinct where her husband first voted and did not transfer to the precinct of her residence and that of her husband.

"I shall appreciate your opinion whether or not these persons would be entitled to vote in the precinct where they did not live, or be required to vote in the precinct of their residence."

If the individual in question, when he moved out of the precinct in which he has registered, did not intend to abandon his domicile in such precinct and still has the intention of resuming his residence therein at some future time, I am of the opinion, and this office has frequently so ruled in the past, that he may continue to vote in his original precinct. The wife of such an individual may, of course, register and vote in the precinct in which the husband maintains his legal domicile. The question of legal domicile so largely depends upon the facts in each particular case, especially the intention of the individual involved, that it is a matter which should be passed on by the judges of election after a full presentation of all of the facts in case of a challenge.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

ELECTIONS—Eligibility to Vote; Residence On United States Reservation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 2, 1944.

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

MY DEAR MR. GREEN:
This is in reply to your letter of April 27, in which you request my opinion upon the question whether or not a person residing on a Federal reservation in Arlington County which is not used for military purposes may be deemed to be a voting resident of Arlington County.

Answer to this question would depend upon whether or not the reservation is one over which the United States has acquired exclusive governmental jurisdiction. Generally speaking, such jurisdiction in the past has not obtained over reservations not related to military or naval purposes, although there are some exceptions. It may be that at the time the Federal Government acquired the lands a special act of the General Assembly of Virginia was enacted which conferred such jurisdiction.

Since the passage of section 355 of the Revised Statutes of the United States, as amended by Act of Congress approved October 9, 1940 (54 Stat., 1083), the mere enactment of a statute conferring jurisdiction of any kind upon the United States over lands acquired by it is not effective unless and until the head of the governmental agency having charge of such property accepts such jurisdiction on behalf of the Federal Government. By Acts of 1940, page 761, the Governor and Attorney General are authorized to convey exclusive jurisdiction in certain cases to the United States upon the request of the appropriate Federal department head, who, in turn, accepts the jurisdiction.

There have been a number of these deeds recorded in Arlington County.

If persons residing on any governmental reservation have been entitled to vote as citizens of Arlington County in the past, that is, since October 9,
1940, they are still entitled to vote as residents of the county unless a deed has been executed by the Governor and Attorney General of Virginia conveying exclusive jurisdiction to the United States over such lands. In a case of this kind, I suggest that you ascertain from the office of the Clerk of the Court whether or not any such deed has been executed and recorded since Governor Darden has been in office. No such deeds were executed while Governor Price was Governor. In the absence of any such deed, persons who, by reason of residence upon such lands, were lawful residents of Arlington County would still be such residents, and be entitled to vote as in the past.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote; Challenge of Time of Residence of Voter.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 20, 1943.

Mr. Frank L. Wilson,
Commissioner in Chancery,
‘Portsmouth, Virginia.

My dear Mr. Wilson:
I am in receipt of your letter of December 18, from which I quote as follows:

“I am writing to inquire whether you can or will straighten me on an apparent irreconcilable conflict of the law according to Michie’s Code of 1942. Sections 82 and 93 of the Code referred to, and section 18 of the Constitution provide that one year’s residence shall be the prerequisite for voting. Section 175, relating to challenges in offering to vote, provides that the person challenged shall make an affidavit that he has resided in this State for ‘two’ years. Is the two-year period mentioned in section 175 a typographical error or was it intended that it should so read?”

The conflict to which you refer is more apparent than real. The explanation is that section 175 of the Code has not been amended to conform with the 1928 amendment to section 18 of the Constitution changing the period of residence in the State to qualify a person to vote from two years to one year. The constitutional provision, of course, controls and, therefore, section 175 of the Code must be construed as if the periods of residence prescribed therein have been changed to conform with the constitutional change.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Registration: Naturalized Citizens.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., September 10, 1943.

MR. CLAUDE O. THOMAS,
Secretary Electoral Board of Arlington County,
Court House,
Arlington, Virginia.

MY DEAR MR. THOMAS:
This is in reply to your letter of September 8, requesting my opinion upon whether section 93 of the Code, relating to registration of voters, authorizes a registrar to register a person who states he is a naturalized citizen of the United States, but who cannot establish the date of his naturalization papers or the Court in which they were issued by reason of his having lost same, without requiring from such person his oath or affirmation that he has been duly naturalized.

Said Code section contemplates that the registrar shall interrogate every person offering for registration upon questions relating to his right to register, and provides that any such person "shall answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the registrar,* * * " The third paragraph of said section I quote as follows:

"If any person claiming to be a naturalized citizen of the United States shall not be able to establish the date of his papers, or the court in which they were issued, by reason of his having lost the same, or for other causes, then his oath or affirmation that he has been duly naturalized shall be accepted and shall entitled him to register."

In my opinion it is the clear intention of the quoted provision that the registrar shall, before registering such a person, require either the production of his naturalization papers or a statement under oath or an affirmation, as the case may be, that he has been duly naturalized.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Naturalized Citizens; Length of Residence.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., March 28, 1944.

HONORABLE T. ALDEN OAST,
Attorney for the Commonwealth,
Portsmouth, Virginia.

MY DEAR MR. OAST:
This will acknowledge receipt of your letter of March 27 reading as follows:

"The local registrar has an application to register for the primary to be held in this city on April 4 a person who has resided in the city of Portsmouth for twelve years. This person became a naturalized citizen in January, 1944. This person has paid poll taxes for three years, within the legal period.
"Will you kindly advise whether this person should be registered and permitted to vote on April 4, 1944?"

Section 18 of the Constitution sets out the qualifications of voters and among others provides that a person must be a "citizen of the United States * * * who has been a resident of the State one year * * *." There is no requirement as to the length of time that a person must have been a citizen of the United States.

I am, therefore, of the opinion that, if the person to whom you refer fulfills the other qualifications prescribed by the Constitution, the fact that he did not become a naturalized citizen until January, 1944, does not affect his eligibility for registration and voting.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: New Resident; Earliest Date for Registration.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 17, 1943.

Mr. Henry H. Elswick,
Registrar,
Richlands, Virginia.

My dear Mr. Elswick:

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

"A person moving from West Virginia into Virginia and paying his poll tax wants to register now, and he has been in the State only six months. Will it be permissible for him to register now, or will he have to wait until he has resided in the State for one year?"

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. Therefore, if the person to whom you refer will have complied with the residence requirements for voting by the time of the next election, I am of opinion that he may now register, provided, of course, he pays the required capitation taxes within the time prescribed by statute.

Very sincerely yours,

ABRAM P. STAPLES
Attorney General.
ELECTIONS—Registration; Residence of Wife Presumed to Be That of Husband.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 4, 1944.

Honorable C. R. Kennett,
City Treasurer,
Roanoke, Virginia.

My dear Mr. Kennett:
This will acknowledge receipt of your letter of March 2, in which you ask the following question:

"A man who is now a resident of Washington, D. C., and has been for a number of years, but has retained his citizenship here and paid his poll taxes regularly during his absence from the city, in 1943 married a lady who was a resident of New York State. He desires to qualify his wife as a voter in the State of Virginia. He was married during the year 1943 and, assuming that he has paid her 1943 tax to us, can she qualify as a voter in the State of Virginia, notwithstanding the fact that she has never actually lived here? In other words, would the law automatically permit her to establish her residence in the State of Virginia by reason of the fact that she is now the wife of a bona fide resident of Virginia?"

As a matter of law, the domicile of a married woman follows that of her husband, although in Virginia she may establish a domicile other than that of her husband if she so elects. In the case you put, however, I take it that the wife desires that her domicile be the same as that of her husband, and I am of opinion, therefore, that she may qualify as a voter in Virginia.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Registration: Where Registered Voter Leaves Virginia and Later Returns to Another County.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 30, 1943.

Honorable Harry K. Green,
Commissioner of Revenue,
Court House,
Arlington, Virginia.

My dear Mr. Green:
This is in reply to your request for my opinion on a question relating to a person who was a resident of Winchester, Virginia, and voted there six years ago, but who four years ago moved to the District of Columbia, and in 1940 moved to Arlington County. You state he has paid his 1941 and 1942 capitation taxes in Arlington County. Your specific question is whether or not such a person is eligible to register and vote in Arlington County without obtaining a transfer from the registrar at Winchester, or without his name being purged from the Winchester registration books.

The answer to this question, in my opinion, depends upon whether or not the person to whom you refer actually became a resident of the District of
Columbia when he moved there, or prior to moving back to Virginia. If he did establish his legal residence in the District of Columbia, then it is my view that he is now eligible to register and vote in Arlington County. If, however, he merely moved to the District of Columbia as a temporary place of abode and with the intention of returning to Winchester to live, he would not be eligible to vote at all because he would not have paid the three years' capitation taxes required.

I do not think such a person's right to register and vote is in any way affected by the fact that the registrar at Winchester has not purged his name from the registration list. This should have been done by the registrar if and as soon as he had knowledge that the person had become a resident of the District of Columbia. This failure to do so does not in any way prejudice the rights of the prospective voter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: New Registration of Voters When Old Registration Books Have Been Destroyed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 2, 1944.

MR. J. C. CURTIS,
Secretary Electoral Board of Warwick County,
Denbigh, Virginia.

MY DEAR MR. CURTIS:
This will acknowledge receipt of your letter of April 27, from which I quote as follows:

"Due to the great increase in population in Newport Magisterial District of Warwick County, Virginia, it was necessary to increase the voting precincts from two (2) to six (6), which increase was done by an order of the Circuit Court.

"The Electoral Board of Warwick County deems it expedient to have a new registration in the entire Magisterial District composing the six voting places. The new registrars have been appointed in the new voting places and the proper books furnished them. However, before new registering is done we deem it necessary to have the new registration in the entire district. In the two old precincts we find that in one the permanent roll has been lost. In both of the old precincts some of the books are badly damaged and mutilated to the extent that we consider them about destroyed. There has been no new registration in either of the two old precincts since 1904, and a great many persons appear on the books who are dead and a number have moved away. Therefore, I would appreciate your advising us in the following question: Have we the right under the present election laws to call for a new registration in the entire Magisterial District, including the four new precincts?"

Section 90 of the Code provides that the electoral board shall provide for a new registration of voters for any election district "whenever the registration books have been destroyed by fire or otherwise." If, therefore, the registration books of the two old election districts have been destroyed, I am of opinion that the electoral board may direct a new registration in all six of the election districts. Obviously, if the registration books of the two old election districts have been destroyed, the names of the voters cannot
be transferred to the books in the new districts, as provided in section 102. You will understand, of course, that I cannot express an opinion on the question of whether or not the registration books have actually been destroyed, since this is a question of fact to be determined by the electoral board and concerning which I have no knowledge.

If only the permanent registration rolls have been destroyed, then a copy of such rolls may be secured from the county clerk, as provided in section 108 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

ELECTIONS—Registration: Type of Books to Be Used.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., JUNE 15, 1944.

FRANCIS S. MILLER, ESQ.,  
General Registrar,  
The National Bank Building,  
Harrisonburg, Virginia.

MY DEAR MR. MILLER:  
I am in receipt of your letter of June 13, from which I quote as follows:

"I am general registrar of voters for this city, and in that capacity I am asking if you will please advise me whether or not our official books of registration can be on some loose-leaf form so that the names of voters may be typed therein, rather than being written in ink longhand.

"The Electoral Board has ordered the registration books to be purged between now and the November election, and they have asked me to institute a loose-leaf system if that is permissible, and to put the names in the books by typewriter."

I presume that the statute under which you are acting as general registrar is chapter 226 of the Acts of 1936, as amended by chapter 178 of the Acts of 1942. The Act in question does not authorize any change in the form of the registration books prescribed by section 94 of the Code, which books are furnished by the Secretary of the Commonwealth. In the absence of such authority I am of opinion that it is not permissible to adopt the loose-leaf system that the Electoral Board desires.

Very sincerely yours,

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

ELECTIONS—Registration: When Registration Book to Be Opened to Register New Voters.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 16, 1944.

Mr. C. T. Moore,
Secretary of Electoral Board,
Back Bay, Virginia.

My dear Mr. Moore:

Replying to your letter of March 14, I beg to advise that section 98 of the Code provides that each registrar in the cities and towns of the State shall annually "on the third Tuesday in May" sit for the purpose of registering new voters in his district, and that all registrars "thirty days previous to the November elections * * * shall sit one day" for the purpose of registering new voters.

Your second question is:

"I would also appreciate it if you would advise me whether or not in your opinion a registrar can be required to register people on other days different from the ones prescribed by law; as an example, could a registrar who happens to be a farmer be required to leave his field at any or all times of the day for the purpose of registering new voters?"

Section 98 also provides that the registrar "shall, at any time previous" to the days I have mentioned, register any voter entitled to vote at the next succeeding election who may apply to him to be registered. I do not think, however, that this last provision should be construed to mean that a registrar is required to register any person who may apply to him for this purpose at any and all hours of the day or night. In my opinion, the registrar may require that the applicant appear for this purpose at such times which are reasonably convenient both to the registrar and to the applicant and that neither the registrar nor the applicant can arbitrarily select such times for registration as are unreasonable under the circumstances. What would constitute a reasonable time would be a question to be determined by the facts in each particular case. In the illustrative case that you put I should say that the answer would be "no."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: When Books to Be Closed in Cities.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 2, 1944.

Mr. James O. Heflin,
Chairman of Electoral Board,
Hopewell, Virginia.

My dear Mr. Heflin:

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

"As chairman of the local Electoral Board, I wish to be advised by your office whether it is now permissible for the general registrar of this
city to register persons eligible and qualified to vote at this time in view of the fact that we have a general election on the 13th instant.

"The provisions of section 98 of the election law is not clear on this point and I have been requested to obtain your ruling in the matter. A prompt reply will be appreciated."

This office has uniformly ruled for a number of years that the effect of section 98 of the Code is to provide that the registration books in cities of the State shall be closed for the registration of new voters after the third Tuesday in May up to and including the day of the June election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: When Residents of Town May Register for Town Elections.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 31, 1944.

Mr. Henry H. Elswick,
Registrar for the Town of Richlands,
Richlands, Virginia.

My dear Mr. Elswick:

This is in reply to your letter of May 29, from which I quote as follows:

"We are having a town election Tuesday, June 13, 1944, and there has been some discussion as to the last day for registration in order to be able to vote in this election. Some of the candidates are insisting that a person would be eligible to vote if they registered the third Tuesday in May, the regular day for the registrar to sit, but that date was the 16th of May and would not be thirty days before the election. I will appreciate your advising if it is necessary that a person register thirty days before an election. This information is desired by the judges of election."

I direct your attention to section 2995 of the Code, which provides that a town registrar shall before any election register all voters who are residents of such town "and who shall have previously registered as voters in the county * * * in which such town is situated, and none others." In view of the quoted language, I am of opinion that all residents of the town who have registered as voters in the county up to and including the third Tuesday in May of this year may register on the town books. I do not know of any statute providing that a person must have registered thirty days before a town election. The thirty day provision for registration is applicable only to the registration held prior to the November elections.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Officials: Appointment of in a Town Located in Two Counties.

MR. W. T. HICK, 
Secretary Carroll County Electoral Board, 
Hillsville, Virginia.

My dear Mr. Hicks: 
I am in receipt of your letter of November 22, from which I quote as follows:

"Due to the number of voters now voting in the Town of Galax it has become necessary to create more than one voting precinct in the town. "I understand that it is the intention of the Town Council to divide the town into three precincts (two in Grayson and one in Carroll) so that the voters may vote at the same place in town elections that they do in the county and State elections.  "Under the circumstances I feel that it would be better if Grayson citizens could be appointed to serve as judges and clerks in the Grayson precincts.  "I would therefore appreciate it if you would advise whether I would have authority to ask citizens of Grayson county to serve in Galax town elections or whether the limitation of my office to Carroll county would necessitate my appointing all election officials from Carroll, in spite of the fact that only Grayson citizens will be voting at two of the precincts."

Section 2995 of the Code provides that:

"The electoral board of the county within which such town or the greater part thereof is situated, shall, not less than fifteen days before any town election therein, appoint one registrar and three judges of election for each voting precinct, which judges shall also act as commissioners of election. The said registrars shall, before any election in said town, register all voters who are residents of the respective precincts of such town, and who shall have previously registered as voters in the county, or either of them in which said town is situated, and none others. The said registrars shall be governed as to their qualifications and powers, and in the performance of their duties, by the general laws of this Commonwealth, so far as the same may be applicable."

You will observe that the quoted section does not deal with the question of the residence of the election officials, but it is entirely clear, in my opinion, that for the precincts which are located on the Grayson side of Galax the election officials may be residents of that portion of Galax lying within Grayson county.

You will also observe that the appointment of the election officials is to be made by the electoral board of the county “within which such town or the greater part thereof is situated.”

You will understand that what I have written represents a construction of section 2995 of the Code and, if there is any provision in the charter of the town of Galax to the contrary (which charter is not before me), it should be taken into consideration.

Very sincerely yours,

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

ELECTIONS—Polls: Annexation; Where Citizens of Annexed Area to Vote.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 24, 1943.

HONORABLE ROBY C. THOMPSON,
Attorney for the Commonwealth,
Abingdon, Virginia.

MY DEAR MR. THOMPSON:
This will acknowledge receipt of your letter of August 23, from which I quote as follows:

"In the year 1942 the city of Bristol, Virginia, annexed a considerable area of Washington county, Virginia. The effective date of the annexation was July 1, 1942. "Are the people who live in the area annexed eligible to vote at the same precincts and in the same manner as they did before the annexation, in the Washington county election to be held November the 2nd, for the purpose of electing a treasurer, clerk of the court, commissioner of the revenue, sheriff, Commonwealth's attorney and candidates for the Legislature? "If the people who lived in the annexed area cannot vote in the county election, can they transfer their voting precinct from where it was originally in the county to the city of Bristol and vote in the city election for candidates for the Legislature in the November election?"

Plainly a person who lives in the area annexed to the city, unless he has changed his residence since annexation, cannot now vote in elections for county officers, since he is no longer a resident of the county.

I call your attention, however, to section 2964 of the Code, which deals with the rights of voters in an area annexed to a city or town, and which provides that "all electors residing in such annexed territory shall be entitled to transfers to the proper poll books in said city or town without again registering therein." A person residing in the annexed area, therefore, provided the other requirements of the election laws are met, may vote in the coming general election for candidates for the State Legislature from Bristol and for any other candidates for office to be voted on by other residents of Bristol. I think, if you will read section 2964 of the Code, you will find that it fully covers your inquiry.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Voting Lists: Posting of; Payment of Poll Tax for First Year of Residence.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 11, 1944.

HONORABLE HOWARD E. COLE,
Treasurer of Loudoun County,
Leesburg, Virginia.

MY DEAR MR. COLE:
I am in receipt of your letter of May 9, in which you ask the following question:

"As we are not having any primary in August of this year due to
the fact no opposition against Honorable Howard W. Smith has developed, kindly advise as to when we are required to post the voting list."

I assume that you refer to the list of persons who have paid their State capitation taxes required to be filed and posted by section 109 of the Code.

In my opinion, the fact that no primary is to be held in your district has no effect upon the application of this section and that the list should be filed by your office this year with the clerk of the court at least five months before the November election and that the clerk shall cause the list to be posted as required by the section.

In reply to your second question, I beg to advise that in such a case as you present this office has heretofore expressed the opinion that a person becoming a resident of Virginia after January 1, 1943, and prior to January 1, 1944, must have paid his capitation tax for 1943 within the time prescribed by law in order to be qualified to vote in elections held in 1944.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Voting Lists: Who to Be Included On List Furnished By Treasurer to Clerk.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 15, 1944.

HONORABLE C. AUBREY WHITE,
County Treasurer,
Mathews, Virginia.

MY DEAR MR. WHITE:
This will acknowledge receipt of your letter of May 11, in which you ask the following question:

"Will you please advise the writer whether or not to list persons becoming of age after the 1st of January, 1943, who pay in advance the first year assessable against them, on the list required by section 109 Virginia Election Laws?"

Section 109 of the Code provides that the treasurer before the June and November elections shall file with the clerk a list of those who have paid their State capitation taxes "during the three years next preceding that in which such election is to be held * * *." In view of this language, it is my opinion that a young person becoming of age in 1943 who pays in advance his 1944 capitation tax should not have his name included on the treasurer's list filed with the clerk by you this year.

Very sincerely yours,

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


COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 28, 1944.

SENATOR ROBERT C. VADEN,
Chairman Senate Privileges and Elections Committee,
Richmond, Virginia.

MY DEAR SENATOR VADEN:

This is in reply to your two letters of February 19, in which my opinion is requested upon certain questions arising out of bills pending before the Committee relating to absentee voting by members of the armed forces. The opinion on some questions is requested by a resolution of the Committee, while other questions are set out in your subsequent letter. The resolution recites the desire of the members of the Committee to exercise all constitutional powers possessed by the General Assembly to permit, encourage, and facilitate the participation by members of the military forces in elections for State and local officers.

The first question is brief and will be quoted in full. It is as follows:

"1. Do the limitations imposed by the Constitution of Virginia upon the powers of the General Assembly govern the exercise of its legislative powers with respect to election laws at a time when the United States is engaged in waging war?"

The answer to this question must be in the affirmative. The States do not possess the power to declare or wage war. This power is vested exclusively in Congress, except in case of actual invasion or immediate threat thereof. Section 10 of Article I of the Constitution of the United States provides that "No State shall, without the consent of Congress, * * * keep troops, or ships of war in time of peace, * * * or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." There has been no such invasion nor is there any imminent threat of same, nor has Congress consented to the waging of war by the Governments of the States. The military forces involved are the forces of the United States, not of the States, and they are under the exclusive control and command of the Congress and the Federal authorities. The State, not being at war, its legislature possesses no extraordinary war powers.

The only case I have been able to find relating to the operation of constitutional limitations upon the powers of the legislatures of a State with respect to election laws at a time when the Nation is at war is Twitchell v. Blodgett, 13 Mich. 127. It is entitled to great weight, however, because a member of the court, who wrote a concurring opinion, was Judge Cooley, the distinguished author of Cooley's Constitutional Limitations, and perhaps the leading authority in this country on constitutional questions. The case is particularly applicable to the problems confronting the Committee, because it involved the constitutionality of what was known as the Michigan Soldiers' Voting Law and involved the question whether the legislature of that State was bound by the provisions of its State constitution when it enacted laws designed to permit absentee voting by Michigan soldiers in active service in the United States Army during the War Between the States. In reaching the conclusion that the Constitution of Michigan must be interpreted as requiring the personal presence of all voters at the polls in the township of the voter's residence, and that the statute was therefore unconstitutional, the Court said:

"* * * considering the great national crisis which led to its enact-
ment, * * * it may be safely said that no question has arisen in our Courts, since the organization of the State, which has excited so much public interest, or so generally enlisted the patriotic impulses, the passions and the prejudices of the people.

* * * * * * *

"In this view it becomes not less important to determine what the question is not, than what it is. The question, then, is not whether in our view upon broad principles of justice and patriotism the electors who have volunteered or been called into the field, and are absent from the State in the public service, ought to be allowed a voice in the government of the country, for the preservation of which they are risking their lives, but whether the constitution of the State has prohibited the Legislature from extending to them that right while thus absent. The question is not whether the constitution ought to have permitted the exercise of this power, but whether by a fair construction of the language of the instrument as framed by the convention, and understood and adopted by the people, the power in question has been prohibited. Our province is not to make or modify the constitution, according to our views of justice or expediency, but to ascertain, as far as we are able, the true intent and purpose of the constitution which the people have deemed it just and expedient to adopt. * * *." (13 Mich. 127, 149-150. Italics supplied.)

" * * * The constitution must be read as applicable to present circumstances, for the simple reason that it was established for all subsequent circumstances and times; and we must give it the same force it would receive had its language been recently adopted, in full view of present emergencies. * * *." (13 Mich. 127, 141.)

And Judge Cooley, in his concurring opinion, after stating the reasons for his conclusion that the Michigan Soldiers' Voting Law was unconstitutional, had this to say:

" * * * Any process of reasoning which arrives at a different conclusion, is, in my opinion, logically false, and if embodied in a judicial decision, would establish a precedent which in the future might be seized upon as a justification for more serious perversion of constitutional language, until that principle of constitutional permanency and inviolability, which, in times like these, constitutes the anchor of our safety, will cease to have force, and the temporary will of the majority will be practically uncontrolled. And, believing as I do, that a high and sacred regard for law and constitutional order is being begotten of these times, I regard it as especially important that the judiciary should do nothing to postpone or to check this result by decisions which strain or bend the meaning of words to meet unexpected emergencies." (13 Mich. 127, 173. Italics supplied.)

The Supreme Court of Appeals of Virginia also had occasion about the same time to consider the question whether conditions resulting from war had the effect of enlarging the constitutional powers of the Virginia Legislature. In 1866 the Virginia Legislature passed an act forbidding sales under deeds of trust for a period of several years. The Union Army had occupied Richmond a few months before and the economic conditions which followed were chaotic. The question of the legislature's power to enact the statute, in view of the provisions in both the State and Federal Constitutions forbidding the passage of any law impairing the obligation of contracts, was decided in the case of Taylor v. Stearns, 18 Grattan (59 Va.) 244. The Court held the act to be in violation of this constitutional inhibition, and in a unanimous opinion disposed of the argument that emergency conditions, hardship, and suffering of the people empowered the legislature to disregard the prohibitory provisions of the Constitution. Speaking for the Court, Judge Rives said:
"* * * No greater or more enduring misfortune, it seems to me, could befall a people, blessed with a constitutional form of government, than a sacrifice of any of its fundamental guaranties by that department of its service which, by the nature of its organization and functions, has ever been count on to uphold with a stern inflexibility private rights and public morals. Great as might be the sufferings growing out of a judicial sentence against this law, and widespread as might be the ruin of individuals and the sacrifice of property under it, they are not, for one moment, to be compared with the evils likely to attend the demoralizing example of a judiciary seeking, however covertly, popular favor by some skillfully disguised compromise of its highest and most imperious duty—that of disdain ing every pretext, however plausible, and withstanding every temptation, however strong, to betray, in the slightest particular, the requirements of the State and Federal constitutions. Such a spectacle of weakness and subserviency upon the bench, if it did not shock, would incurably deprave public sentiment; destroy confidence in the administration of the laws; spread corruption through other branches of the public service, and fearfully depress the hopes of the friends of constitutional freedom. And it really seems to me that it would only be due to that gracious order of Providence, which overrules evil for good, if these pernicious effects should, indeed, stop here, and not descend to every walk of life and all orders of men, spreading abroad the contagion of dishonesty, weakening respect for law, corrupting the commerce and debauching the morals of society. * * * ." (59 Va. 244, 293-294. Italics supplied.)

It is clear from the foregoing decision of the highest court of this State, and which the Court has not since departed from, that the existence of emergency conditions due to the United States being engaged in the prosecution of a war does not operate in any way to suspend the provisions of the Constitution of Virginia with respect to the qualification of voters in or the holding of elections, nor does it operate to enlarge the powers of the General Assembly concerning same.

In my consideration of the several questions submitted by the Committee relating to the interpretation of certain specific provisions of the Constitution of Virginia, the principles enunciated by our highest Court as hereinabove set forth must be faithfully adhered to. The Attorney General, like the members of the General Assembly, has taken the oath prescribed by section 34 of the Constitution of Virginia that he will support said Constitution. The test of constitutionality laid down in the above case, and therefore to be applied to any proposed legislation, is whether the enactment of same will be in "support" of the Constitution, or whether it might be deemed a "skillfully disguised compromise" or a "pretext, however plausible" to "betray" that instrument, as pointed out in the opinion of Judge Rives above quoted from. In the light of these principles the other questions submitted will now be considered.

2. The next inquiry referred to in the resolution of the Committee, as enlarged by the fourth inquiry in your supplemental letter relates to registrars and involves the following four questions:

(a) In what tribunal does the State Constitution vest the power of appointment of registrars or registration officers; (b) Does the Constitution require that such an officer be a qualified voter in Virginia, and in the county or city for which he acts, and (c) Does the Constitution require such an officer to take and subscribe the oath of office set forth in section 34 thereof.

These questions will be considered in the above order.

(a) In what tribunal does the State Constitution vest the power of appointment of registrars or registration officers?

Section 31 of the Constitution contains this provision: "Each electoral board shall appoint the judges, clerks and registrars of election for its county or city." This language is plain and unambiguous. By it the Constitution has clearly vested in the local electoral boards the exclusive power and duty
of appointment of the registrars for their respective counties and cities. In so doing it has denied to the General Assembly any power to appoint them or to curtail the power conferred upon the electoral boards to make the appointment. You inquire whether the legislature has power to provide by law that each electoral board will be deemed to have appointed all Army and Navy officers as registration officers for members of the armed forces in the absence of notification to the contrary. It seems clear to me that legislation so providing would have the effect of taking away from the electoral boards the affirmative power of making and initiating such appointments and convert said power conferred on them by the Constitution into a negative one. In other words, the plain effect would be a legislative amendment of said section 31 of the Constitution conditioned upon concurrence therein by the electoral boards. Thus, by affirmative action of the legislature on the one hand, coupled with failure of action by the electoral boards on the other, the mandatory requirement of the Constitution that the "electoral board shall appoint" the registrars would be dispensed with. Such a proposed enactment would seem to me to be a clear violation of this constitutional provision.

(b) Does the Constitution require that such an officer be a qualified voter in Virginia, and in the county or city for which he acts?

This question relates to the power of the electoral board itself to appoint as registration officers all Army and Navy officers in active service.

The first paragraph of section 32 of the State Constitution is as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience." (Italics supplied.)

The language quoted clearly requires every officer of the State, and of every county or city, to be a qualified voter and a resident thereof with two exceptions. The first exception confers upon the General Assembly the power to alter this requirement as to officers elected by the people, which would not apply to the registrar, who is an appointive officer. The second exception applies to "positions or posts requiring special technical or professional training and experience." Obviously the office of registrar, even if it could be regarded as a position or post, does not require technical or professional training or experience.

The duties of the registrar, other than such as are clerical, relate primarily to the ascertainment of the fact that a person admitted to registration is qualified as to age and residence, and is possessed of sufficient intelligence and education to prepare, in his own handwriting, his application for registration and answer such questions as the registration officer may submit to him as required by section 20 of our Constitution. The registration officer is also required to have the applicant's answers to such questions reduced to writing and to certify and preserve same "as a part of his official records."

It is clear, therefore, that the office of registrar does not come within the exceptions referred to and that the Constitution renders ineligible to hold said office or to act as registration officer any person who is not a resident of the county or city for which he acts. To appoint any Army officer other than a qualified voter of such county or city as a registrar or registration officer would, in my opinion, be an obvious violation of this section.

(c) Does the Constitution require such an officer to take and subscribe the oath of office set forth in section 34 thereof?

Section 34 of the Virginia Constitution provides as follows:

"Members of the General Assembly, and all officers, executive and
judicial, elected or appointed after this Constitution goes into effect shall, before they enter on the performance of their public duties, severally take and subscribe the following oath or affirmation, * * * ."

While the Supreme Court of Appeals of Virginia has not had occasion to construe this section, it is significant that the quoted language is broader and more comprehensive than that contained in section 5 of Article III of the Constitution of 1869, which had been construed by said Court to apply to all State and local officers. The 1869 provision was in these words:

"All persons, before entering upon the discharge of any function as officers of this State, must take and subscribe the following oath or affirmation: * * * ."

At the time the present Constitution was adopted this language had been construed by our Court of Appeals to apply to all officers, both State and local. See Branham v. Long, 78 Va. 352 (Commissioner of the Revenue); Childrey v. Rady, 77 Va. 518 (city school trustee); Johnson v. Mann, 77 Va. 265 (city treasurer).

In Childrey v. Rady, supra, the Court said, in referring to the constitutional requirement of taking the oath of office:

" * * * And then in advance of the performance of any of these the constitution peremptorily requires the oath of office. The duty of taking the oath as a prerequisite is imposed in terms that admit of no doubt. It is required of every officer. It applies to all; and it is made penal by statute to exercise any function of office without first taking and subscribing the oath." (77 Va. 518, 533.)

The language of section 34 of the present Constitution requiring members of the General Assembly and "all officers, executive and judicial, elected or appointed * * * " to take the oath of office is all inclusive. It is clearly broader than the corresponding provision of the Constitution of 1869 in that the phrase "officers of this State" has been omitted, eliminating any possibility of restricting the requirement to State officers alone.

The office of registrar is expressly created and his appointment provided for in section 31 of the Constitution. Certain of its duties are prescribed by section 20. The registrar is therefore a constitutional officer. In view of the all-inclusive language of section 34 and the cases above referred to, to hold that it is not applicable to a constitutional officer whose title is expressly designated in another section of the same Article of the Constitution would, in my opinion, not be permissible.

My conclusion is that registrars, before entering upon the performance of the duties of their office, are required to take and subscribe the oath of office required by section 34 of the Constitution.

3. You next inquire whether the General Assembly possesses the power to permit members of the armed forces to vote in elections for State and local officers without such members having registered or paid the poll taxes required by section 21 of the Constitution.

Section 18 of the Constitution prescribes the qualifications of voters. In addition to citizenship, age and residence, it provides that the voter must have been registered and must have "paid his State poll taxes, as hereinafter required." Section 21 of the Constitution prescribes, as a condition of voting, that "he shall as a prerequisite to the right to vote, personally pay, at least six months prior to the election all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote." Section 173 of the Constitution imposes upon the General Assembly the mandatory duty to "levy a State capitation tax of, and not exceeding one dollar and fifty cents per annum on every resident of the State not less than twenty-one years of age, except those pensioned
by this State for military services; * * * ." In compliance with this duty the General Assembly, by section 22 of the Tax Code, has made the required levy.

In view of what I have said in reply to your first inquiry, it follows that I am of opinion that the General Assembly does not possess the power to exempt members of the armed forces from the requirements of the Constitution that, in order to render them eligible to vote in such elections, they must register and pay their poll taxes as therein provided.

4. Your next question is whether the granting to the members of the armed forces of a nominal pension, retroactive to include the years 1941, 1942 and 1943, regardless of whether such members were in the service during said years or not, would have the effect of rendering them eligible to vote without payment of the poll taxes heretofore levied against them.

In my opinion the granting of such a pension would have no such effect. While section 173 of the Constitution, quoted from in reply to your third inquiry, does not impose upon the General Assembly the mandatory duty of levying a poll tax upon those "pensioned by this State for military services," on the other hand, it does not prohibit the General Assembly from making such a levy. The only section of the Constitution which exempts any person from the payment of a poll tax as a voting prerequisite is section 22, which provides that no veteran of the armed forces in the war between the States, or his wife or widow, "shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote."

The poll tax for the years 1941 to 1944, inclusive, has already been levied on every Virginia resident member of the armed forces who at the time is or was twenty-one or more years of age. All such members already have either been assessed or are assessable with tax for such years. The granting of the pension would not in any way change or alter their poll tax status. Since they already have been assessed or are assessable with said poll taxes it is clear that the General Assembly is without power to render them eligible to vote without the personal payment of same as required by the Constitution.

5. Your next inquiry is whether the General Assembly has the power to appropriate a specific sum of money to each adult Virginia member of the armed forces and direct the State Treasurer, six months before the elections, to pay all poll taxes required so as to qualify them to vote. The proposed legislation would provide that the said Treasurer would be acting as the personal agent of such members in making said payments, in the absence of notification from them not to pay same. Each member would be entitled to receive the unexpended portion of the sum appropriated upon application after termination of military service. The act of voting by any such member, the proposed legislation would provide, would constitute a ratification of the payment of the tax by the Treasurer as his agent.

There can be no question that the plan proposed as above outlined emanates from the highest motives. It has a strong emotional appeal to all of us who have our sons, near relatives, and close friends in the service. Viewed from the standpoint of helping them, there is no one who would oppose it if the General Assembly possesses the power to enact it into valid legislation. In considering this question of constitutional power, however, it is necessary that judgment be not swept away by emotional appeal. It would not benefit the service man to make an idle gesture of providing him with a means of voting which would not effectuate that purpose. Many who would otherwise protect their right to vote might rely on an unconstitutional measure and not pay the tax as they otherwise would.

There can be no question as to the power of the legislature to appropriate money for the benefit of members of the armed forces or even other classes of Virginia citizens. The question which arises is whether a poll tax paid in the manner proposed constitutes a personal payment as required by the Constitution, in order to qualify as a voter the member of the armed forces for whom it is paid. Section 21 of the Constitution requires that the voter "shall,
as a prerequisite to the right to vote personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote." The meaning of the underscored words "personally pay" was the subject of consideration by the Supreme Court of Appeals in Tilton v. Hernan, 109 Va. 503. It was contended in that case that it was necessary for the voter to pay the tax to the treasurer in person,—that he be personally present. But the Court held that this was not necessary, that the payment might be made by check sent through the mails or transmitted by a duly authorized agent, provided however that it is paid out of the debtor's own funds and because he desires to pay the tax. Said the Court:

"The principal definition of the word 'personally' given by Webster and the Century Dictionary is, 'in a personal manner,' and every one of ordinary intelligence understands that he does not personally or 'in a personal manner' pay a debt he owes unless its payment reduces his estate or means to the extent of the payment; and that if this be not the case, but the debt be paid by another out of that other's means, such debtor could not claim that he had personally discharged the obligation. Where, however, the debtor was the source of the payment and paid the debt because he desired to discharge the obligation out of his own funds, it is, as would seem clear, a personal payment, no matter by what method or avenue the money is made to reach the hand of the creditor.

"So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll taxes required of him, and paid them out of his own estate or funds because he wished to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer, or to one of his deputies, or sent by check drawn on a bank in which the drawer has funds to meet its payment, or by the hand of the taxpayer's clerk or duly authorized agent; * * *." (109 Va. 503, 507-508. Italics supplied.)

It will be noted that the Court attaches two necessary characteristics to a personal payment of the tax. First, the money must be paid out of the taxpayer's own funds; and, second, because he desires or wishes to pay same. Does the proposed plan meet these requirements? They will be considered in the order above set out.

The first requirement laid down by the Court is that the money be paid out of the funds or estate of the taxpayer. The proposed plan is to appropriate the money to the member, but not unconditionally. It is not property under his control. The Treasurer is directed to use same to pay the members poll taxes for the years 1941, 1942 and 1943, unless the member notifies him to the contrary, and to pay same on or before May 6, 1944. From a practical standpoint, members in service overseas would have no opportunity to notify the Treasurer not to pay the tax. In reality the State would actually pay the tax. The man in service would have no real voice in the matter.

With regard to the second requirement stated in the Court's opinion—that the taxpayer must wish or desire his money to be used for the payment of his poll taxes—it seems clear that, even if the money appropriated could be considered to be the property of the man in service, it could not be expended for this purpose without his knowledge, consent, and authority. Yet, the proposed legislation would require the money to be paid in discharge of the service man's poll tax, even though he had no knowledge whatever on the subject. He might not care to vote, and, if the money were his, might prefer to use it for purposes other than the payment of the poll tax. It cannot, in my opinion, be said that the Court's second requirement for a personal payment has been met by the proposed legislation. It cannot be said under that plan that the service man wishes or desires any money belonging to him to be used for the payment of his poll tax.

It seems to me that the plan of poll tax payment by the State which is
proposed violates the basic principles which pervade the election laws of this State with respect to the qualification of voters. While we all would welcome any lawful method of aiding the members of the armed forces in this respect, a different reaction as to the constitutionality of payment of the tax by the State in this manner would undoubtedly follow a similar proposal for the payment of the poll taxes of any other class of citizens, such as lawyers, physicians, farmers, or members of labor unions. In fact, if the plan suggested is constitutional, then it is within the power of the General Assembly to abolish entirely the poll tax as a voting qualification by appropriating the amount of the tax to every adult citizen of the State and directing its payment. This could be viewed as one method of distributing school funds to the localities, since they receive the proceeds from poll taxes. But it would in effect operate as a legislative repeal of the provision of the Constitution requiring payment of the tax as a voting qualification.

It is extremely unpleasant for me to have to render an opinion that any legislation proposed for the benefit of the members of the armed forces is beyond the power of the General Assembly to enact. It would have been a source of much gratification if I could conscientiously have reached a different conclusion. In the discharge of the duties imposed on the Attorney General by the Constitution and laws of the State, I have expressed herein my firm convictions, which have been reached after much painstaking thought and study.

Sincerely,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation of 1944: Registration Required.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 2, 1944.

HONORABLE JOHN D. CROWLE, JR.,
Chairman Electoral Board of City of Staunton,
Staunton, Virginia.

MY DEAR MR. CROWLE:
This is in reply to your letter of April 25, in which you request my opinion upon several questions relating to absentee voting by members of the armed forces.

Your first question is whether or not under the recent Acts passed at the last session of the General Assembly a member of the armed forces may vote ‘without registering. The act (Chapter 287 of the Acts of 1944) does not dispense with the necessity for registration.

Your next question is whether or not the act provides for registration by mail.

Sections 3 and 4 of said act do provide for such registration upon application to the Secretary of the Commonwealth. However, the act did not take effect in time to enable the Secretary of the Commonwealth to contact members of the armed forces and advise them so that they could qualify in the June municipal elections, and he has not undertaken to apply the act to these elections. The provision providing for the payment of poll taxes of members of the armed forces could not be applicable because such payment is required six months before the election. As to registration, the registration books are closed thirty days before the election and it was impossible for the Secretary of the Commonwealth to secure information as to the post office addresses of the members of the armed forces and have the necessary printing done in time for said elections. However, if there is any member of the armed forces
who desires to make application to the Secretary of the Commonwealth immediately, while it would hardly seem possible to carry out the requirements of chapter 287 of said acts, no doubt the Secretary will use his best efforts to do so in order to permit the registration before the expiration of time before the beginning of the thirty day period during which the registration books are closed.

Chapter 288 of the act provides for the printing of absentee ballots by the Secretary of the Commonwealth for State and local elections, and requires all candidates to qualify ninety days before both primary and general elections and notification of the names of candidates to be given the Secretary of the Commonwealth. However, as the act was passed less than ninety days before the June municipal elections this year, these two acts have generally been regarded as not applicable to this year's elections.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation of 1944: Discharged Soldier.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 9, 1944.

HONORABLE B. L. ANDERSON,
Treasurer of Smyth County,
Marion, Virginia.

MY DEAR MR. ANDERSON:
I am in receipt of your letter of June 3, in which you ask the following question:

"Can a service man who has been in the armed forces of the United States during the past year or more, and who has failed to pay his poll taxes, be entitled to vote in the forthcoming November election when he has been honorably discharged from the army either before or after May 6, 1944?"

Your letter raises for the first time the problem of the right of a discharged soldier to vote in the coming November election where he was discharged on or after the last day on which his capitation taxes could have been paid to render him eligible to vote. The Act of Congress abolishing the capitation tax as a prerequisite to voting in time of war by members of the armed services provides that:

"No person in military service in time of war shall be required, as a condition of voting in any election for President, Vice-President, electors for President or Vice-President, or for Senator or Member of the House of Representatives, to pay any poll tax or other tax or make any other payment to any State or political subdivision thereof."

Chapter 286 of the Acts of 1944 recognizes and gives effect to the Act of Congress and states that it is declared "to be the public policy of Virginia to encourage, aid, and facilitate voting by her citizens who are members of the armed forces ***."

The persons you describe were members of the armed forces on the last day on which the capitation taxes could have been paid to render them eligible to vote and were entitled to the exemption afforded by the Act of Congress.
Being thus exempted from the capitation tax requirement, and when the policy of the Virginia Act is considered, I am of the opinion that it is reasonable to construe the Act of Congress together with the Virginia Act that the exemption to which the soldier was entitled as of May 6, 1944, remains with him up to and including the November elections to be held this year. To hold otherwise would result in, I am sure, an unintended hardship and would be depriving this class of their vote on account of a situation which is entirely beyond the control of the members thereof.

Obviously one of the purposes of the Federal Act was to protect the right of a member of the armed forces to vote where on account of the performance of military duties it was impossible or difficult to comply with the laws of the States as to registration and the payment of capitation taxes. Therefore, since the right to vote of the class of persons you describe would have been lost but for the Federal Act by reason of a member of the class being absent in the military service on May 6, 1944, and thus unable to pay his capitation tax, I think it reasonably plain that it was the intent of the Federal Act to protect the voting right of this class, even though a member of the class may have received his discharge after May 6, 1944, and before the November election. I have already expressed an official opinion that the Federal Act in question should be given effect by Virginia election officials as a valid exercise of the war powers of Congress upon the theory that under such war powers Congress had the power to protect the right of members of the armed forces to vote, just as it has protected and preserved many other civil rights of members of the armed forces under various civil relief Acts.

My conclusion, therefore, is that those residents of Virginia which you describe are entitled to vote in the November election without the payment of capitation taxes otherwise required by the laws of Virginia.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation of 1944: Discharged Soldiers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 16, 1944.

HONORABLE I. VAL PARHAM,
City Treasurer,
Petersburg, Virginia.

MY DEAR MR. PARHAM:

I have your letter of June 13, with reference to the payment of poll taxes by men in the armed forces.

As you will note from the copies of the Acts recently sent you, chapter 286 relates to the right of members of the armed forces to vote in the presidential and congressional elections this year, but does not in any way relate to State and local elections. The effect of this Act is to preserve the right of a member of the armed forces to vote even though, by reason of his forced absence, he is unable to take care of his obligation to pay his tax or to register. This, however, does not relieve him of the legal obligation to pay the tax upon his return. In other words, the payment of the tax as a prerequisite to the right to vote is eliminated so far as suffrage is concerned while he is in the armed forces, but this has no affect upon his obligation to pay the tax after his discharge. In this connection, I have expressed the view that members of the armed forces who are discharged from service after May 6,
at a time when it was too late for them to pay their taxes in order to qualify them to vote in this year's election, would still be entitled to the protection offered by the Federal Act and chapter 286 of the Virginia Acts of 1944, and may vote in this year's presidential and congressional elections without the payment of such tax.

The last two chapters of the Acts sent you, numbers 287 and 288, relate to the payment of poll taxes necessary to qualify members of the armed forces to vote in the State and local elections to be held in 1945.

Chapter 287 creates a fund for the benefit of and as part of the estate of Virginia members of the armed forces, and provides for the payment of such poll taxes as may be necessary to qualify them to vote upon application to the Secretary of the Commonwealth. When these taxes are paid in this manner, the obligation of the member of the armed forces is discharged and he will not have to pay them again.

With reference to the case of Mr. Shapiro, if he is still a member of the armed forces it is not necessary for him to pay any poll taxes to vote this year. As above stated, if he was a member of the armed forces up to May 6 and was discharged after that time, it is my opinion that he can still vote in this year's election without the payment of the poll tax. However, this does not excuse him from the payment of the tax later on if he has been so discharged since May 6.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

EMBALMERS AND FUNERAL DIRECTORS—Applicants for Examination for License; Qualification of.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 20, 1944.

MR. F. C. STOVER,
Secretary State Board of Embalmers & Funeral Directors of Virginia,
Strasburg, Virginia.

MY DEAR MR. STOVER:

This is in reply to your letter of March 28, 1944, in which you request my opinion as to the eligibility of a certain applicant to take the examination for an embalmer's license.

Under section 1720 of the Code of Virginia, a person must be a graduate of a school of embalming approved by the State Board of Embalmers and Funeral Directors before he is eligible to take the required examination. It appears that the Board now approves only schools which require completion of a nine months' course, while several years ago the Board approved schools which required completion of only a six months' course. I understand that the change in the Board's position on this matter was made after the better schools lengthened their courses from six months to nine months.

You state that in the case in question the applicant previously applied for examination after graduating from a school that was approved by the Board when only a six months' course was required. The applicant failed to pass the required examination. The school from which he graduated now requires a course of nine months and is still on the list of schools approved by the Board.

The applicant now wishes to take another examination and you ask if the fact that he did not take a nine months' course would make him ineligible to receive an embalmer's license. Since the statute merely requires
the applicant to be a graduate of a school approved by the Board and does not require any specified period of attendance at such school and since the applicant graduated from a school which was at that time and is now approved by the Board, it is my opinion that he is eligible for examination.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

EMINENT DOMAIN—Liability of State for Damages to Flow of Water in Spring Caused by Blasting.

OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., SEPTEMBER 27, 1913.

MR. A. H. PETTIGREW,
Right of Way Engineer,
Department of Highways,
Richmond, Virginia.

MY DEAR MR. PETTIGREW:

At your request I have examined the file of the Department of Highways on the complaint made by Mrs. Cora Brill with respect to the damages caused to a spring located on her land. From the file it appears that the Department, in carrying out the construction work for the connection between Route 604 and Route 55, found it necessary to construct a box culvert under Route 604. In excavating for this culvert, it was necessary to cut through and do some blasting in seamy shale rock located approximately one hundred feet from the spring situated on the land of Mrs. Brill. Apparently, in doing this work the source of the underground water feeding that spring was interfered with, since the elevation of the water in the spring immediately fell about two feet. None of the work was done on land belonging to Mrs. Brill, it all being done on land belonging to Mrs. Daisy Orndoff and with the latter's permission.

In general it may be said that the owner of land upon which is located a spring fed by percolating waters has no right of action against an adjoining landowner if the latter digs a well or cuts a drainage ditch upon his own land or makes any other reasonable use or development of his land, although in doing so such adjoining landowner cuts off the source of the percolating water feeding the well of the other landowner. See 27 R. C. L., pages 1171-1176; Clinchfield Coal Corporation v. Compton, 148 Va. 437; and Couch v. Clinchfield Coal Corporation, 148 Va. 455.

While the above may be accepted as a rule for general guidance, the rights and responsibilities of the parties may be different in a particular case due to peculiar facts not intended to be covered by the general principle. In my opinion, the general rule is applicable to the case now under consideration, for it appears that the nature of the work which caused the injury to Mrs. Brill's spring was a reasonable use and development of the land upon which Mrs. Orndoff had authorized the road to be built. While the construction of the road seems to have interfered with the source of the underground water supplying the spring, it is my opinion that there is no liability on the part of the State for the damage caused. Since this is so, it is my further opinion that the Department has no right to pay for the damage to the spring.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 7, 1944.

HONORABLE F. C. PETERSON,
State Forester,
Box 1368,
Charlottesville, Virginia.

My dear Mr. Pederson:
This will acknowledge receipt of your letter of March 2, in which you ask the following question:

"Reference is made to section 545(b), Acts 1940, of the Virginia Code, which, upon approval of majority vote of the board of supervisors of any county, becomes effective in the county. "The board of supervisors in one of our cooperating counties approved the provisions of this section on December 2, 1940. Today I am advised that the board of the same county by majority action voted to rescind their previous approval of the act. Will you please advise if any board, after affirmatively voting to make the law effective in their county, can at a later date vote to annul their previous decision or action?"

Section 545 of the Code as amended by Chapter 189 of the Acts of 1940 provides that:

"Section (b) of this act shall not become effective in any county of the Commonwealth unless and until the same shall have been approved by a majority vote of the board of supervisors or other governing body of said county."

This office has heretofore expressed the opinion that, where the board of supervisors has authority to adopt an ordinance, it also has the inherent authority to repeal it. However, I do not think that this rule is applicable in this case. The section of the Code to which I have referred, as amended in 1940, simply provides that a part of the section does not become effective in any county until the board of supervisors adopts it; but, once adopted in any county, it becomes a State law in that county and not an enactment of the board of supervisors. It seems to me to plainly follow that, being a State law in the county after the governing body has adopted it, the board of supervisors has no authority to repeal it therein.

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

FOREST SERVICE—Regulatory Statutes Not Applicable to State Agencies.
Public Officers—Unlawful to Advise Others to Violate Statutory Law.

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

Mr. Alfred Akerman,
Director The Seward Forest,
University of Virginia,
Triplett, Virginia.

My dear Mr. Akerman:
This is in reply to your letter of July 7, in which you request my opinion upon the question whether or not, where the provisions of section 549a, chapter 143, of the Acts of the General Assembly of 1942, have been adopted by the board of supervisors of a county, such county may afterwards through
action of its board of supervisors withdraw from the operation of said Act.

The statute makes no provision for withdrawal, and in my opinion this is beyond the power of the board of supervisors to bring about.

I note your comments as to the effect of the statute upon your method of operating the Seward Forest, which is the property of the Commonwealth of Virginia and is being operated by you as an officer of the University of Virginia having management of the forest. You express the fear that, if you do not comply with the provisions of the statute, you will be subjected to fines for violation of same.

It is a well-settled rule that a regulatory statute, unless by its express terms it is made to apply to the State, does no so apply. The statute is directed exclusively at commercial activities and expressly so provides. While the operation by the State may consist of sales of some of the timber, its primary purpose as expressed in your letter is for use as an experimental station for the study of the growth and development of timber. It is my opinion, therefore, that there is no obligation upon the University of Virginia to comply with said section 549a if, in the opinion of the authorities in charge of the forest, it is advisable not to do so.

I note also your reference to the fact that you regard professional ethics as binding you to advise commercial timber growers not to comply with the law. In my opinion, this would be an unlawful act on the part of a public officer, and would probably subject you to prosecution as an accomplice in the event the law should be violated through your activities. If the authorities of the University of Virginia reach the conclusion that the 1942 Act is not desirable, the remedy is to seek an amendment of the statute at the hands of the General Assembly.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Proceeding to Confiscate and Forfeit Automobile to State Is Civil.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 18, 1944.

HONORABLE ROBERT H. OLDHAM,
Clerk Circuit Court of Accomack County,
Accomac, Virginia.

MY DEAR MR. OLDHAM:

I have your letter of April 14, 1944, in which you ask whether informations filed against automobiles for violations of the Alcoholic Beverage Control Act are civil or criminal proceedings. These proceedings are civil in their nature and should be recorded on the appropriate docket.

The Supreme Court of Appeals has recently had opportunity to express this view in the case of Ives v. Commonwealth (December, 1943), 182 Va. Advance Sheets 17, 27 S. E. (2d) 906, in which the Court held such a proceeding to be "*** a civil action against an automobile and not a criminal action against a person *** ."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
GAME, INLAND FISH, AND DOG CODE—Authority to Cut Fire Lanes Through Forests and Dispose of Timber.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 8, 1943.

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

My dear Mr. Hart:
I am in receipt of your letter of November 4, from which I quote as follows:

"To protect the woodlands on our State Game Farm in New Kent County and Sussex Game Refuge in Sussex County from fire waste, we deem it necessary to establish fire lanes by clearing strips through said woodlands.

"We would like to have your opinion if our Commission could sell the timber and cord wood cut in these fire lanes, proceeds to be used in payment of labor and residue, if any, deposited to the credit of the Game Protection Fund in the Treasury of the State."

While the statutes dealing with the powers of the Commission of Game and Inland Fisheries do not in terms cover the situation you present, I am of the opinion that the Commission would unquestionably have the incidental power to sell the timber and cord wood which would result from the establishment of these fire lanes. Furthermore, I am also of the opinion that the proceeds from the sale of this timber and cord wood may be deposited to the credit of the Game Protection Fund. Item 372 of the last Appropriation Act (Acts 1942, at page 868) provides that all monies, fees and revenues collected by the Commission of Game and Inland Fisheries shall be paid into the State treasury to the credit of the Game Protection Fund.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Dog Code: Improper to Allocate Game Warden Allowance to Sheriff.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 18, 1944.

HONORABLE I. R. DOVELL,
Attorney for the Commonwealth,
Luray, Virginia.

My dear Mr. Dovel:
This will acknowledge receipt of your letter of January 13, from which I quote as follows:

"The Board of Supervisors of Page County, Virginia, have been paying the game warden of this county $25 per month to investigate and handle all sheep, turkey and chicken claims.

"The Board wishes to know if it would be permissible to have the
sheriff or the deputy sheriff perform this service and pay either of them the sum of $25 per month, which sum would of course be in addition to the salary allowed by the Compensation Board."

I presume you refer to the compensation that has heretofore been paid the game warden from the dog fund under authority of section 3305(81) of the Code. This section provides in part that from this fund "if the board of supervisors desire it may make therefrom an allowance to the game warden for services." Since the Legislature thought it necessary to expressly authorize such a payment and stipulated that the allowances should be made to the game warden, it is clear in my opinion that it must be made to that officer and no other, which would, of course, mean that it could not be made to the sheriff or a deputy sheriff.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Person Paying Any State Tax May Recover for Sheep Killed by a Dog.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 21, 1943.

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

MY DEAR MR. BROWN:

This will acknowledge receipt of your letter of December 18, in which you inquire as to the proper construction of the words "any person taxed by the State" as used in section 74 of the Game, Inland Fish and Dog Code of Virginia as amended by Chapter 243 of the Acts of 1932 (Michie's Code, 1942, section 3305(75)), which section provides for compensation for livestock or poultry killed or injured by a dog.

So far as I know, this language has not been construed by a court, nor do I find any opinion of this office dealing with it. I am inclined to agree with you, however, that it includes any person who has paid any direct State taxes, such as a license tax on an automobile. I know of no principle by which it could be held that such broad language includes some State taxes and excludes others, and I am further of the opinion that the words would include a person who had paid some State taxes for which he or she was liable and had not paid others.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE EDWARD O. MCCUE, JR.,
Chairman Special Committee of the House of Delegates,
State Capitol,
Richmond, Virginia.

My dear Mr. McCue:

This is in reply to your letter of February 26, in which you request my opinion upon two questions with reference to action which may be taken by your committee.

The first question relates to the time when your report to the House of Delegates may be made.

It is a general rule of law that the power and authority of a committee of one house of a legislature continues only so long as the legislature is in session. If, therefore, your committee contemplates that any action of any kind, whether recommendations or otherwise, is to be taken by the House as a whole, your report should be filed before the adjournment at the end of sixty days from the beginning of the session. I am of the opinion that the committee, if it so desires, would have the authority or power to prepare its report during the time of the constructive session and file same with the clerk at any time prior to final adjournment.

Your second question is as follows:

"What powers, if any, the House of Delegates possesses, under the Constitution, Statutes, and by reason of inherent power to deal with officers of Norfolk County, Virginia, and what methods are proper to be employed in dealing with such officers, should any action be warranted?"

In connection with this question, you state the following:

"In referring to officers, the Committee has in mind the Judge of the Circuit Court of Norfolk County, the Clerk of the Circuit Court of Norfolk County, the Attorney for the Commonwealth, the Trial Justice, the Sheriff, and his deputies, and special police officers appointed under the Statute by the Judge of the Circuit Court of Norfolk County, and the Board of Supervisors."

It is my opinion that the House of Delegates has no authority to take any action of any kind with respect to disciplining or removing any of the officers named in the above paragraph except the Judge of the Circuit Court of Norfolk County. With respect to Governor, Lieutenant Governor, Attorney General, Judges, and various other officers referred to in section 54 of the Constitution, should any of them be deemed to offend against the State by malfeasance in office, corruption, neglect of duty, or other crime or misdemeanor, impeachment proceedings may be instituted by the House of Delegates and prosecuted before the Senate which shall have the sole power to try impeachments. Section 104 of the Constitution provides that Judges may be removed from office for cause, but this requires a concurring vote by both Houses of the General Assembly, and the House of Delegates alone cannot remove any Judge.

With respect to the various other officers, it would seem that the function of the House of Delegates would be limited to making such recommendations to appointing powers, and other authorities having power to discipline or remove any such officer, as it might deem proper, and also to supply to such
authorities and powers any information deemed pertinent in the form of records or transcripts of testimony. Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HAMPTON ROADS SANITATION DISTRICT—Separate Contracts to Be Made to Cover Handling of Industrial Waste.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 20, 1944.

MR. R. W. DIGGES,
Manager Hampton Roads Sanitation District Commission,
322 Flatiron Building,
Norfolk 10, Virginia.

MY DEAR MR. DIGGES:
I am in receipt of your recent letter in which you direct my attention to section 7(a) of the Sanitation Districts Law of Nineteen Hundred Thirty-Eight, which reads in part as follows:

"Every commission is hereby authorized and empowered to charge and collect fees, rents, or other charges for the use and services of the sewage disposal system. Such fees, rents and charges may be charged to and collected from any person, contracting for the same or from the owner or lessee or tenant, or some or all of them, who uses or occupies any real estate which directly or indirectly is or has been connected with the sewage disposal system, or from or on which originates or has originated sewage or industrial wastes, or either, which directly or indirectly have entered or will enter the sewage disposal system, and the owner or lessee or tenant of any such real estate shall pay such fees, rents and charges to the commission at the time when and place where such fees, rents and charges are due and payable."

You also referred to section 18(b) of the Act as amended, which is as follows:

"Every commission is hereby authorized to provide, construct, operate and maintain facilities for the treatment and disposal of industrial wastes originating in the district, and to enter into contracts with any person, on such terms and conditions as the commission may approve, providing for or relating to the treatment and disposal of any such industrial wastes."

You then state:

"The question for discussion will revolve around the treatment of the industrial wastes. It is not clear in my mind whether under the authority of Section 7(a) the Commission has a right to charge and collect fees for industrial wastes along with the charges for the treatment of sewage, or would it be necessary under 18(b) for the Commission to enter into a separate contract with any person or company providing for or relating to the treatment and disposal of any industrial wastes."

"There are several large industrial concerns such as the Newport News Shipbuilding and Dry Dock Company which have industrial wastes in addition to sewage. It is not clear whether the Commission shall enter
into separate contracts for all industrial concerns for the treatment of industrial wastes in addition to the charges that it can make and collect for sewage treatment under the provisions of Section 7(a)."

Section 2 of the Act (Chapter 335 of the Acts of 1938) separately defines, among other things, the terms "industrial wastes" and "sewage." I take it, therefore, that "sewage" does not include all "industrial wastes." Section 7 of the Act, to which you make specific reference, provides for the Commission to establish a scale of fees and charges for the use of the sewage disposal system which is applicable to every user of the system, while section 18 of the Act authorizes the Commission to construct, operate and maintain facilities for the treatment and disposal of industrial wastes, and to enter into contracts for the treatment and disposal of such wastes. I take it, therefore, that the treatment and disposal of industrial wastes mentioned in section 18 are activities which are not included in the normal service of the sewage disposal system. My conclusion is, therefore, that the Commission is authorized to enter into separate contracts for the treatment of industrial wastes in addition to the charges that it makes for the normal use of the sewage disposal system.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HAMPTON ROADS SANITATION DISTRICT—Re-entry of Locality to Commission After Withdrawal Is Not Provided For.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 3, 1944.

HONORABLE J. S. DARLING,
Acting Chairman Hampton Roads Sanitation District Commission,
322 Flatiron Building,
Norfolk 10, Virginia.

MY DEAR MR. DARLING:

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

"Chapter 335 Acts of Assembly 1940 as amended provides that any county or city in whole or in part embraced within a sanitation district may by resolution adopted by its governing body and filed with the sanitation commission within six months after the creation of the district, give notice of its intention to consider withdrawing from the district. "The Hampton Roads Sanitation District Commission would like to ask an opinion from you as to the method to be pursued for any county, city or town to reenter the commission after withdrawing according to the manner prescribed. In other words, it seems that the governing body has the power to withdraw, but can the governing body elect to reenter the district without a poll of the voters? Your advice upon this question will be greatly appreciated as the cities of Portsmouth and South Norfolk will be requested to reenter the district on the basis of a projected program now in process of formation."

I assume in replying to your inquiry that the cities of Portsmouth and South Norfolk have not only given notice of their intention to consider withdrawing from the Hampton Roads Sanitation District, but have complied with all of the provisions of section 4a of Chapter 351 of the Acts
of 1940 relating to their withdrawal, so that they have now ceased to be a part of the district. If my assumption is correct, I can find no statutory authority for the two cities to now again become a part of the district and in the absence of such statutory authority I do not believe that the authority exists. The General Assembly has dealt elaborately with the question of withdrawing from the district and, if it was the intention of that body that a locality which had withdrawn should have the authority to reenter the district, I believe such authority would have been expressly given.

If the Commission desires a locality to have the authority about which you inquire, I suggest that an amendment of the statute be drafted for introduction in the General Assembly now in session, and I further suggest that, if such an amendment is deemed desirable, the bond attorneys, Messrs. Hawkins, Delafield and Longfellow, of New York, be requested to prepare the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Disposal of Abandoned Pavements.

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

MR. A. H. PETTIGREW,
Right of Way Engineer,
Department of Highways,
Richmond, Virginia.

My dear Mr. Pettigrew:

This is in reply to your request for my opinion as to whether the Highway Department has the right in cases where highways in the Primary and Secondary systems are rebuilt on a new location to go upon the old sections of the road and remove the surfaces and make such changes as would be necessary to place the old right of way in keeping with the adjacent lands. It is my understanding that the purpose of such action is to improve the appearance of land as seen from the new highway and secure for use in other work such material as can be salvaged from the old surface.

In my opinion the answer to this question depends largely upon practical considerations governed by the facts of each particular case. If the road as built upon the new location completely replaces the old roadbed and makes the latter entirely unnecessary as a public road, it is my opinion that the old road can be destroyed by such work. If, however, the old road is still necessary to serve as a means of access to even one or two of the adjacent properties, it is my opinion that such work cannot be done by the Department if it would have the effect of destroying the old road as a traveled way.

As to the first type of case mentioned in the previous paragraph, the public could have no objection because it would have been furnished with a new way equally as satisfactory as the old and serving the same purposes as the old. In the second type of case, the public could complain on the ground that the old road was still necessary as a public way. While in an appropriate case there may no longer be any duty upon the Department to maintain the old road up to the standard of other roads in either the Primary or Secondary systems, no road serving the public as a public road should be destroyed by the Highway Department until it has been vacated through appropriate legal proceedings or completely abandoned by the public as a traveled way.
Insofar as the rights of the adjacent landowner, as such, are concerned, he has no legal right to object unless he has acquired title to the property free of the easement for road purposes. If the State owns in fee the land over which the old road is built, the adjacent landowner acquires no title to the same by the action of the State in building a new road and no longer using the old. Even where the interest of the State is only an easement, the landowner does not acquire title to the land free of the easement until there has been a legal abandonment or vacation of the highway. Such abandonment or vacation never takes place in the absence of a clearly established intention to abandon the public rights in the highway. See Elliott on Roads and Streets, Fourth Edition, Section 1173.

It seems clear, therefore, that the State Highway Commissioner, in acting for the public through the Highway Department, has the right, before intentionally leaving any road to be no longer used as a highway, to remove such installations as will be useful in other highway construction work and to leave the old right of way in a neat condition in keeping with the adjacent lands.

Whether the adjacent landowner could refuse to permit such action with respect to sections of roads which for some time have not been used depends upon whether he has already acquired title to the land free of the easement. He would have acquired such title if the road has been vacated in legal proceedings carried out pursuant to statutory provisions. Even in the absence of such provisions, he may have acquired such title if the road has been actually abandoned. While mere non-user may not amount to such an abandonment as would vest such title, if there has been non-user coupled with other factors clearly establishing an intention on the part of the public authorities and the public itself to abandon the road, a legal abandonment of the road may be accomplished. For this reason, it would be advisable to carry out such work of destruction of the old road surfaces of roads previously discontinued only with the consent of the landowner.

You have also asked whether, in cases where the State only has an easement for the old road, the discontinued part of the road can be used as a storage place for gravel and other material without the consent of the landowner. If the landowner has acquired title free of the easement by means set out above, this cannot be done. If not, it is my opinion that the discontinued section of the road can be used for this purpose to the same extent as the edge or unusual portion of the right of way of a regularly traveled road could be so used. Such use would, in my opinion, be limited to more or less temporary use for such purpose, as a permanent use would be converting an easement for a traveled way to an easement for a different and larger use.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Authority to Determine Whether a Particular Road Is a Public Road.

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

HONORABLE C. CARTER LEE,
Commonwealth's Attorney,
Rocky Mount, Virginia.

MY DEAR MR. LEE:
This is in reply to your letter of November 10, regarding an alleged public road in Gills Creek Magisterial District of Franklin County which passes through the lands of Ernest Brown.
It appears from your letter that, when county roads were incorporated into a Secondary System of State Highways under the Byrd Road Act, this road was believed to be a county road to be included in that system and was mapped as such along with other such roads of Franklin County. However, Mr. Ernest Brown, the owner of the property through whose property the road passes, disputed the fact that this was a public road and since that time this question has remained undetermined. The Board of Supervisors was requested in 1932 to declare the road a public road but refused to pass up the question.

You state that in September of this year Mr. J. L. Brown appeared before the Board of Supervisors and requested the Board to declare it a public road. The question has arisen as to the power of the Board of Supervisors to determine this question and you have requested my opinion as to whether it has jurisdiction to do so or whether the matter is one to be determined by litigation in the courts in a suit for a declaratory judgment or otherwise.

The matter is, in substance, a legal controversy between the owner of the land upon whose property the road is located, on the one hand, and the Commonwealth, which now has the authority to maintain roads in the Secondary System of Highways, or such members of the public who contend the road is a public road, on the other hand.

While section 8 of the Byrd Road Law (section 1975oo of Michie’s Code of Virginia, 1942) continues in the Boards of Supervisors the power to establish new roads to become a part of the Secondary System, I find no statute vesting in Boards of Supervisors the jurisdiction to determine a legal controversy over whether an existing road is a public road in the secondary system, or whether such road is a private road subject to the control of the landowner through whose property the road runs. For this reason, it is my opinion that the Board of Supervisors has no power to adjudicate the dispute between Mr. Ernest Brown and Mr. J. L. Brown as to whether the road is now a public highway. This is a matter which can be adjudicated by appropriate litigation in court.

If, however, the Board of Supervisors now desires to take steps to establish the road as a public road to become a part of the Secondary System, it may do so under the statutes prescribing the procedure for such action. See sections 1975oo and 2039(2)-2039(6) of Michie’s Code of Virginia, 1942.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Authority of Counties to Participate in Costs of Secondary Road System.

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

MR. A. H. PETTIGREW,
Right of Way Engineer,
Department of Highways,
Richmond, Virginia.

MY DEAR MR. PETTIGREW:

This is in reply to your letter of July 17 in which you ask if Boards of Supervisors of Counties have any right to participate in the payment of the costs of acquiring rights of way for roads in the secondary system of State highways.
By Chapter 415 of the Acts of Assembly of 1932, the secondary system of State highways was created and the control, supervision, management and jurisdiction of the same were vested in the State Department of Highways. The Act specifically provided that the maintenance and improvement, including construction and reconstruction of that system should be by the State under the supervision of the State Highway Commissioner and that the local road authorities should be relieved of control, supervision, management and jurisdiction of roads constituting that system.

By Section 4 of that Act, it was provided that certain funds were to be set aside as a fund for the secondary system to be disbursed by the State under the supervision of the State Highway Commissioner. By Section 7, the Commissioner was vested with the power of eminent domain to be used in acquiring rights of way for the system.

By Section 3 of the Act, Boards of Supervisors were forbidden to make any levy or contract any further indebtedness for the construction, maintenance or improvement of roads. (This Section was subject to a proviso that Boards of Supervisors of Counties adjacent to cities of the first class might, for the purpose of supplementing funds available for expenditure by the State for the maintenance and improvement of roads in such Counties, where such supplementary funds are necessary on account of the existence of suburban conditions adjacent to such cities, levy county or district road taxes.)

By Section 8 of the Act, it was provided that the local road authorities should continue to have power then vested in them for the establishment of new roads to become parts of the secondary system. No provision was made for the expenditure of funds by the counties for this purpose. In 1934, however, Section 8 was amended to provide that when, in proceedings to establish such new roads, the Board or commission appointed to view the same awarded damages for the right of way, such award might be paid by the Board of Supervisors out of the general county levy funds.

By Chapter 271 of the Acts of Assembly of 1940, Section 8 of Chapter 415 of the Acts of Assembly of 1932 was further amended to vest in the local road authorities the power to alter or change the location of any road which was then in, or which might thereafter become a part of, the secondary system. By this amendment it was also provided that damages which might be awarded for such alteration or change of location of such road might be paid out of the general county levy funds.

Upon a consideration of these various statutory provisions, it is my opinion that the jurisdiction and control of roads in the secondary system are in the State Highway Commissioner and that the local authorities cannot spend county funds for the acquisition of rights of way for roads in that system except under and by virtue of the provisions of Section 8 of Chapter 415 of the Acts of Assembly of 1932 as amended by Chapter 271 of the Acts of Assembly of 1940. The authority of Boards of Supervisors to expend funds for secondary road purposes is limited by the provision of that Section, as it now reads, to expenditures in connection with the establishment of new roads to become a part of the secondary system and expenditures in connection with the alteration or change in the location of roads in that system. In other cases they have no authority to participate in the costs of the acquisition of rights of way for roads in said system.

These views are subject, however, to the exception previously noted existing in the case of counties adjacent to cities of the first class.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HOSPITALS—Disposal of Unclaimed Clothing of Prior Patients.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JUNE 22, 1944.

MR. C. P. CARDWELL, JR.,
Superintendent Buildings and Grounds,
Medical College of Virginia,
Richmond, Virginia.

MY DEAR MR. CARDWELL:
This is in reply to your letter of June 15 from which I quote as follows:

"We are writing to request that your office give us a ruling regarding the length of time that we are responsible for patients' clothes.

"We have in our clothes room now clothes that have been left here for a year or more. In order to make room for additional clothes and to properly maintain this room, we would like to dispose of these clothes, but hesitate to do so for fear that we might be in some way responsible for them."

You have further orally advised me that the clothes to which you refer are those of patients in the various wards. It seems that these are clothes which the patients wore when they were admitted to the wards, there being no room to store such clothes in the wards. Most of these clothes which have not been claimed, you state, were taken from patients involved in accidents, many of whom have either subsequently died or were sent to jail or left the hospital without leaving any address. You also say that these clothes which you have been holding for a considerable period have a very insignificant monetary value.

I can find very little authority dealing with the duty of a public institution, such as the hospital of the Medical College of Virginia, in such a situation as you present. Of course, where the address of the owner of the clothes is known, he or she should be communicated with and notified to claim the clothes. If such claim is not made within a reasonable time, say two or three months, I think you would be justified in disposing of these clothes in any manner the hospital authorities may direct. Where the address of the patient is unknown and no claim is made for the clothes within a reasonable time, say six months, I think that the hospital authorities would again be justified in disposing of the clothes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—Granting Certificate of Sanity to Discharged Inmate of Hospital.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 9, 1944.

DR. H. C. HENRY,
Commissioner Department of Mental Hygiene and Hospitals,
309 North 12th Street,
Richmond 19, Virginia.

MY DEAR DR. HENRY:
This is in reply to your letter of May 5, from which I quote as follows:

"Section 1046 of the Code concerns the discharge of patients not
charged with or convicted of crime. For many years it has been the
custom of the superintendent to give patients on discharge a certificate,
setting forth their condition on discharge; that is, whether restored to
sanity or as improved or unimproved. At the same time a copy of said
certificate is sent to the clerk of the court in whose office the commitment
is filed. Will you kindly advise us in the first place whether there is any
authority in law for the filing with the clerk a copy of such discharges?
Then, in case a person discharged as improved or unimproved, who sub-
sequently recovers and applies for a certificate of discharge as recovered,
how may this be effected other than by court proceedings?

"Two such cases have recently come to my attention in which the
persons had been discharged as improved, certificates to that effect issued,
and the hospital books and records in the central office so recorded—the
case closed in effect. A year or more later the patient in one case pre-
sents an opinion from a qualified psychiatrist that he has recovered and in
the other presents himself personally to the superintendent. In each case
the superintendent gives him a certificate of discharge as recovered. I am
uncertain as to the effect of such discharges when all the records have in
effect been closed at the time the first discharge was issued and a copy
of this discharge filed in the office of the clerk of the court."

In answer to your first question, I will state that I can find no statutory
requirement that a copy of the certificate of discharge given a patient be for-
warded to the clerk of the court in whose office the commitment is filed.
You have advised me, however, that the information contained in these
certificates is of value to the records of the clerk's office, and there is certainly
no reason why copies of these certificates may not continue to be forwarded
to the clerk.

Your second question, namely, whether or not the superintendent of a
State hospital, in cases where a patient has been discharged as improved or
unimproved under section 1046 of the Code, may subsequently issue a certifi-
cate to such patient as being restored to sanity, presents a more difficult
problem. Certainly, where a patient has been discharged as improved or un-
improved, his legal status is that of an insane person, the section simply pro-
viding that this class of discharge may be issued where it will not be detri-
mental to the public or to the patient and where it appears that the patient
will be sufficiently provided for by himself, his committee, relatives, or friends.
Unquestionably it would appear that a patient who had received this class of
discharge and who has subsequently been restored to sanity should be entitled
to have some official ascertainment of this fact without undue expense or
trouble. I am of opinion, therefore, that, where a patient who has been dis-
charged as improved or unimproved subsequently voluntarily submits him-
self to the jurisdiction of the institution from which he was discharged and
the superintendent ascertains by observation and examination that such patient
has been restored to sanity, the superintendent would have the power to issue
a certificate of discharge to this effect.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
MR. LAWRENCE CALDWELL,
Steward Eastern State Hospital,
Williamsburg, Virginia.

MY DEAR MR. CALDWELL:

I am in receipt of your letter of July 13, in which you state that a patient was transported to your institution by the sheriff of Dinwiddie county without application having been first made for the admission of such patient (sections 1022 and 1027 of the Code) and without instructions from the superintendent of your institution to the sheriff to transport the patient. You further state that, if your institution had been notified, you would have sent one of your employees for him and would not have requested the sheriff to transport him.

Under these circumstances, the provisions of sections 1022 and 1027 not having been complied with by the sheriff, technically, I am of opinion that as a strict matter of law the sheriff cannot compel the Eastern State Hospital to pay his bill covering his expenses in transporting the patient to the hospital.

In my letter of May 10 addressed to the State Compensation Board, with reference to the expense of transporting patients to State hospitals, to which the sheriff refers, I expressed the following opinion:

"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."

You will observe, however, that my opinion that the hospital should pay the sheriff's expenses in transporting a patient is predicated upon the assumption that application for admission has been made to the hospital and that the hospital has authorized the sheriff to transport the patient. As I have stated, the provisions of section 1027 do not seem to have been complied with by the sheriff in the instant case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
INSANE, EPILEPTICS, ETC.—Appointment of Guardian for Insane Person in Sterilization Proceeding.

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

HONORABLE WALTER H. ROBERTSON,
Judge Circuit Court of Smyth County,
Marion, Virginia.

MY DEAR JUDGE ROBERTSON:

I am in receipt of your letter of August 26, with reference to the requirement in section 1095-i of the Code (Michie, 1942) that in sexual sterilization proceedings, if there be no guardian or committee for the insane person, the superintendent of the institution "shall apply to the circuit court of the county * * * or to the judge thereof in vacation * * * for the appointment of a guardian for such insane person. Since the statute expressly directs "the superintendent" to make the application, I am inclined to agree with you that it is not necessary that this application be presented to the court by an attorney acting for the superintendent. As you say, the important thing is that a suitable person be appointed to defend the rights and interests of the inmate, and I think you are correct in holding that the guardian should be an attorney.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE, EPILEPTICS, ETC.—Where Insane Persons to Be Committed.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., DECEMBER 13, 1943.

DR. H. C. HENRY,
Commissioner Mental Hygiene and Hospitals,
309 North 12th Street,
Richmond, Virginia.

MY DEAR DR. HENRY:

I am in receipt of your letter of December 8, enclosing a letter from Dr. R. Finley Gayle, Jr., in which he asks if a person found to be insane by a lunacy commission under section 1017 of the Code may be committed to the Medical College of Virginia Hospital just as if this hospital were one of the State hospitals for the insane prescribed by section 1004 of the Code.

In my opinion, there is no authority for such a commitment under the laws of this State dealing with the commitment of the insane to State institutions. The only institutions to which the insane may be committed and cared for at the expense of the State as a result of a finding of insanity by a lunacy commission are the hospitals for the insane mentioned in section 1004 of the Code, namely, those hospitals located at Williamsburg, Staunton, Marion and Petersburg.

It is very probable that pursuant to section 1020 of the Code, if a lunacy commission finds a person to be insane, "upon request of the patient's friends" such patient may be committed to the Medical College of Virginia Hospital, but in this case neither the State nor any county, city or town shall be liable for any costs or charges arising out of the patient's being sent to such hospital, nor would the College be compelled to receive the patient.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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INSANE, EPILEPTICS, ETC.—Person Committed to Institution Is Not Subject to Sterilization Until Admitted as Inmate.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 19, 1944.

Mr. George W. BakeMAN,
Acting Director Medical College of Virginia,
1200 East Broad Street,
Richmond, Virginia.

My dear Mr. BakeMAN:
I am in receipt of your letter of June 7 regarding the sexual sterilization of a young girl who has been committed to the State Colony but not admitted.

The sections of the Code (Michie's, 1942) dealing with sexual sterilization of inmates of State institutions are 1095h to 1095n. The procedure is set out in considerable detail and the statutory provisions should be closely followed. The sections make no provision for the sterilization of a person who is not an actual inmate of one of the institutions named therein, and I am of opinion, therefore, that the operation should not be performed until the girl has actually been admitted to the State Colony.

For further details as to the procedure and the practice, I suggest that you confer with Dr. H. C. Henry, Commissioner of Mental Hygiene and Hospitals, who is in your building.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSURANCE—Burial Associations May Deposit Bonds With State Treasurer for Safekeeping.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 4, 1943.

Honorable George A. BowLES,
Commissioner of Insurance,
State Corporation Commission,
Richmond, Virginia.

My dear Mr. BowLES:
I acknowledge receipt of your letter of September 30, in which you state that the Southwestern Virginia Burial Association, Incorporated, has requested permission to deposit with the Treasurer of Virginia, pursuant to section 4271 of the Code of Virginia, bonds of the United States Treasury in amount of $15,000.

You then ask:

"I shall appreciate your advising me whether or not in your opinion this department can properly advise the Treasurer of Virginia to accept an additional voluntary deposit from the Southwestern Virginia Burial Association, Incorporated, under the provisions of section 4271 of the Code of Virginia as amended.

"The Southwestern Virginia Burial Association, Incorporated, is organized under the provisions of Chapter 170 but operating as a burial
society under the restrictions imposed by Chapter 169-a. Its present deposit, as required by this latter chapter, is $2,500.00."

Section 4271 of the Code of Virginia is contained in Chapter 170 of the Code, which deals with the regulation of assessment or co-operative life and casualty companies. It permits any such company to deposit with the State Treasurer, in excess of the amount required of such company by law, certain types of security including "bonds of the United States," provided "such deposit be not less than ten thousand dollars."

The Southwestern Virginia Burial Association, Incorporated, organized under Chapter 170 of the Code, operates, as you say, under Chapter 169-A of Michie's Code, section 4258(2) of which provides that such companies "shall be governed by the provisions of chapter one hundred and seventy of the Code of Virginia except as specifically provided in this Act." There is nothing in Chapter 169-A which prohibits burial societies from making voluntary deposits with the State Treasurer, therefore it is my opinion that they are entitled to the privileges afforded under section 4271 of Chapter 170 of the Code of Virginia.

Since the deposit which the Southwestern Virginia Burial Association, Incorporated, desires to make is in proper amount and is of proper kind, it is my opinion that it would be proper for you to advise the Treasurer of Virginia to accept this voluntary deposit.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Payment of Allowance for Work Performed by Convict Who Escapes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1944.

HONORABLE W. FRANK SMYTH, JR.,
Superintendent Virginia State Penitentiary,
Richmond, Virginia.

MY DEAR MR. SMYTH:

This is in reply to your request for my opinion as to whether or not it would be proper for the penitentiary authorities to pay to the estate of an escaped prisoner the allowance set up to the credit of such convict under sections 5045 and 5048a of the Code of Virginia.

Section 5048a provides for an allowance to every person sentenced to the penitentiary of ten cents for each day he works, and section 5045 allows an additional allowance to be paid for work done beyond the task assigned to the prisoner. Both of these sections provide that such funds accumulated to the credit of the prisoner and not withdrawn by him pursuant to the provisions of these sections during his imprisonment shall be paid when he is discharged from the penitentiary. It is my opinion that when a prisoner escapes and dies while out of custody, he cannot be considered as having been discharged from the penitentiary, and that since the funds accumulated to his credit are required to be paid by the statute only at the time of his discharge, such funds should not be paid to the estate of the prisoner.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
JAILS AND PRISONERS—Prosecution of Persons Who Are Being Con- 

fined to Penitentiary for Other Offenses.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., February 8, 1944.

HONORABLE J. HUME TAYLOR,  
Attorney for the Commonwealth,  
Norfolk 10, Virginia.

MY DEAR MR. TAYLOR:  
This will acknowledge receipt of your letter of February 1, from which I quote:

"I would like to know whether or not the Commonwealth of Virginia may, as a matter of right, have a prisoner who is confined in the State Penitentiary delivered to the Circuit Court of a county, or the Corporation Court of a city, for the purpose of standing trial in said county or city for a felony committed prior to his incarceration in the State Penitentiary. The indictment pending in said city or county court having been returned subsequent to his incarceration in the Penitentiary."

I can find nothing in the statutes which would limit the right of the Commonwealth to prosecute a person under the conditions you describe. In the absence of any such statutory prohibition, it is my opinion that it is within the discretion of the Commonwealth's Attorney whether such prosecution shall be instituted. The accused is already in the custody of the State, and I can see no practical objection to trying him for the second offense, and should you elect to continue with such prosecution I am sure you will be able to make satisfactory arrangements with the Superintendent of the Penitentiary for a delivery of the prisoners.

Should the accused be thus tried for such second offense, and convicted, the Court should, of course, recite in its judgment whether the sentence imposed is to run concurrently or consecutively with the one under which the prisoner is now being held.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

JAILS AND PRISONERS—Agreement for Transfer of Prisoners While Jail Is Being Repaired to Be Approved by Board of Corrections.

COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, VA., May 25, 1944.

MAJOR R. M. YOUELL,  
Commissioner of Corrections,  
Richmond 6, Virginia.

MY DEAR MAJOR YOUELL:  
This is in reply to your letter of May 23, reading as follows:

"Sometimes it is desirable or necessary for a county or city to close its jail temporarily and arrange for the use of the jail facilities of one or more other counties or cities for the confinement and care of its prisoners. Whenever one unit of government enters into an agreement with another unit of government for the use of its jail, as aforementioned, do the
statutes require that such an agreement be approved by the State Board of Corrections?"

I assume that an agreement of the nature you describe is being made pursuant to the authority contained in section 13 of chapter 217 of the Acts of 1942, as amended. If this assumption is correct, I am of opinion that such an agreement may only be made subject to the approval of the State Board of Corrections.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Consolidation of Jails of Different Localities and Designating Respective Jails for Different Purposes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 22, 1944.

MAJOR R. M. YOUELL:
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Major Youell:
This will acknowledge receipt of your recent inquiry with reference to the jail situation in the cities of Norfolk and Portsmouth and the county of Norfolk. You state:

"As you are undoubtedly aware, there has been a tremendous increase in the number of females committed to jail in the cities of Norfolk and Portsmouth, and the county of Norfolk. The jail for each of these units of government under present conditions has inadequate facilities for the care, treatment and segregation of female prisoners.

"After considerable thought and study has been given to this problem, it has occurred to me that one of the best methods of solving it would be to use the Norfolk county jail as a place of confinement for all females committed to jail in Norfolk city, Norfolk county, and the city of Portsmouth; and to arrange for the use of the city of Portsmouth jail as a place of confinement for all male prisoners from the city of Portsmouth and the county of Norfolk. The city of Norfolk would continue to use its city jail farm as a place of confinement for certain female prisoners."

and then ask the following question:

"Would it be entirely legal for the governing bodies of the county of the county of Norfolk, the city of Norfolk, and the city of Portsmouth to enter into an agreement whereby the jail owned by the county of Norfolk would be designated as the place of confinement for female prisoners committed to jail from the city of Norfolk, the city of Portsmouth, and the county of Norfolk; to designate this jail as the only jail in which female prisoners would be held in confinement in jail for these three units of government; (the city of Norfolk would continue in use its city jail farm as a place of confinement for certain female prisoners); to limit this jail to the confinement of female prisoners only; to designate the city of Portsmouth jail as the place of confinement for all male prisoners committed to jail from the city of Portsmouth and the county of Norfolk; to limit this latter jail to the confinement of male prisoners only?"
Section 13 of Chapter 217 of the Acts of 1942, as amended by an Act of the General Assembly of 1944 (Senate Bill No. 236) and approved by the Governor yesterday, provides as follows:

"Consolidated jails and jail farms.—(a) Any two or more counties, any two or more cities, or any one or more counties and any one or more cities, acting through their respective governing bodies, are hereby authorized to effect an agreement for the joint use, maintenance and operation of the jail or jail farm of any one or more, or all of them, or for the construction, maintenance and operation of a consolidated jail or jail farm. Every such agreement shall be made subject to the approval of the Board.

"(b) The use, construction, maintenance and operation of each such jail and of each such jail farm shall conform to such standards as are prescribed by the Board.

"(c) Except insofar as the same are inconsistent with the provisions of this act, other provisions of law in relation to the construction, inspection and maintenance of jails and jail farms shall apply to each jail and to each jail farm used, constructed, maintained or operated pursuant to the provisions of this section."

Under the provisions of the section quoted above I am of opinion that the county of Norfolk and the city of Norfolk and the city of Portsmouth clearly have the authority to enter into an agreement or agreements to make effective the plan outlined in your inquiry.

You also ask a number of questions relative to the operation of the jails of these political subdivisions in the event said agreements are perfected. These questions are as follows:

"Would any agreement entered into by the governing bodies of these units of government require the approval of the city sergeant of Portsmouth, the city sergeant of Norfolk and the sheriff of Norfolk county? Would these three officials be required to commit, receive, and hold prisoners in accordance with such an agreement? Would the sheriff of Norfolk county be responsible for the management and operation of the Norfolk county jail if it is used by the several units of government as proposed; and would he employ the personnel required to operate the jail? How and by whom would food and other supplies needed for the care and feeding of prisoners confined in the jail be purchased; how and by whom should arrangements be made for medical care for such prisoners? In what manner would expenditures for the operation of the jail be handled; and how would such expenditures be shared in by the three units of government?"

The section under review provides for the agreements to be entered into by the governing bodies of the respective political subdivisions, and I see no necessity for obtaining the approval of the sergeants of the cities and the sheriff of the county. These officials would, under the provisions of Chapter 386 of the Acts of 1942, continue to be the jailors of their respective jails and would continue to receive, care for and hold prisoners duly committed to their jails. The deputies and other employees of such officials would continue to be employed by them in accordance with general law, the number of such deputies and employees and their compensation to be approved by the State Compensation Board. The food and other supplies needed for the care and feeding of prisoners confined in each jail and the medical care of such prisoners would be handled as provided in Chapter 386 of the Acts of 1942 and especially sections 8 and 9 thereof. The expense of operation of the jails, including the cost of care and feeding of and medical attention for the prisoners, would be shared by the respective political subdivisions in accordance with the provisions of the agreements which may be entered into. These
agreements could also properly provide for participation by the contracting parties in the cost of additions to and equipment for any jail or jails involved.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Costs of Removing Prisoners While Jail Is Undergoing Repairs.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 18, 1944.

HONORABLE E. R. COMBS,
Chairman State Compensation Board,
Richmond, Virginia.

My dear Mr. Combs:
I am in receipt of your letter of April 5, with regard to certain phases of the situation which will arise as a result of the contemplated transfer to other jails and to the State Farm of prisoners who would otherwise be confined in the jail of the city of Richmond, such transfer being made necessary by the closing of the Richmond jail for repairs. Your letter is chiefly concerned with the question as to whether or not the State Compensation Board would be justified in authorizing the payment by the State of two-thirds of the additional traveling expenses which will be incurred by the deputies of the City Sergeants of Richmond on account of such transfer of prisoners.

An unusual situation, amounting to an emergency, exists and I am frank to say that the pertinent statutes do not afford a very precise answer to your inquiry. Therefore, I shall not attempt to go into a detailed discussion of the various statutory provisions involved. After careful consideration, however, I have reached the conclusion that under the facts existing in this particular case the Board would be justified in authorizing the payment by the State of two-thirds of these additional traveling expenses. The question of what are traveling expenses to be reimbursed in part by the State is one of fact to be passed on by the Board. I have in mind particularly the board and lodging of those deputy sergeants who will be stationed at Hopewell, for example, for several months.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Compensation Where Town Prisoners Are Kept in County Jail.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., April 20, 1944.

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

My dear Mr. Lee:
I am in receipt of your letter of April 12, from which I quote as follows:

"A dispute has arisen between the Mayor of Rocky Mount and the
REPORT OF THE ATTORNEY GENERAL

county relative to charges for keeping town prisoners in the county jail. Section 3510 of the Code of Virginia fixes the fees to a jailer, and section 3487(1)(b) provides that every sheriff and every deputy shall, however, continue to collect all fees and mileage allowances now or hereafter provided by law for services by such officer.

"I would like your opinion as to whether or not under the circumstances the Board of Supervisors is entitled to charge for the board of town prisoners pursuant to section 3510, and whether or not it should be collected by the sheriff and turned over by him to the treasurer.

"We have attempted to negotiate a contract which varies some from the rates therein mentioned, which contract would be between the Council of the Town of Rocky Mount and the Board of Supervisors. Can the Board of Supervisors by contract reduce this amount if they see fit?"

Section 9, subsection (c) of chapter 386 of the Acts of 1942 provides in effect that the sheriff shall collect from a town for which any prisoner is held in the county jail "the reasonable costs, to be determined by agreement with the governmental unit involved, or, in the absence of such agreement, as shall be determined by the State Board of Corrections, of feeding, clothing, caring for, and furnishing medicine and medical attention for, prisoners held for such *** town ***. All moneys so collected from *** such *** town *** shall be promptly paid into the treasury of his county *** and the total amount so collected shall be retained by such county ***."

If, therefore, the county and town cannot agree on a contract, it would appear from the above that the costs to be paid by the town to the county for keeping town prisoners shall be fixed by the State Board of Corrections.

I am further of the opinion that the Board of Supervisors and the town may by contract agree upon such amount that the town will pay the county as to the two units may appear proper. Certainly, in view of the statute, the contract may fix a less amount than is provided in section 3510 of the Code.

All money paid by the town to the county under the contract, as you will see, is to be paid into the treasury of the county and retained by the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Compensation Where Town Prisoners Are Kept in County Jail.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., JUNE 19, 1944.

HONORABLE GRADY W. GREGORY,
Sheriff Franklin County,
Rocky Mount, Virginia.

MY DEAR MR. GREGORY:
I am in receipt of your letter of June 16 from which I quote as follows:

"A dispute has arisen here over the charges that I shall make against the Town of Rocky Mount for keeping their prisoners in the county jail. Please advise who is the proper party to act for the county in making a contract with the Town to keep their prisoners. That is, shall I make the contract or shall the Board of Supervisors?"

Section 9, sub-section (c) of Chapter 386 of the Acts of 1942 provides
that a sheriff shall collect for town prisoners held in the county jail a reason-
able cost of caring for and feeding such prisoners “to be determined by
agreement with the government unit involved.” In view of this provision I
am of the opinion that the agreement on the part of the county should be
made by the Board of Supervisors or someone acting for the Board. If the
Board has designated you to act for it in making the agreement, then, of
course, you may do so, but the agreement when made should be approved
by the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Expense of Keep of Fugitives from Other
States; How Borne.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 26, 1943.

HONORABLE H. M. RATCLIFFE,
Attorney for the Commonwealth,
Henrico County,
402 Travelers Building,
Richmond, Virginia.

My dear Mr. Ratcliffe:
I am in receipt of your letter of July 17, in which you inquire as to the
responsibility for the costs of caring for prisoners held in jail for another
state on fugitive warrants.

This question is controlled by Chapter 386 of the Acts of 1942, section
9(c), wherein it is provided that the sheriff “shall also collect * * * from
any other state or country for which any prisoner is held in such jail, the
reasonable costs, to be determined by agreement with the governmental unit
involved, or, in the absence of such agreement, as shall be determined by the
State Board of Corrections * * *.”

In view of this specific provision, I know of no authority for the payment
by the state of the costs of caring for such prisoners.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Expense of Operation; Chairs and Tables.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 23, 1943.

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

My dear Major Youell:
I am in receipt of your letter of November 15, in which you inquire
whether the Commonwealth should reimburse the City of Richmond for a
proportionate part of the cost of tables and chairs to be used in serving meals
to the prisoners in the Richmond City jail.
Section 9 of Chapter 386 of the Acts of 1942 provides in part that the Commonwealth shall reimburse a county or city "for such proportionate part of the reasonable cost of food * * * and of the clothing, medicine, lights, water, heat, disinfectants, bedding, and other necessary supplies required for the prisoners confined in * * *" jail. The section goes on to provide how the amount of the Commonwealth's share of these expenses shall be determined.

I have previously advised you on several occasions that the determination of just what expenses shall be shared by the Commonwealth is more an administrative question than a legal one. For your future guidance, however, I will state that in my opinion the pertinent statutes contemplate that the Commonwealth shall reimburse the locality for its part of expenses incurred which are reasonably necessary for the proper care and feeding of prisoners in jail. By Chapter 217 of the Acts of 1942 the State Board of Corrections is given general supervisory authority concerning the feeding, clothing, medical attention, care and treatment of all prisoners confined in jail. It is, therefore, my opinion that, if in the judgment of the Board an expense is incurred by a locality which is reasonably necessary for the proper care or feeding of prisoners in its jail, then the Commonwealth should reimburse the locality for its share of such expense. To be specific, in the case of the chairs and tables purchased for the Richmond City jail, if the State Board of Corrections considers that such chairs and tables are reasonably necessary for the proper feeding of the prisoners in the jail, then I am of opinion that the prescribed portion of the cost of such tables and chairs should be borne by the Commonwealth.

I do not mean to suggest that the locality should be reimbursed by the State for a part of the cost of everything that a particular locality should choose to purchase for use in the jail. To illustrate my view, if a particular locality should choose to provide each cell in its jail with a radio, I do not think that the Commonwealth should reimburse such locality for any part of the cost of these radios if in the judgment of the State Board of Corrections they are not reasonably necessary for the proper care and treatment of the prisoners. I also suggest that it may be that a reimbursable expense incurred in the jail of one locality may not always be a reimbursable expense in the jail of another locality. For example, it would appear to me that there may be expenses which are reasonably necessary in the jail of a large city, such as the City of Richmond, which may not be reasonably necessary in a small jail in a county and vice versa.

This letter has no application to the expense incurred for the construction, repair, or maintenance of a jail from the standpoint of the custody or safekeeping of prisoners confined therein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Hospital Expense of Prisoner; How Certified.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., July 30, 1943.

HONORABLE R. M. YOUELL,
Commissioner of Corrections,
Richmond, Virginia.

MY DEAR MAJOR YOUELL:

Repling to your letter of July 27, I am of the opinion that in the case of the hospital expenses referred to in my letter of July 19 to Honorable J.
Robert Switzer, Clerk, Circuit Court of Rockingham County, where the prisoner is charged with violation of a state law and where such expenses are certified by the court, certification should go to the State Comptroller and the bill paid out of the appropriation for criminal charges. It is not necessary for such certification under section 4960 of the Code to be passed on either by the Commissioner of Corrections or by the Board of Supervisors.

Where the hospital bill is incurred in caring for a prisoner charged with the violation of a county ordinance, such bill should be presented to the Board of Supervisors of the county. Section 4960 of the Code is not applicable to expenses incurred in connection with prisoners charged with violation of local ordinances.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Duty of Clerk Where Commonwealth Judgment Has Been Paid.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., August 30, 1943.

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

MY DEAR MR. GILLESPIE:
This is in reply to your letter of August 28, in which you state:

"The records of this county show that the Commonwealth of Virginia recovered a judgment against one Kester Phipps for $250 for a fine, and $144.16 for costs, or a total of $394.16. Said judgment is dated August 25, 1924, and docketed September 25, 1924, in the clerk's office of this county, in Judgment Lien Docket No. 10, page 62.

"The records further indicate that the said judgment and costs were paid in full.

"Section 6468a of the Code provides a method of marking judgments in favor of the Commonwealth satisfied when payment thereof is made to the clerk. I would appreciate it if you would advise me how a judgment paid during the tenure of office of one clerk can be satisfied after he has ceased to hold office and while in office failed to mark the judgment satisfied.

"Would it be necessary to have the judgment debtor file a petition in the circuit court of the county where the judgment was recovered praying for an order directing the present clerk to mark the judgment satisfied, if, of course, the evidence would substantiate such an assertion? If this is the procedure, who should be made parties defendant to the petition?"

In my opinion, if the present clerk is satisfied that the judgment and costs have been entirely paid, he may now mark such judgment satisfied, even though the payment may have been made during the tenure of office of his predecessor. I presume, of course, that before taking this action the clerk will require such evidence as to him may seem proper concerning the payment, but, if the payment actually has been made, I do not think that the statute contemplates that only the clerk in office at the time of such payment may mark the judgment satisfied.

If the clerk cannot be satisfied concerning the payment or for other
reasons thinks he should not mark the judgment satisfied, then the only recourse that the judgment debtor would appear to have would be by petition in the circuit court of the county, wherein the judgment debtor would be plaintiff and the present clerk defendant.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Revocation of Driving Permit of Federal Employee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 26, 1943.

HONORABLE HAROLD R. STEPHENSON,
Attorney for the Commonwealth,
Fluvanna County,
Palmyra, Virginia.

MY DEAR MR. STEPHENSON:
This is in reply to your letter of August 24, 1943, from which I quote in part:

"I desire an opinion from you on the following question: Can a Federal employee who has been authorized and directed by his superiors to use his own automobile, or other privately owned vehicle, in the discharge of his official duties, operate his own automobile on the Public Highway of this Commonwealth while on the business of the Government after his operator's license has been suspended or revoked in this Commonwealth?

"Your opinion of May 11, 1943, covered rights of the Commonwealth of Virginia to revoke driver's permits of Federal employees who operate Federally owned vehicles. The distinction in the instant case is that the vehicle is privately owned, rather than Federally.

"I am of the opinion that the same principal is involved, in the instant case, that the automobile is used on official business of the Government and that any restriction of the right of the Federal employee to operate his automobile on authorized travel in conducting the duties of his office would be to interfere with the business of the Federal Government and therefore an invasion of Federal rights."

I find myself in complete accord with the opinion you express, but wish to call to your attention that portion of my former opinion which refers to the defendant's use of the highways for personal or pleasure driving, to-wit:

"* * * the defendant (one convicted of driving under the influence of intoxicating liquor) is thereby automatically barred from the use of the State highways for personal or pleasure driving for a period of one year—but, he is not barred from their use while in the bona fide discharge of said federal duties."

I notice from the records in the case before you that the conviction of drunken driving was had on June 18, 1943, while his federal certificate of Automobile Travel Authorization is dated July 1, 1943. However, I think that is not important in view of the fact that the question under consideration concerns his right to future use of the highways pursuant to the authorization of July 1, 1943.

Very sincerely yours,

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

JUVENILE AND DOMESTIC RELATIONS—Powers of Local Juvenile and Domestic Relation Courts Are Transferred to Trial Justice.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.
RICHMOND, VA., March 14, 1944.

HONORABLE D. S. VASS,
Judge Juvenile and Domestic Relations Court,
Galax, Virginia.

MY DEAR MR. VASS:

This is in reply to your letter of March 13, 1944, in which you request my opinion on the question of whether the Trial Justice Act (sections 4987a-p of the Code of Virginia) abolishes the jurisdiction of the Juvenile and Domestic Relations Court of the Town of Galax. You have made reference to my earlier opinion of June 18, 1934, in which I stated that the Trial Justice Act as originally enacted in 1934 did not abolish the aforesaid Court.

In 1926, the Town of Galax was authorized, by an amendment to its charter, to provide for a juvenile and domestic relations court. Acts of 1926, p. 936, ch. 557.

The original Trial Justice Act of 1934, which made the trial justice the judge of the juvenile and domestic relations court for the county, expressly provided that it should not be construed as affecting "** any town in any such county **." Also, the repealer clause at the end of the Act was not broad enough or sufficiently express to justify the conclusion that special charter provisions of towns were thereby repealed. Acts 1934, p. 466, ch. 294.

It was my opinion in 1934, therefore, that the Trial Justice did not abolish the jurisdiction of the Juvenile and Domestic Relations Court of the Town of Galax.

In the subsequent amendments to the Trial Justice Act, it clearly appears that the intention of the General Assembly is to consolidate in the trial justice all the jurisdiction previously exercised by justices of the peace, mayors, and other special justices of the localities, except in certain instances expressly specified in the Act. In 1942, for example, the Act as amended and re-enacted contains the following provision:

"Be it further enacted, That all acts and parts of acts, both general and special, including charters of cities and towns, inconsistent with the provisions of this act, as amended, are hereby repealed to the extent of such inconsistencies. **." (Acts 1942, pp. 574-581, ch. 376 at p. 581.)

You will observe that this provision expressly repeals the provisions of charters of cities and towns inconsistent with the Act, therefore, I am of the opinion that the Court of Juvenile and Domestic Relations for the Town of Galax has no jurisdiction to deal with matters arising under the general law pertaining to juveniles and domestic relations.

Very sincerely yours,

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

JUVENILE AND DOMESTIC RELATIONS—Court May Be Separated From Civil Justice Court by Special Act of General Assembly.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
Richmond, Va., March 25, 1944.

Honorable Andrew W. Clarke,
Member of the State Senate,
107 North Fairfax Street,
Alexandria, Virginia.

My dear Senator Clarke:
I have your letter to me of March 25, which is as follows:

"Under the 1938 Acts of the General Assembly, chapter 256, page 393, relating to the city charter of Alexandria, Virginia, section 16 provides that from and after the effective date of this Act the civil and police justice of the city of Alexandria shall ex officio be judge of the Juvenile and Domestic Relations Court of said city. During the past session of the General Assembly a bill was introduced in the House, known as House bill 401, by Mr. W. Selden Washington, the Delegate from the city of Alexandria, which bill provided that the judge of the civil and police court should be separated, and that a separate judge should be elected pursuant to the general law under section 1945 of the Code by the city council. This bill was amended in the Senate by providing the people should have the right to elect the Juvenile and Domestic Relations judge. The House rejected the amendment and the bill was permitted to die, and the law remained as amended by the 1938 Acts.

"The regular election in the city of Alexandria for the election of the civil and police Judge will be held in November, 1945, and, under the present law, the judge elected to this position is ex officio the judge of the Juvenile and Domestic Relations Court for a term of four years. I would like very much to have your opinion as to whether or not the 1946 session of the General Assembly could enact emergency legislation separating the judge of the civil and police court and the judge of the Juvenile and Domestic Relations Court, after the civil and police judge has been elected by the people."

It is my opinion that the answer to your question is in the affirmative, and that the General Assembly has the power, by passing an Act amending the charter for the city of Alexandria, to separate the offices of the judge of the civil and police court and the judge of the Juvenile and Domestic Relations Court to become effective immediately.

Very sincerely yours,

Abram P. Staples,
Attorney General.

LAND GRANTS—Of Islands in Pamunkey River.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
Richmond, Va., August 17, 1943.

Mr. R. E. Wilkins,
Secretary of the Commonwealth,
Richmond, Virginia.

Dear Mr. Wilkins:
Your letter of the tenth instant with enclosure received. The enclosure is a letter from Mr. Vivian Lacy, Deputy Clerk of the County of New Kent,
which says that Mr. Gunthrow is interested in getting a grant for a small island in the Pamunkey River, located between Matton Creek and Macon’s Creek on the New Kent shore up the river from Poplar Grove Farm. He says that Mr. Henry S. Duncan, R. F. D. #3, Richmond, Virginia, used the island last year for a duck blind, and that he understood from a conversation with Mr. Duncan that the island is not covered by water during low tide but is probably covered by water during high tide. You ask my opinion as to whether or not this island is subject to location and grant.

The island is most likely owned by the Commonwealth. Under Chapter 139 of the Code all the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of the Commonwealth shall continue and remain the property of the Commonwealth to be used in common by all the people. Grants of land abutting on the streams which are navigable, or where the tide ebbs and flows, extend only to the ordinary low water mark and this island has probably never been granted to anyone.

Grants of land by the Commonwealth to individuals are made with the view that the Grantee will improve the land by cultivation and so make the property productive where otherwise it would be unproductive if not granted. The Commonwealth along with the United States is vitally interested in maintaining the navigability of all tidewater streams. This fact has been emphasized by the comparatively recent legislation which prohibits the issuing of grants for any islands created in the navigable waters of the State through dredging operations. (See Section 459 of the Code.) My opinion, therefore, is that the island in the Pamunkey River should not be granted to an individual but should remain in the Commonwealth for common use.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

LICENSES—Dog Licenses; Fine to Be Imposed for Failure to Pay Tax.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 16, 1944.

Mr. C. D. Henkle,
Justice of the Peace,
Buena Vista, Virginia.

My dear Mr. Henkle:

I am in receipt of your letter of February 14, and beg to advise that section 3305(82) of Michie’s Code of 1942 provides that any person convicted of failure to pay the dog license tax prior to February 1 on any dog owned by him “shall be fined not less than the amount of the license tax required by law to be paid on such dog, nor more than ten dollars, and be required to obtain proper license forthwith * * *.” In my opinion, no fine of less than the amount above prescribed may be imposed for failure to secure the license. The fine of not less than five nor more than one hundred dollars to which you refer applies to the offense of making a false statement in order to secure a dog license.

You will understand, of course, that this letter is in no way to be construed as passing on the authority of a justice of the peace to try a person charged with failure to secure a license for his dog.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
LITERARY FUND—Purchase by County of Its Own Bonds From State Board of Education.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 18, 1944.

Dr. DABNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond 16, Virginia.

MY DEAR DR. LANCASTER: This will acknowledge receipt of your letter of January 10, from which I quote:

"You have advised this department that in your opinion the State Board of Education has no authority to sell bonds issued by county school boards for loans from the literary fund to banks, financial institutions, or other private investors.

"Does your opinion apply to boards of supervisors who wish to purchase the school board bonds of the same county, to be used by the supervisors as an investment held by the county sinking fund for the redemption of bonds issued by the board of supervisors for purposes other than for the public schools?"

In an opinion given your predecessor under date of March 15, 1935, to the effect that the State Board of Education does not have authority to sell and transfer bonds which evidence loans made out of the literary fund to the local school boards, I stated:

"The statutes of Virginia with reference to loans from the literary fund confer power upon the Board of Education to resort to remedies for the collection of the loans made to local school boards which are essentially different from the remedies given to the holder of an ordinary county or district school bond. If these bonds may be lawfully transferred, it would seem to follow that the transfer of the bonds would transfer to the new holder thereof these same remedies.

"While the statute does authorize the State Board of Education to invest and reinvest its funds, there is no express provision authorizing the sale or transfer of the securities evidencing loans made out of the literary fund to local school boards. In the absence of express authority, I am of the opinion that it would be contrary to the general intent and purpose of the statute to give the remedies which the law provides for the collection of these loans to private individuals."

This opinion, as you will observe however, related primarily to the sale of these securities to banks, financial institutions, or other private investors. A sale to the county which issued them presents another question, and it is obvious that some of the objections to their sale to private investors would not apply in such a case. Indeed section 2741-a of the Code expressly authorizes the board of supervisors of a county to invest sinking funds of the county "in obligations of the county," provided such investment "be first approved by the circuit court of said county, or the judge thereof in vacation, and the form of security be examined and approved by the Commonwealth's attorney of said county, which approval shall be entered of record in the law order book of said court." In view of this express statutory provision I do not feel that I can say that the State Board of Education is prohibited from selling the securities in question to the county which issued them. If such a sale should be made, however, I do not think that the county could in turn sell the securities to the private investors mentioned in the opinion to which
I have referred. This would mean that the purchasing county would have a very limited market for the securities, a market indeed probably confined to the State Board of Education or to the State's sinking fund commissioners. I should think that this fact would be carefully considered by a county before purchasing these securities.

It is also, of course, unnecessary for me to say that, even if the State Board of Education has the authority to dispose of these literary fund loans in the manner indicated, whether or not they should exercise this authority is a matter within the Board's discretion.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LITERARY FUND—Acts of 1942 Reducing Rate of Interest Not Applicable to Certain Certificates of Indebtedness.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
Richmond, Va., January 21, 1944.

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

MY DEAR DR. SANGER:

This will acknowledge receipt of your letter of January 18, in which you call attention to the 1942 amendment of section 643 of the Code (Chapter 30 of the Acts of 1942) reducing the interest rate on certain loans made from the literary fund from 4 per cent to 3 per cent per annum, and inquiring if such reduced interest rate is applicable to certificates of indebtedness of certain of the State educational institutions, including the Medical College of Virginia, issued under the authority of Chapter 440 of the Acts of 1936, when such certificates of indebtedness have been purchased by the State Board of Education out of the literary fund.

In my opinion your question must be answered in the negative. The loans referred to in section 643 of the Code are obviously loans from the literary fund to county, city and town school boards, for not only is it so stated in the title to the Act amending the section, but this is also evident from the sections of the Code immediately preceding and following section 643. On the other hand, Chapter 440 of the Acts of 1936 authorized the agencies named therein, none of which is a county, city, or town school board, to issue and sell their certificates of indebtedness bearing interest at 4 per cent, which certificates of indebtedness may or may not be purchased by the State Board of Education from the literary fund.

Very sincerely yours,

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

LOBBYING—Compensation Contingent Upon Success of Efforts of Lobbyist.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 28, 1943.

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

MY DEAR MR. SINGLETON:

This is in reply to your letter of December 16 in which you request my opinion upon whether Chapter 85 of the Acts of Assembly of Virginia of 1938 (Chapter 20A of Michie’s Code of Virginia, 1942) makes invalid a contract of employment of a legislative agent or counsel calling for compensation contingent upon the passage of legislation if such contract was entered into before the Act was passed.

This Act is entitled “An Act to regulate lobbying, to regulate the employment of persons, and the activities of persons employed, to promote or oppose legislation before the General Assembly of Virginia and the committees and members thereof, or either, and to provide penalties for violations of this act,” and Section 4 of the Act states that:

“No person shall be employed as a legislative counsel or legislative agent for a compensation dependent, in any manner, upon the passage or defeat of any proposed legislation or upon any other contingency connected with the action of the General Assembly, or of either branch thereof, or any committee thereof.”

In my opinion the purpose of this statute was to regulate all lobbying before the General Assembly, except that expressly excepted from its terms and was to prohibit any employment of a legislative agent or counsel upon a contingent fee contract whether the contract for such employment was made before or after the passage of the Act. So construed the Act is not, in my opinion, unconstitutional because of constitutional provisions forbidding the impairment of the obligations of contracts. It is well established that the constitutional protection of the obligations of contracts is subject to the police power of the States and that a statute passed in the legitimate exercise of that power is valid although it incidentally destroys existing contract rights. All contracts made with respect to matters subject to regulation under the police power are made in reference to the possible exercise of that power. Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 79 L. Ed. 1086, 55 S. Ct. 570; 12 Am. Jur. Constitutional Law, Section 421.

Of course, no one could be punished under Chapter 85 of the Acts of Assembly of 1938 for having made a contract for the employment of a legislative agent or counsel upon a contingent fee basis prior to the passage of the Act. So applied, the Act would be an ex post facto law and therefore invalid. However, the constitutional provision forbidding the passage of ex post facto laws does not prohibit the legislature from prohibiting the continuance of such employment and making it illegal to do in the future what a person may have in the past contracted to do. Such legislative action is entirely prospective and does not constitute the passage of an ex post facto law.

In my opinion the lobbying Act of 1938 was a proper exercise of the police power and violates no constitutional provisions in prohibiting lobbying under contingent fee contracts entered into before its passage.

Very sincerely yours,

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

MARRIAGE AND DIVORCE—Applications for Marriage License; How Sworn to.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 30, 1943.

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

My dear Governor Darden:

The communication enclosed with your letter of November 29 from Captain J. G. Ware, Commanding the U. S. Naval Construction Training Center at Camp Peary, presents the question as to whether or not applicants for a marriage license under section 5074 of the Code have to personally appear before the clerk of the court in order to secure such license.

I have heretofore expressed the opinion that section 5074 of the Code does not require the actual presence before the clerk of the applicants for a marriage license, but that the application may be completed by the applicants and sworn to before a notary public or other person qualified to take acknowledgments. Upon receipt of such application the clerk may send the marriage license to the applicants by mail.

I have also expressed the opinion that, if the clerk desires to satisfy himself as to the accuracy of some particular fact stated on the application for the license, he may for this reason require the presence of the applicants. For example, there may be a fact stated in the application which is contrary to the clerk's own knowledge, or for obvious reasons the clerk might want to ascertain the date of a divorce decree, or he might not be satisfied as to the age, race, or residence of either one or both of the parties. In the normal case, however, I see no reason why the clerk may not issue the license upon receipt of an application therefore properly filled out and sworn to, without requiring the applicants to appear before him in person.

I hope that in the light of the opinion which I am expressing herein some arrangement may be worked out which will be satisfactory both to Captain Ware and to the Clerk of the Circuit Court of York County.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Insanity Subsequent to Desertion Does Not Bar Divorce Action.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 26, 1944.

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

My dear Mr. Singleton:

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

"I would like for you to give me your opinion on a part of section 5103 of the Code, which reads as follows:

"When the suit is for divorce from the bond of matrimony for wil-
ful desertion and abandonment, it shall be no defense that the guilty
party has, since the commencement of such desertion, and within two
years thereafter, become and has been adjudged insane, but at the
expiration from the commencement of such desertion the ground for
divorce shall be deemed to be complete. * * * .

"Does this mean that, although a person may have deserted his
spouse, and then gone insane, the innocent party cannot get a divorce
a mensa et thoro, or would it be possible to get a divorce a mensa et thoro?"

Our Court of Appeals in Wright v. Wright, 125 Va. 526, said that:

"It may be regarded as settled by the great weight of authority that
the insanity of the defendant is no bar to the prosecution of a suit for
divorce for a cause which accrued before such insanity began * * * ."

Section 5104 of the Code provides that:

"A divorce a mensa et thoro may be decreed for * * * abandonment or
desertion."

In this class of divorce no definite period of desertion is required by the
statute to sustain a suit for divorce.

It therefore follows, I think, from the holding in Wright v. Wright, supra,
that, if the court is satisfied from the facts and circumstances of any case that
the desertion was such as to come within the statute and occurred prior to
the insanity of the defendant, a divorce a mensa et thoro may be decreed even
though the defendant may subsequently have become insane.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MILITARY LAWS—Eligibility of Appointees to State Military Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 2, 1943.

Honoroble Colgate W. Darden, Jr.,
Governor of Virginia,
Richmond, Virginia.

My dear Governor Darden:
I have your letter of the sixteenth instant, enclosing copy of a letter to
you from General S. Gardner Waller. You state that you would like to
appoint General E. E. Goodwyn, who now commands the Virginia Protective
Force, as a member of the Military Board and ask for my opinion as to his
eligibility.

Section 2673(11) of Chapter 106 of the Code, which is the military code
of Virginia, provides for the membership and organization of the Board. The
Governor, the Adjutant General, the senior officer of the Virginia national
guard, the Secretary of the Commonwealth, and one other member, to hold
office during the pleasure of the Governor and to be appointed by him, such
member to be a member of the National Guard with Federal recognition and
with more than three years' service, and above the rank of Captain, con-
stitute the Military Board.

The Virginia Protective Force is not an organization provided for by
statute and, while in wartime its functions and operations in the State are
comparable to those of the National Guard and can be used for the same purposes, it cannot be said to take the place of the National Guard in the sense that its senior officer would be a member of the Military Board. It would seem reasonable for him to be eligible and the Legislature will probably amend the law to make him so if the matter is called to their attention, but until the law is so changed, it is my opinion that the senior officer of the Virginia Protective Force is not automatically a member of the Military Board.

My information is that General Goodwyn is not eligible for appointment by you, not being "an officer of the National Guard with Federal recognition." The Legislature at the next session can amend the law so that you can make the appointment.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Arrests Made by State Trooper to Be Charged With Violation of State Law, and Not Local Ordinance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., February 16, 1944.

HONORABLE W. A. METZGER,
Trial Justice,
Leesburg, Virginia.

MY DEAR MR. METZGER:

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

"We have a county ordinance paralleling the State law in respect to speeding and I will thank you to advise me if an arrest made by a traffic officer can be tried as a violation of a county ordinance or of the State statute and if tried as a violation of a county ordinance the fine would go to the county instead of the State."

This office has heretofore expressed the opinion that, where an arrest is made by a State police officer for violation of the motor vehicle laws of this State, the person arrested shall be charged with and tried for a violation of State law and not a violation of a county ordinance, and the fine, if any imposed, will go to the State. See section 2154(169) of Michie's Code of 1942.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Hit and Run Law.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General.
RICHMOND, VA., May 13, 1944.

HONORABLE S. PAGE HIGGINBOTHAM,
Attorney for the Commonwealth,
Orange, Virginia.

MY DEAR MR. HIGGINBOTHAM:

I have your letter of May 2, 1944, in which you ask my opinion con-
cerning the construction of section 2154(104) of the Code (Michie's) of Virginia. You ask whether this section requires the driver of an automobile to make a report to the police authorities of an accident in which the driver struck and instantly killed a drunk person lying in the highway.

The chief purposes of the statute are to require the driver of an automobile involved in an accident to stop, render aid if possible, and disclose his identity. Violation of this section is punishable under section 2154(105) of the Code.

The first sentence in the statute contemplates a situation in which the person injured is capable of making an intelligent notation of the information given by the driver, or is accompanied by some person who can accept the information. In this type of case this section of the Code does not require that the driver report the accident to the police authorities, but it does require the driver to render aid if the circumstances necessitate such action.

The second sentence in the statute contemplates a situation in which the damage is to an unattended vehicle or to some other object, in which event the driver is required, not only to make reasonable effort to locate the owner, or leave a note attached to the object, but to "report the accident in writing" to the police authorities.

The first sentence in the statute is not applicable because this sentence does not require a report to be given to the police at all.

The second sentence in the statute is not applicable because it contemplates the striking of an unattended vehicle or some other object. A drunken person lying in a highway is not an unattended vehicle, and, in my opinion, does not fall within the meaning of "some other object."

Where a person is struck, the main purpose of the statute is to require a driver to stop and render aid, whether the driver be at fault or not. Indeed, immediate aid given, particularly if the victim be unconscious, may be the margin of difference between life and death in many cases.

Where the person struck dies instantaneously, no aid can be given, and in the absence of any express requirement in the statute, it would be contrary to the principle which requires penal laws to be strictly construed, to presume that the General Assembly intended that a notice of the accident be given to the police.

From what I have said it follows, in my opinion, that the driver of a vehicle which hits and kills a person instantaneously may not be punished under section 2154(104) and (105) of the Code for failure to report the accident to the police. I call to your attention, however, section 2154(106) of the Code, which, for other purposes, does require that such driver give notice of such accident to the police.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Revocation of Driving Permits; Extension of Such Revocation.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., October 6, 1943.

Senator Aubrey G. Weaver,
Front Royal, Virginia.

My dear Senator Weaver,
Since our conference this morning I have investigated the provisions of our statutes relating to the effect upon the duration of the time of revocation
of an automobile driver's license of such driver being convicted of operating his motor vehicle during the time of such suspension. The situation you discussed with me certainly seems a hardship case, as the driver had at all times previously abainted from driving his car, and, at the time of his arrest, had driven it a distance of only one block to obtain gasoline so his wife could drive him to see his father who was very ill in case he should be summoned to his bedside. He had returned from this mission when the officer arrested him. If he had contested the case, the court might have taken the view that driving such a short distance should be considered *de minimis* and not such a material violation as to require a conviction. However, he did not defend the charge but submitted to a conviction.

In this situation I see no possible way for him to escape the plain provisions of the statute. Michie's 1942 Code, section 2154(186), subsection (b), imposes a mandatory duty upon the Division of Motor Vehicles in these words: "The division, upon receiving a record of the conviction of any person upon a charge of operating a motor vehicle while the license of such person is suspended or revoked, shall immediately extend the period of such first revocation or suspension for an additional like period."

This provision leaves no discretion whatever in the Division as to whether the license shall be revoked. Nor does it permit any inquiry by the Division into the facts and circumstances attending the conviction. The extension of the time of revocation follows as a matter of law, when the Division receives the record of such a conviction.

With reference to your inquiry as to the power of the Governor to restore a revoked license, I find that last year this office gave an official opinion that the Governor has no such power.

Sincerely,

ABRAM P. STAPLES,
Attorney General.
Section 11 of Chapter 360 of the Acts of 1932 reads as follows:

"Nothing in this act shall be construed to preclude any city or town through which any motor vehicle carrier operates from imposing a reasonable charge on such motor vehicle carrier for the use of the streets, roads or routes, including bridges, other than toll bridges, maintained by such cities or towns; provided, however, that such charge for motor vehicle carriers shall not exceed one-fifth cent per mile for each mile operated within such city or town by any vehicle weighing five thousand pounds or less; two-fifth cent per mile so operated by any vehicle weighing more than five thousand pounds and less than fifteen thousand pounds; and three-fifths cent per mile for each mile so operated by any vehicle weighing more than fifteen thousand pounds."

The effect of this section, of course, is to allow cities and towns in which a motor vehicle carrier operates to impose a limited tax for the use by the carrier of the roads and streets maintained by such cities and towns. If, as a matter of fact, a city or town does not maintain any road or street used by a motor vehicle carrier, then I am of opinion that the tax authorized by the section may not be imposed on that particular carrier. Whether or not a town in any particular case maintains a road or street used by a carrier is a question of fact on which this office cannot attempt to pass.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

OFFICIAL BONDS—Premiums May Not Be Paid in Advance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 8, 1943.

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

MY DEAR MR. DOWNS:

Referring to our conversation this morning and your previous letter with reference to a suggested practice that county treasurers contract with bonding and surety companies for bonds covering their entire term of four years, paying the premium in advance, I have given considerable study and thought to this matter, and have also obtained some information from the Insurance Department.

Your inquiry is directed to the question whether or not it would be lawful for the State's share of the entire four-year premium to be paid in advance at the time of the execution of the bond. It seems that by paying in this manner, while there would be no saving on the premium for the first year, there would be a saving of fifteen per cent on the premiums for each of the next three years.

It seems that the uniform practice throughout the State has been to pay separate premiums annually during the continuance of the bond.

Appropriations made by the General Assembly are almost always made on an annual basis, and, in view of the practice which has long prevailed of taking care of each year's bond charges out of the annual appropriation for that year, I do not believe that, in the absence of express legislation contained either in the appropriation bill or elsewhere, there would be legal authority for the payment of the entire four years' bond charges out of an appropriation for one year.
I call your attention also to the fact that under the rules and regulations, which I am advised by Mr. C. W. Harris, Statistician of the Bureau of Insurance, apply to all fidelity bonds covering tax collectors, there can be no refund of unearned premiums in the event of the death or resignation of the treasurer prior to the expiration of his term until and from the date of a clearance, which I understand to mean a release from any liability which may have been incurred by reason of any breach of the condition of the bond by the resigned or deceased treasurer.

Since I know of no authority which any State officer or agency has to execute any such clearance or release of liabilities which have accrued during the time the deceased or resigned officer held office, it would seem that it would be impossible to obtain a refund of unearned premiums in any case of this kind. In any such case, therefore, the State would have paid more for its protection against the risk of loss during the year covered than it would have to pay under the annual payment plan. Of course, it is obvious also that the State would be out of the use of the money used to pay the additional three years' premium in advance.

It may be that the bonding companies might revise their rules and regulations to permit a refund of unearned premiums without the clearance required under their present plan.

If Governor Darden, after considering the matter, feels that it would be a wise policy to adopt a practice of paying the entire four-year premium in advance, I suggest that an appropriate provision be inserted in the budget bill providing for same.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON, PROBATION AND PAROLE—Governor Has No Authority to Commute Sentences Other Than Capital Punishment.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 21, 1943.

HONORABLE RALPH E. WILKINS,
Ex-Officio Secretary to the Governor,
Governor's Office,
Capitol Building,
Richmond 12, Virginia.

My dear Mr. Wilkins:

This will acknowledge receipt of your letter of December 16, in which you ask for my opinion on this question:

"The Governor has requested me to secure from you an opinion on cases which he feels the sentence meted by the court is disproportionate with the crime committed, as to whether or not he would have the legal right to commute a portion of the sentence, making the prisoner eligible for parole consideration."

A commutation of sentence is the substitution of a less for a greater punishment and may be imposed upon the convict without his acceptance and against his consent, whereas a pardon, conditional or unconditional, is a grant to the validity of which acceptance is essential, Lee v. Murphy, 22 Gratt. (63 Va.) 789, and the opinion herein is based upon this distinction.
The power of the Governor to grant pardons and commute sentences is conferred by section 73 of the Constitution. This is its language:

"He shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the house of delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment."

If the executive had been granted the general power to pardon without more, it is well settled that such a grant would have included the lesser power of commutation upon the theory that, if the whole offense may be pardoned, a fortiori a part of the punishment may be remitted or the sentence commuted. 39 Am. Jur., Pardon, Reprieve and Amnesty, Sec. 63. But the section has expressly defined the power to commute sentences by saying that the executive has the power "to commute capital punishment." The implication is plain that commutation in other than capital cases is excluded. "Expressio unius, alterius exclusio." This is the view of the Supreme Court of Appeals in the leading case of Lee v. Murphy, supra, wherein the constitutional provision interpreted was substantially the same as it appears in the present Constitution. There it is said:

"It is to be borne in mind there is a material distinction between a conditional pardon and a mere commutation of punishment. A conditional pardon is a grant, to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected, there is no power to force it upon him. A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this state the executive is only authorized to commute capital punishment; whereas he may grant conditional pardons in all cases legally involving an exercise of the pardoning power."

My conclusion is that in Virginia the Governor does not have the power to commute sentences except in capital cases.

Of course, you are well aware of the fact that the Governor may direct the Director of Parol, through the State probation and parole officers, to exercise such supervision over prisoners released on conditional pardon as he may require (Chapter 218 of the Acts of 1942), and that in granting conditional pardons the Governor may annex thereto conditions that are not impossible, immoral or illegal.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON, PROBATION AND PAROLE—When a Prisoner Serving Sentence for Non-Payment of Fine Is Eligible for Parole.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., APRIL 18, 1944.

HONORABLE WILLIAM S. MEACHAM,
Chairman Parole Board,
Richmond, Virginia.

MY DEAR MR. MEACHAM:

This is in reply to your letter of April 10, 1944, requesting my opinion on a matter which you state as follows:

"The question has now come up as to whether persons convicted of
felonies and serving their jail sentences in the major prison system should receive any consideration from the Parole Board in connection with that part of their terms which are being served in payment of fines and costs. For example, the prisoner has a six month jail sentence to serve, and an additional six months in which to work out a fine and court costs. Should the part of the sentence being served for fines and costs be taken into consideration by the Parole Board in any way in determining prisoners' eligibility for parole? * * * .”

Where a person is confined in jail pursuant to §4953 of the Code for failure to pay a fine, his service of the maximum time limits set out in the statute does not operate to satisfy the fine in any respect, and the Commonwealth may thereafter proceed to collect the entire fine. The Supreme Court of Appeals has said that imprisonment under this statute merely constitutes a means of enforcing payment.

However, where the imprisonment for non-payment of a fine is in any of the institutions named in §2095 of the Code, the statute itself provides that service of the maximum limit of six months discharges the fine in full. Thus it would appear that such service is in effect an alternate punishment and not merely a means of enforcing payment. This view is strengthened by the further provision in the statute that persons thus confined are entitled to a good conduct allowance on such six months' confinement.

It is true, as you suggest, that the Parole Board has no authority to remit fines. However, the mere absence of such power would not necessarily prevent the Board from releasing on parole persons who are confined for non-payment of such fines. The authority of the Board is set out in §4788d(2) of the Code as follows:

“Release on parole * * * persons convicted of felonies and confined under the laws of the Commonwealth in (any penal institution in the Commonwealth) * * * .”

I note that the recent General Assembly amended the portion enclosed above in parenthesis and designated specific institutions.

As I have indicated earlier, §2095 of the Code seems to contemplate that a service of six months is in effect an alternate punishment for payment of the fine; furthermore, the person, if he be confined for a felony, falls within the description of those persons whom the Board, pursuant to §4788d(2) of the Code, may consider for parole, i. e., he is "convicted of a felony and confined under the laws of the Commonwealth."

It is my opinion, therefore, that the Parole Board does have authority to parole such persons, and may take the sentences of such persons into consideration in determining when and whether such persons are eligible for parole.

It should be noted, however, that the parole of such person would not operate to remit or discharge the fine, and consequently such person would not doubt be reluctant to accept parole under such circumstances, especially if his fine was in large amount. He would probably rather serve the six-month period and see the whole sentence satisfied. In cases of smaller fines, however, the parole would provide the prisoner an opportunity to earn the money to pay off his fine. This could be made a condition of the parole if the Parole Board felt so advised.

Very sincerely yours,

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

PARDON, PROBATION AND PAROLE—Probation Officers; Jurisdiction of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 26, 1943.

HONORABLE WILLIAM S. MEACHAM,
Director of Parole,
Richmond, Virginia.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond, Virginia.

GENTLEMEN:

This is in reply to your recent joint letter in which you set out in detail the pertinent provisions of several statutes dealing with the matter of probation as it falls within your respective departments, and you then ask whether the judges of the Juvenile and Domestic Relations Court throughout the State may refer cases to the probation officers appointed pursuant to Chapter 218 of the Acts of 1942 (Michie's Code, sections 4788c-n) establishing the Virginia Parole Board.

The Act above referred to, in setting out the functions, powers and duties of probation and parole officers, provides expressly in section 5, sub-section (1) that they shall

"Investigate and report on any case pending in any court or before any justice in his jurisdiction referred to him by such court or justice";

and in sub-section (2) shall

"Supervise and assist all persons within his territory placed on probation, and furnish such person with a written statement of the conditions of his probation and instruct him therein."

There are no provisions in the Act which exclude cases pending in Juvenile and Domestic Relations Courts, therefore, under the two sub-sections above quoted, it seems clear that judges of those courts, in the absence of any other prohibition, may utilize the services of such probation and parole officers.

I note from your letter that the Commissioner of Public Welfare was advised by proponents of the Probation and Parole Bill that it was not the intent of the bill to extend its application into the field of juvenile proceedings, and that to evidence this intent Chapter 106 of Acts of 1922 (Michie’s Code, section 1902o) dealing with the duties of local superintendents of public welfare was amended to read

"To perform those services required of probation officers with respect to juvenile and domestic relations courts established by chapter 483 of Acts of Assembly, 1922."

In my opinion the above amendment does not accomplish the result claimed for it, because it does not make such superintendents the exclusive probation officers for the said Juvenile and Domestic Relations Courts.

Of course, the Probation and Parole Act of 1942 does not abolish the office of local probation officers as they existed under prior laws, therefore, it is my opinion that judges of Juvenile and Domestic Relations Courts have the alternative of referring appropriate matters to either their local probation officers or to those appointed pursuant to the provisions of the Probation and Parole Act of 1942.

If it be deemed wise to eliminate this overlapping of jurisdiction, it will, in my opinion, be necessary to amend the Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PILOTS—Apprentice Pilots; Extent of Authority.

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

HONORABLE G. ALVIN MASSENBURG,
Member House of Delegates,
Hampton, Virginia.

MY DEAR MR. MASSENBURG:

I have before me your letter of September 18, 1943, relating to the interpretation of sections 3615, 3616, 3617 and 3620 of the Code. From your letter and a subsequent conference with you on the subject it appears that there are several apprentice pilots who have not had five years' experience but are considered qualified to pilot and conduct vessels whose draft of water exceeds fifteen feet (the maximum draft permitted a second class pilot), but not qualified to conduct vessels exceeding a fixed higher draft, for illustration twenty-five feet. You request my opinion as to what action the Board of Pilot Commissioners may take to permit such apprentices to lawfully conduct said vessels.

Section 3615 does not permit an apprentice to be examined by the Board for a pilot's certificate or branch of any class unless he has served as an apprentice to some Virginia pilot for five years. Therefore it is clear that the service contemplated to be performed by these apprentices must be rendered in their capacities as apprentices. Section 3620 provides how this may be authorized. The Board of Commissioners, the section says, "may endorse on a copy of his master's branch the name of the pilot boat, her port, and the class to which said master belongs; and thereupon such apprentice may conduct and pilot vessels, as his master might do, and subject to the same regulations." Section 3616 classifies the pilots into three classes, while section 3617 provides as follows:

"Pilots of the first class may pilot and conduct vessels of every burthen and description; those of the second class shall be confined to vessels whose draft of water does not exceed fifteen feet; and those of the third class to vessels whose draft of water does not exceed twelve feet."

From the last quoted section it is clear that in order for the apprentice to be authorized to conduct or pilot vessels whose draft is in excess of fifteen feet, his master must be a first class pilot.

The next question which arises is as to the necessary action to be taken to restrict the authority of the apprentice to conduct or pilot vessels to those whose draft does not exceed twenty or twenty-five feet, as the case may be. This may be accomplished by the master issuing to the apprentice a written order forbidding him to conduct or pilot vessels whose draft exceeds such maximum number of feet as the master desires to specify in the order. It would be appropriate to write this order on the apprentice's copy of his master's branch. Since the apprentice is not authorized to disobey his master's orders or instructions, this order would restrict his authority to act as pilot only of the vessels therein specified.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PROCESS, SERVICE OF—In Divorce Proceedings.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 11, 1943.

Mr. W. H. Walton,
City Sergeant,
Suffolk, Virginia.

My dear Mr. Walton:
Your letter of October 8 has been received. I quote therefrom as follows:

"I would thank you to advise me if services can be affected in a chancery matter as in any other civil case, namely service in person, on a member of a family over sixteen years of age or by posting on the front door of the usual place of abode."

The only difference in the Code provisions with reference to the method of service of process in divorce cases from that in other civil actions is that in divorce cases the service of the process must be made by an officer. Section 6042 of the Code provides that the summons to commence a divorce suit and notices to take depositions, or for any other purpose, shall be served only by the sheriff of the county or sergeant of the city, or the deputies of either, in which the service is sought to be had, except that, when it is improper for the sheriff or sergeant or their deputies to make service, it shall be done by the coroner. And section 5106 of the Code also makes this distinction. The Legislature has by these two sections required the service to be done by an official who would be answerable for a false return.

The manner of service, whether in person or on some other, and explaining the purport, or by posting, as prescribed by section 6041 of the Code, is the same in all cases, including divorces. But it must be done by an officer, as above stated.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACTS—Priority of Liens Upon Estate of Recipient of Public Assistance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 13, 1943.

Honorable John B. Boatwright,
Attorney-at-Law,
Buckingham, Virginia.

My dear Mr. Boatwright:
I am in receipt of your letter of December 11, in which you ask, if the claim allowed by section 1904(18) of the Code (Michie, 1942) against the estate of a recipient of old age assistance for the amount of such assistance comes ahead of a lien for taxes on land owned by such recipient.

I am of the opinion that the lien for taxes clearly has priority. The section providing for the claim for the amount of the assistance expressly provides that it is subservient to "prior liens." Liens for taxes are, in my opinion, clearly included in "prior liens."

Very sincerely yours,

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

PUBLIC ASSISTANCE ACTS—Priority of Liens Upon Estate of Recipient of Public Assistance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 10, 1944.

HONORABLE W. H. CARTER,
Attorney for the Commonwealth,
Amherst, Virginia.

MY DEAR MR. CARTER:
This will acknowledge receipt of your letter of April 5, in which you ask the following question:

"The local board of public welfare of Amherst county has requested me to obtain from you an opinion as to whether or not a debt secured by a deed of trust on a recipient’s real estate executed and recorded after the recipient begun to receive assistance from the local board of public welfare, would be a prior lien to the lien provided for under section 1904(18) of the Code of Virginia, upon the death of the recipient."

Section 1908(18) of the Code (Michie, 1942) provides that on the death of any recipient of assistance the total amount paid as such assistance "shall be allowed as a claim against the estate of such recipient, prior to all other claims except prior liens..." The section then goes on to provide that the notice of the claim against the estate shall be filed with the clerk of the court where the real estate is situated, and that when so filed the clerk shall record it in the current deed book and index it in the names of both the local board and of the deceased recipient. In view of the provision for the recordation of the claim in the deed book, it is my opinion that a debt secured by a deed of trust on a recipient’s real estate and recorded prior to the recordation of the claim against the estate is a prior lien within the meaning of the section.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACTS—Welfare Board Has No Authority to Release Estate of Recipient.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 22, 1943.

HONORABLE G. W. LAYMAN,
Attorney for the Commonwealth,
New Castle, Virginia.

MY DEAR SENATOR LAYMAN:
I am in receipt of your letter of October 19, from which I quote as follows:

"Section 20 of the Public Assistance Act provides for recovery from estate of recipient. The second paragraph of the section provides that 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, etc.

"Is it mandatory of the Board to require the Superintendent of Public
Welfare to execute and acknowledge a notice of such claim? Or is it discretionary with the Board to require the Superintendent of Public Welfare to execute such a notice? If the Board fails to require a notice of such claim, would the Board be liable?

"Has the Welfare Board the authority to release by resolution its claim upon the real estate of a recipient before or after the death of the recipient?"

In my opinion, the section to which you refer, which is now section 1904(18) of Michie's Code of 1942, makes it the duty of the local Board of Public Welfare to attempt to recover from the estate of a recipient of assistance the total amount paid as such assistance where there are funds or property out of which such recovery may be made. This being true, it is further my opinion that the local Board of Public Welfare should make every reasonable effort to make such recovery, including the filing of the notice of the claim with the clerk of the court. Once such notice has been filed, however, and the claim having been thus protected, I think it is within the discretion of the Board to postpone for a reasonable time the enforcement of the claim against the real estate of the decedent, especially in cases where immediate enforcement would work an undue hardship.

I know of no authority which the Welfare Board has to release a claim against the estate of the recipient where there are any funds or property out of which the claim can be collected.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACTS—Settlement of Claims Against Estate of Recipient of Public Assistance.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, V.A., April 18, 1944.

Dr. William H. Stauffer,
Commissioner of Public Welfare,
Richmond, Virginia.

My dear Dr. Stauffer:

This is in reply to your letter of April 6, in which you ask a number of questions relative to recovery from estate of recipients of assistance provided under the Virginia Public Assistance Act. You refer particularly to recipients of old-age assistance and to section 1904(18) of Michie's Code of 1942 relative to such recoveries.

Your first question is:

"Is it mandatory that the local board of public welfare file a claim against the estate of a deceased OAA recipient?"

In my opinion, the section to which I have referred contemplates that, where the local board ascertains or by the exercise of reasonable diligence can ascertain that there are any assets of the estate out of which a recovery could be made, the claim for the recovery must be filed by the local board. I certainly do not think that the General Assembly intended, where there is property out of which the assistance could be recovered, to give the local board the discretion of filing claims against some estates and not filing them against others. I further think that the claim should be filed in cases where the recipient was receiving assistance up to the time of death and
also in cases where the recipient had ceased receiving assistance prior to death.

Your next two questions are as follows:

"May the local board of public welfare agree to a settlement in recovery against the estate of a deceased recipient of an amount less than the total claim if, in the judgment of the said local board, the collection thus effected is as much as or more than can probably be realized net through any other procedure (considering attorneys' fees and other litigation costs)?

"If the local board may agree to a compromise settlement as suggested under (2) above, may such decision be on the basis of the judgment of the local board alone?"

In my opinion, whether or not an agreement may be made to accept a recovery in an amount less than the total claim must depend on the facts in each particular case. If, as a result of investigation of the assets of any estate, it is obvious that there are not sufficient assets to discharge the entire claim, a settlement for less than such entire claim may be made, especially where, as you suggest, such settlement is as much or more than could be realized through litigation, taking into consideration attorneys' fees and other costs. For example, where the sole asset of the estate is real estate worth less than the amount of the claim for assistance, it would appear quite useless to go through with an expensive chancery suit to subject real estate to the payment of the claim. I am further of the opinion that under the broad powers given to the State Board of Public Welfare to supervise the administration of the Public Assistance Act (section 1904(4) of Michie's Code of 1942) the Board may prescribe regulations covering such compromise settlements or require such settlements to be first submitted to the Board before being finally accepted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACTS—Recovery for Public Assistance May Be Had Against Recipient During His Lifetime.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 31, 1944.

Ross S. Gibson, Esq.,
Acting Commonwealth Attorney,
Spotsylvania, Virginia.

My dear Mr. Gibson:
I am in receipt of your letter of May 29, from which I quote as follows:

"The Board of Supervisors of Spotsylvania County has requested me to write you for a ruling in regard to the recovery of claims against the property of a recipient of assistance under the Virginia Public Assistance Act of 1938, as amended in 1942.

"The case presented to you is based on a situation where a recipient, although old and infirm, and unable to make a living, nevertheless, owns a parcel of real estate with some buildings and improvements thereon, and intends to dispose of his property."
"I do not find in section 1904(18) of the Code of Virginia, nor in your letter of August 26, 1942, to Mr. James W. Phillips, Director, County and City Organization, Department of Public Welfare, Richmond, Virginia, where any provision is made for the recovery of claims against the estate of a recipient during his lifetime."

Section 1904(18) of the Code (Michie, 1942), as you suggest, only provides for recovery from the estate of a recipient of old age assistance. I call your attention, however, to section 1904(17) of the Code, which provides for the recovery of assistance from a recipient during his lifetime. Whether or not action should be taken in any particular case seems to be a matter within the discretion of the local Board of Public Welfare.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Construction of Building to Be Used as Public Cannery Is Proper.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 2, 1944.

HONORABLE BERNARD MAHON,
Attorney for the Commonwealth,
Bowling Green, Virginia.

MY DEAR MR. MAHON:

This will acknowledge receipt of your letter of February 1, from which I quote the following:

"The United States Government has appropriated certain money, the expenditure of which is administered by the State Board of Education, Department of Vocational Education and Home Economics, through the local school boards, for the purpose of establishing canneries in buildings located on the public school grounds and which are operated under the supervision of the vocational education teacher. Under this program the United States government pays for the equipment and the county school board pays for the construction of the building and certain small equipment. The cannery is available to anyone in the county to can their meats and vegetables, for which they pay a nominal sum per can. I understand that the vocational education teacher does this work during the summer time and is paid a salary out of the funds which are paid by those who use the plant.

"Please advise whether or not the county school board can make an appropriation out of its funds for the construction of the building for this purpose on its own property and of buying certain small equipment necessary for its operation."

I am advised by the State Board of Education that the project to which you refer is a definite part of the general program of vocational education and home economics, and, in view of this fact, I know of no reason why the county may not provide local funds for the purposes mentioned by you; in fact, I am advised that many counties throughout the States are already doing so.

While you do not raise the question, I call your attention to the fact that in order for the school board to expend funds for this purpose there should be an item in the school budget to cover such expenditure. If the
budget does not contain such an item, then I am of opinion that the school board can only make the expenditure with the consent of the board of supervisors. See section 656 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Investment of County Funds in U. S. Treasury Certificates.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 3, 1944.

MR. W. E. KIDD,
Division Superintendent of Schools,
Lovingston, Virginia.

MY DEAR MR. KIDD:

I am in receipt of your letter of January 31, in which you ask if a county school board may “purchase one year certificates of the U. S. Treasury with school funds.”

I am of opinion that the investment to which you refer may be made, but it should be made under authorization of the board of supervisors of the county. For an Act dealing expressly with this subject I call your attention to Chapter 15 of the Acts of the Extra Session of the General Assembly of 1942, authorizing boards of supervisors of counties to direct the investment “out of any moneys available in the general fund, or in any sinking fund, or any special fund of such county, city, or town” in “bonds or other evidences of debt of the United States of America, or of the State or any political subdivision or institution thereof, * ***.”

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Elections: Member of Electoral Board Is Eligible to Be Candidate for Elective Office, But if Elected Should Resign From Electoral Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 13, 1943.

HONORABLE DAN M. CHICESTER, Secretary,
Stafford County Electoral Board,
“Glencairne”,
Palmouth, Virginia.

MY DEAR MR. CHICESTER:

This is in reply to your letter of August 12, in which you request my opinion upon the three questions hereinafter set out.

1. Is there any provision of the Constitution, or of the law of Virginia prohibiting a member of a County or City electoral board being a candidate for an elective office, and offering himself as such candidate in an election?
I have been unable to find any provision within the Constitution or statutes of Virginia which would render a member of a county or city electoral board ineligible to become a candidate for an elective office in his county or city, and, in my opinion, he may legally offer himself as such candidate in an election.

2. If not, is there any necessity or requirement that such member resign from his membership on the board before filing his notice of candidacy, or while such election is pending?

There is no provision of the Constitution or statute which would require such a member of the electoral board, who has announced his candidacy for such an elective office, to resign from his membership on the board either before filing his notice of candidacy, or while such an election is pending.

3. If not, would he be required to resign his membership on such board before he qualified for such elective office, in event he was elected to such office?

The following provision appears in both section 31 of the Constitution and section 84 of the Code of Virginia:

"No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar or judge of election."

While the provision above quoted does not expressly provide that a person already a member of an electoral board shall be ineligible to remain a member thereof after he is elected to another office, it is my opinion that the effect of the provision is to render the holding of said two offices by the same person improper. The effect of said provision is to make the offices what are generally referred to as "incompatible offices," that is, offices which cannot properly be held at the same time by one person. It is my opinion, therefore, that, if the candidate above referred to is elected by the people to an office in his county, he could not properly qualify for such office until after his resignation as a member of the electoral board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Bond; County School Attendance Officer Not Required to Give Bond.

COMMONWEALTH, OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 29, 1943.

Honoradle A. Barclay Taliaferro,
Attorney for the Commonwealth,
Orange, Virginia.

My dear Mr. Taliaferro:

I am in receipt of your letter of October 27, in which you ask if a county school attendance officer appointed under section 685 of the Code is required to formally qualify and give bond.
Section 2696 of the Code prescribes what county officers shall qualify and take the oath prescribed by section 269 of the Code and a school attendance officer is not included within the scope of the section, nor do I find any statute requiring that a school attendance officer give bond. My conclusion is, therefore, that a school attendance officer appointed under section 685 of the Code is not required to qualify and give bond.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

PUBLIC OFFICES—Compatibility of: Member of County School Electoral Board and Member of General Assembly.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 12, 1944.

HONORABLE WILLIAM N. NEFF,
State Senator,
Abingdon, Virginia.

MY DEAR SENATOR NEFF:

This is in reply to your letter of April 8, 1944, in which you ask whether a member of a county school electoral board, who later was elected to the General Assembly and qualified for the latter office, could continue to serve as a member of the school electoral board.

Section 653a(1) of the Code provides that in each county there shall be a "school trustee electoral board, which shall be composed of three qualified voters, who are not county or State officers * * *". It is apparent, in my opinion, that this provision makes the offices of membership on such school trustee electoral board and membership in the General Assembly incompatible.

The section of the Code above referred to does not make such member of the school electoral board ineligible to hold membership in the General Assembly, and I know of no other law which would have that effect. Therefore, the precise question is what effect qualification in a second office has upon a first office where the two offices are incompatible.

The general rule is stated in 42 Am. Jur. 940, title "Public Offices" §78, as follows:

"At common law, and under constitutional and statutory prohibitions against the holding of incompatible offices, a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resign, the first office, * * * ."

Although the precise question was not before the Court for decision, the Supreme Court of Appeals had occasion to state the rule in similar fashion in Bunting v. Willis, 27 Gratt. (68 Va.) 144:

" * * * There is a manifest difference between offices held under the same government, and offices held under different governments, as under the state and federal. In the former case, the whole matter is under the control of one and the same government, and the acceptance of one office is ipso facto a vacation of another, incompatible therewith, and previously received. * * * ."
REPORT OF THE ATTORNEY GENERAL

It is my opinion, therefore, that when a member of a county school elec-
torial board qualifies as a member of the General Assembly, he thereby ipso
facto vacates his former office on the school electoral board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of: Member of Electoral Board and
Member of School Board; Teacher From Adjoining County.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 26, 1944.

HONORABLE R. D. STONER,
Clerk Circuit Court of Botetourt County,
Fincastle, Virginia.

My dear Mr. Stoner:
I am in receipt of your letter of May 24, in which you ask the following
questions:

"1. May a member of the Electoral Board of Botetourt County serve
also, simultaneously, as a member of the County School Board?
"2. May a teacher who is employed in an adjoining county or city
serve as a member of Botetourt County School Board—he being a prop-
erty owner, resident and voter in Botetourt County?"

Section 644(1) of the Code (Michie, 1942) provides that "no State or
county officer * * * shall be chosen or allowed to act as a member of a
county school board * * *
.

Pursuant to this provision, this office has fre-
quently expressed the opinion that various State and county officers may not
be members of county school boards. The quoted language unquestionably
covers a member of the county electoral board.

I do not think that a teacher can be said to be a "State or county officer."
If the teacher to whom you refer, therefore, as teaching in another county
or city is a bona fide resident of the magisterial district of Botetourt county
from which he is appointed, I know of no reason why he may not be appointed
as a member of the county school board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of: Principal of School and Clerk of
School Board.

COMMONWEALTH OF VIRGINIA;
Office of the Attorney General,
Richmond, Va., May 18, 1944.

HONORABLE WILLIAM McL. FERGUSON,
Member of House of Delegates,
Newport News, Virginia.

My dear Mr. Ferguson:
This will acknowledge receipt of your letter of May 17, which reads as
follows:
"The question has arisen in Warwick county with regard to the propriety of the Warwick County School Board having as its clerk the principal of the Warwick County High School. This question does not seem to be specifically covered in the school laws unless possibly by section 655 of the Code, which provides for the election or appointment by the school board on the recommendation of the superintendent of 'a competent person as clerk of the school board.'

"I should appreciate your opinion on whether the fact of being principal would ipso facto disqualify a person from also holding the office of clerk of the board because of the possible conflict in interest arising from the duties encumbent upon those two positions."

I know of no statute which prohibits the principal of a high school from being appointed as clerk of a county school board of the county in which he teaches, nor am I able to find any statutory duties imposed which would make the two positions incompatible. Therefore, unless the school board assigns duties to its clerk which would in its opinion make the two positions incompatible in fact, I know of no reason why one person may not hold both positions.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility of; Member of U. S. Selective Service Board and Election Judge.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 22, 1943.

HONORABLE S. J. THOMPSON,
Attorney for the Commonwealth,
Rustburg, Virginia.

MY DEAR MR. THOMPSON:

This is to acknowledge receipt of your letter of July 16, in which you ask if a member of the Selective Service Board may serve as a judge of election. Section 31 of the Constitution provides that no person "holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, * * *", shall be appointed a judge of election. While a member of a Selective Service Board receives no compensation, I am informed, he is appointed by the President of the United States and is a Federal officer. Furthermore, he is certainly, in a sense, in the employment of the United States Government as he is certainly, performing services for that government.

In view of the quoted Constitutional provision, therefore, I am of opinion that the better view is a member of a Selective Service Board should not serve as a judge of election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICES—Time of Qualification; Private Employment Involving a Conflicting Interest Prohibited.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 4, 1944.

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

My dear Mr. Thoma:
This will acknowledge receipt of your letter of December 29, in which you ask for my opinion on the following question:

"Is it permissible to administer the oath of office to a deputy prior to the commencement of the term of office of the principal?"

I know of no reason why a deputy may not qualify for the term for which he is to serve prior to the commencement thereof. However, I think it preferable for the principal to have first qualified.

You also ask:

"Is it proper for a deputy-clerk to act as agent or attorney in fact for a surety company in the execution of official bonds where the bond is taken (1) before the clerk and (2) before the deputy-clerk who also acts for the surety company?"

Such a practice is in my opinion contrary to public policy. It is well settled that a public officer owes an undivided duty to the public and will not be permitted to place himself in a position which will subject him to conflicting duties or interests or expose him to the temptation of acting in any manner other than in the best interests of the public. See 43 Am. Jur., Public officers, sec. 266; Stuart v. Commonwealth, 91 Va. 152. That conflicting interests exist where an officer (or his deputy) in his official capacity approves a bond and at the same time acts in his (either the officer's or his deputy's) private capacity as agent for the surety on the bond is too patent to require elaboration.

Very sincerely yours,

Abram P. Staples
Attorney General.

PUBLIC RECORDS—Distribution of Acts of Assembly, Journals, and Supreme Court Reports.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 8, 1944.

Honorable A. B. Gathright,
Director Division of Purchase and Printing,
Finance Building,
Richmond, Virginia.

My dear Mr. Gathright:
I am in receipt of your letter of May 3, in which you ask a number of questions relative to the free distribution of Acts of Assembly, Journals of the House and Senate, and Reports of the Supreme Court. I shall endeavor to answer your questions seriatim.

Your first question is:

"Section 390 relating to the free distribution of the Acts of Assembly among branches of the State government provides that a copy shall be
In your opinion does this cover the heads of each operating unit including institutions, boards, commissions and agencies, or does it confine the authorization to about 13 directors and commissioners of large units designated as departments in our organization chart?"

In my opinion the words "each head of a department" refer to the administrative departments of the State government as created and established by the General Assembly. See Sections 585(66)-585(93) of Michie's Code of 1942.

Your second question is:

"Section 390 enumerates each 'sergeant and treasurer.' Does this authorization include town sergeants and town treasurers or merely city and county officials?"

The language which you quote, literally construed, includes town sergeants and town treasurers. However, you have advised me that it has not been the practice in the past to furnish the Acts of Assembly to these officers. In view of this fact and of the further fact that in many towns these officers would very seldom have occasion to refer to the Acts, I am of opinion that you would be justified in continuing the practice which has been established.

Your next question is:

"Sections 390 and 392 require copies of the Acts and Journals for each educational institution in the State maintaining a library.' What is a library and is this clause broad enough to cover both public and private elementary schools and high schools?"

I have heretofore expressed the opinion that the quoted language is broad enough to cover public high schools which maintain libraries, and I think, therefore, it is broad enough to cover private schools which are on the same plane as high schools and which maintain libraries. I do not think that the language should be construed to include elementary public and private schools. I imagine that very few, if any, of such schools maintain libraries with any substantial number of books, and that furthermore such schools would have no real need for the Acts.

You then ask:

"Sections 390 and 392 refer to 'each public library.' This seems to overlap in some instances 'each educational institution in the State maintaining a library.'"

The words "each public library" clearly refer to such libraries as are not maintained by an educational institution.

Your last question is:

"Section 390 includes 'justices having trial jurisdiction.' From the records it appears that each justice of the peace heretofore has received a copy of the Acts at the expense of the State. It seems clear that the law provides only for justices having trial jurisdiction, and this list now is much smaller than it was before the trial justice legislation was enacted."

I agree with your interpretation that only justices having trial jurisdiction are entitled to receive free copies of the Acts.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC RECORDS—When Old Vouchers May Be Destroyed.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 23, 1943.

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

My dear Mr. Bradford:

I am in receipt of your letter of November 20, enclosing a communication addressed to you from Mr. S. S. Smith, Director of the Dairy and Food Division of the Department of Agriculture and Immigration, in which he states that on account of the lack of space it is necessary that "a large number of vouchers covering payments made on our appropriation" from 1917 to December 31, 1929, be destroyed. Mr. Smith states that the accounts for this period have long since been audited and that there is no valid reason for their preservation. You desire to be advised whether these records can legally be destroyed and, if so, what procedure is necessary before such action can be taken.

I know of no reason why these records should not be destroyed if they are no longer of any value, provided the consent of the State Librarian and the State Comptroller is obtained as provided in section 353 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
PUBLIC WELFARE—State Not Liable for Torts Committed by Escaped Inmates of Institutions.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 11, 1944.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond 19, Virginia.

My dear Dr. Stauffer:

I am in receipt of your letter of February 10, with reference to a claim submitted to you by Mr. C. S. McDougle for property belonging to him stolen and damaged by three boys who had been regularly committed to the State Board of Public Welfare and by that Board sent to the Hanover Industrial School. It seems that these boys ran away from the School and while they were at large stole and damaged the property on account of which Mr. McDougle now makes his claim. You desire the opinion of this office on the question of whether the State Board of Public Welfare has authority to compensate Mr. McDougle from public funds.

While the incident which you describe is indeed regrettable, I know of no authority which the State Board has to disburse State funds for this purpose. The Hanover Industrial School is an agency of the State, and it has long been well settled that the State is not liable for damages in cases of this character in the absence of statutes, and I know of no statute recognizing the liability of the State in such cases.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC WELFARE—Board Has No Control Over or Responsibility for Property of Its Ward.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 16, 1944.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond 19, Virginia.

My dear Dr. Stauffer:
I am in receipt of your letter of February 11, in which you state that certain children who have been committed to the State Board of Public Welfare under section 1910 of the Code by the Juvenile and Domestic Relations Court of Augusta County have an interest in some real estate which is a part of the estate of their deceased father. You are further advised by an attorney in Staunton that in his opinion the interest of these children in this real estate is being adversely affected by improper actions of the executors of the estate. You have been requested to cooperate in a suit to protect the interest of the children who have been committed to the State Department.

In my opinion, section 1910 of the Code, authorizing the commitment of certain delinquent, dependent and destitute children to the State Board of Public Welfare, only contemplates that the Board shall have the custody and control of the person of such children, and that this section and the other pertinent sections of the Code dealing with this class of children do not contemplate that the State Board shall have any control of or responsibility for any property interest of its wards. I direct your attention to that part of section 1910 which provides that a child committed under the section shall "be subject to the guardianship of the court" which committed it.

Therefore, in my reply to your question as to how you may cooperate in a suit to protect the property interest of these children, I beg to advise that in my opinion the State Board has no authority to take any part in initiating or carrying on such a suit. In view of the guardianship of the court which committed the children, to which I have referred, I should think that the initiative should be taken by that court.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Payment of Expenses of Children Held for Detention Homes.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 9, 1944.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond 19, Virginia.

My dear Dr. Stauffer:
I am in receipt of your letter of April 29, in which you call my attention to the following language in section 1914 of the Code:

"The same fees or allowances shall be paid by the State for children boarded out or held in a detention home as are now paid for prisoners confined in jail."
You further advise me that it has been the practice for years to construe the above language as referring to the fees allowed a jailor by section 3510 of the Code. You further refer to a changed method of reimbursing counties and cities for the cost of keeping State prisoners in the jails of such counties and cities (Chapter 386 of the Acts of 1942) and ask if, instead of following the practice which you state has been in existence for many years, the actual cost of keeping these children in detention homes may be paid.

I do not think the quoted language is susceptible of the construction you suggest. Under the present system of paying for the care and feeding of State prisoners in jail there are no fees or allowances paid to anyone. The State simply reimburses the locality for the actual cost of caring for and feeding State prisoners. It is my opinion, therefore, that the only scale of fees and allowance that is prescribed by statute which may be paid for the care of these children is that to be found in section 3510 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Terms of Office of Members of Local Boards.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., NOVEMBER 17, 1943.

DR. WILLIAM H. STAUFFER,
Commissioner of Public Welfare,
Richmond 19, Virginia.

MY DEAR DR. STAUFFER:

I am in receipt of your letter of November 15, in which you refer to section 1904(6) of the Code (Michie, 1942), dealing with the appointment of members of local Boards of Public Welfare, in which it is provided that in counties the Board shall be appointed by the Judge of the Circuit Court for definite terms of two years. The section also provides that:

"The judge in making appointments for terms beginning July 1, 1942 and thereafter, shall so arrange the membership that at all times one member of the local Board of each county shall also be a member of the Board of Supervisors, except in those instances where the Board of Supervisors has determined otherwise, in which case one member of the local Board of Public Welfare shall be selected from a list of three persons submitted by the Board of Supervisors."

You then state:

"It so happens that, pursuant to this provision, the judges in most of the counties, did appoint to the Welfare Board, beginning July 1, 1942, a member of the Board of Supervisors. The term of office of local board members is for two years. Now, as a result of the recent election for members of the Board of Supervisors, it develops that in several instances the incumbent member of the Board of Supervisors appointed to the Welfare Board will not be returned to office as a supervisor, and if this person is to be continued as a member of the Welfare Board, until the expiration of the two year appointment, there will not be technical compliance with the statute requiring that a member of the Board of Super-
visors be represented on the Welfare Board, or, in the second statutory alternative, a designate of the Board of Supervisors will not be represented on a Welfare Board."

Your inquiry is:

"Is it possible to construe the statute to mean that under such circumstances the failure of re-election to the Board of Supervisors automatically terminates the appointment to the Welfare Board, and that it is therefore necessary for the appointing judge to proceed under the language of section 1904(6) in the same manner as if the term of office had expired."

The situation you present is unusual and after consideration I am of the opinion that it is one that is not contemplated in the statute and for which no provision has been made. Since a specific term of two years is prescribed for each member of the Board of Public Welfare, and since the appointment of the Board of Supervisors member of the Board was valid when made, I cannot find anything in the statute which makes the term of such member expire upon his failure to be re-elected to the Board of Supervisors. A member of the local Board may be removed "for cause" by the Judge of the Circuit Court, but I can find nothing in the statute which would indicate that the failure of a member to be re-elected to the Board of Supervisors could be said to be cause for removal.

Since the Judge of the Circuit Court is the appointing power, and since the duty is placed upon him to arrange the membership of the local Board of Public Welfare so that a member of the Board of Supervisors will serve thereon, the best advice that I can give you is that the question be left to the determination of the appointing power.

It would appear unnecessary to add that the obvious solution to the problem is for the member of the local Board of Public Welfare who was defeated for re-election to the Board of Supervisors to resign.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Amount of Bond Required in Printing Contracts.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 6, 1943.

HONORABLE A. B. GATHRIGHT,
Director Division of Purchase and Printing,
Finance Building,
Richmond, Virginia.

My dear Mr. Gathright: I am in receipt of your letter of October 4, from which I quote as follows:

"Please advise if, when requiring bond of a contractor who has entered into a contract with the Commonwealth to furnish printing or paper, the penalty of such bond shall be fixed in an amount equal to the contract price of the printing work to be done or of the paper to be furnished; or, may the Director, under the provisions of section 401-b, exercise the discretionary authority therein granted with respect to requiring
bonds of successful bidders and fix the penalty of such bonds as may be required in the sum of not less than one-third of the amount of the accepted bid in each case."

In my opinion, the penalty of a bond given to secure the faithful performance of a contract for printing and the penalty of a bond given to secure a contract for the furnishing of the paper required for such printing should be in an amount equal to the contract price for the work to be done or for the paper to be furnished. This is the plain requirement of sections 383 and 384 of the Code.

It is true that section 401-b of the Code gives to the Director of the Division of Purchase and Printing certain discretion concerning whether bonds shall be required and the amounts thereof in the case of contracts for the purchase of materials, equipment and supplies generally; but, since sections 383 and 384 lay down express requirements concerning bonds given in the case of contracts for printing and for the paper to be used in such printing, I am of opinion that the discretion I have mentioned given by section 401-b is not applicable to the printing and paper contracts. I call your attention to the fact that sections 383, 384 and 401-b of the Code are all a part of an Act passed in 1938 (Acts 1938, page 223) consolidating and codifying into a single chapter the laws of Virginia relating to public printing and centralized purchasing. This being true, and the General Assembly having laid down certain specific requirements with regard to contracts for printing and paper, such requirements must be complied with, even though they may be to some extent in conflict with the requirements relating to contracts for purchases generally, as prescribed by section 401-b.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PURCHASE AND PRINTING—Reports of State Corporation Commission.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 14, 1943.

HONORABLE THOS. W. OZLIN,
State Corporation Commission,
Richmond, Virginia.

MY DEAR MR. OZLIN:

This is in reply to your letter of July 8, in which you request my opinion upon the question whether or not the appendix to the annual report of the State Corporation Commission printed as a separate pamphlet or volume should be paid for out of the appropriation made to the Division of Purchase and Printing under the provisions of section 394 of the Code.

I am advised that the appendix referred to consists principally of reports of railroad companies made to the Commission. The section referred to expressly provides that in printing the report of the Commission there shall be included such reports of railroad companies.

The statute is not clear whether it would be permissible to print the appendix in a separate volume from the main report of the Commission. However, in view of the fact that the practice has been followed for many years of printing the report and the appendix separately at the expense of the appropriation made to the Division of Purchase and Printing, it is my opinion that, in the absence of any good reason for departing from this administrative and departmental construction which the Act has received for many years, the same practice should be continued. No good reason has been ad-
advanced or suggested for such departure, and it is my opinion, therefore, that both the main report and the appendix thereto, which should be considered as an integral part of the report itself, should be paid for out of said appropriation, and should be considered as embraced within the provisions of section 394 of the Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

REAL ESTATE BROKERS—License Fees When Acting as Auctioneer.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1944.

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

MY DEAR MR. GILLESPIE:
I am in receipt of your letter of January 29, in which you ask a number of questions. Your first question is:

"If a person, firm, or corporation secures real estate broker's license, as contemplated in chapter 175C of the Code, and has his place of business in a given county in Virginia, is he required to secure an auctioneer's license in addition thereto under section 160 of the Tax Code, or a license under section 196 of the Tax Code, before engaging in the selling of real estate at public auction?"

Chapter 461 of the Acts of 1924 as amended (Chapter 175C of Michie's Code of 1942) is a regulatory measure adopted under the police power of the State, and in my opinion a real estate broker's license secured under the provisions of that chapter is not in lieu of the State revenue license required of auctioneers and real estate agents by sections 160 and 196 of the Tax Code, respectively.

Your next question is:

"If he is required to secure the additional license under section 196 or under section 160 of the Tax Code, is he required to secure a license in each county other than that of his regular place of business before engaging in the selling of real estate at public auction?"

In my opinion, if a real estate agent or auctioneer of real estate desires to engage in business in a county or city other than that in which he has secured a revenue license, he should also secure a license in such other county or city. See section 131 of the Tax Code. You will observe that section 196 of the Tax Code provides that a person licensed as a real estate agent may sell in the county or city wherein he is licensed at auction or privately real estate entrusted to him for sale without taking out an auctioneer's license. You will understand, of course, that I am not attempting to express an opinion on the question of what constitutes engaging in the business of a real estate agent, since this is a matter which can only be determined by the facts existing in each individual case.

Your last question is:

"Is it correct that no license, if one is required, can be issued to a person as a real estate broker until he has qualified before the Virginia Real Estate Commission as contemplated under Chapter 175C?"
I can find nothing in the law that requires a commissioner of the revenue to refuse to issue a real estate agent's license under section 196 of the Tax Code to a person who has not qualified before the Virginia Real Estate Commission. However, I might add that, even if a person should secure a license as a real estate agent under section 196 of the Tax Code, he would still be subject to the requirements of the Act regulating real estate brokers and salesmen and, if he did not comply with the provisions of that Act, he would be subject to the applicable penalties specified therein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Fees to Be Taxed Where Lands Are Exchanged; Recordation Where Tract of Land Is Located in Two Counties.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 23, 1943

HONORABLE C. T. GUINN,
Clerk Circuit Court of Culpeper County,
Culpeper, Virginia.

MY DEAR MR. GUINN:
This will acknowledge receipt of your letter of November 18, in which you ask the following question:

"Mr. A and Mr. B have exchanged certain real estate. Mr. A's property is valued at $4,000; Mr. B's property is valued at $3,500. Mr. B pays Mr. A $500 difference. Mr. A gives Mr. B a deed and Mr. B gives Mr. A a deed, and these deeds are admitted to record. Should each deed be taxed on its face value, that is, $4,000 and $3,500, or should the exchange value be considered? Also, should the revenue stamps be according to the full values or only on the exchange value?"

Since section 121 of the Tax Code, imposing recordation taxes on deeds, provides that every deed which is admitted to record shall be taxed on the basis of the consideration of the deed or the actual value of the property conveyed, whichever is greater, I am of opinion that each one of the deeds mentioned in your inquiry should be taxed on the basis of the actual value of the property conveyed thereby if such value is greater than the consideration. So far as the recordation tax is concerned, I do not think that the exchange value should be considered.

Your next question is:

"Mr. A owns land in Culpeper County, and buys other land adjoining his present farm, but located in Fauquier County. The new purchase contains 16.4 acres, and two and a fraction acres is now assessed in Fauquier County, the balance being assessed in Culpeper County, as it is part of a larger tract. Can this deed be admitted to record in Culpeper County and the two and a fraction acres now assessed in Fauquier County be transferred by the Commissioner of Revenue of Fauquier County to be assessed in Culpeper County?"

If the owner desires the protection which the recordation statutes afford, he can only obtain it, in my opinion, by recording the deed in both Culpeper and Fauquier Counties. However, this is a question for the determi-
nation of the landowner. Insofar as the assessment of the real estate for taxation is concerned, that part which is located in Culpeper County should be assessed in that County and the part located in Fauquier County should be assessed in that County. I know of no way by which any land lying in one county may be assessed in another.

As to what revenue stamps, if any, should be affixed to the deeds, since this involves the construction of a Federal statute, I do not think this office should attempt to pass on the question, and I suggest that, if you are in doubt, you communicate with the Collector of Internal Revenue.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

RECORDATIONS—Unacknowledged Deed to a Cemetery Lot; Fiduciary's Account. Fee of Justice of Peace in Lunacy Proceeding.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General
Richmond, Va., May 17, 1944.

HONORABLE ROBERT D. HUFFMAN,
Clerk Circuit Court of Page County,
Luray, Virginia.

My dear Mr. Huffman:
I am in receipt of your letter of May 15, in which you ask the following question:

"Is it permissible by law to record a certificate of ownership to a cemetery lot, which does not pass legal title, which certificate has been signed by the president and secretary of the Board of Trustees, and not acknowledged, in the deed book?"

I do not think that the instrument in question should be recorded unless it has been acknowledged, but, if it is acknowledged and the owner of the lot desires it to be recorded, I see no reason why you should not do so upon the payment of the proper tax and fees.
You also ask:

"Which is the proper book in which to record accounts of a fiduciary settled in a chancery cause involving real estate?"

It has always been my understanding that where the accounts of a fiduciary are settled before the court in a pending suit it is not necessary that such accounts be recorded in any book, unless the court directs otherwise.

In reply to your third question, I will state that, in my opinion, under section 1021 of the Code, a justice of the peace for his services in a lunacy case is entitled to a fee of $2, which fee includes issuing the warrant directing the person alleged to be insane to be brought before him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
RESIDENCE—How Legal Residence in Virginia May Be Established.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 27, 1944.

Miss J. Louise Barrett,
Registrar Virginia State College,
Petersburg, Virginia.

Dear Madam:
I am in receipt of your letter of January 25, from which I quote as follows:

“This letter is written to request information regarding the conditions under which a former resident of another state may establish residence in the State of Virginia, and the proper procedure to follow to accomplish this end. The question has been raised by a member of the armed forces now stationed at Camp Lee whose wife is registered as a non-Virginia student in the college.

“We shall appreciate whatever information you may give us with reference not only to this particular case, but to civilians requesting the same information.”

Legal residence may be established in Virginia by the acquisition of a physical place of abode in the State accompanied by the intention to establish the legal residence at such physical place of abode. I call your attention, however, to section 24 of the Constitution, which provides that:

“No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof by reason of being stationed therein; * * *.”

I also call your attention to section 1003-1(a) of the Code (Michie, 1942), providing, among other things, that no person shall be entitled to reduced tuition charges at any of the State colleges accorded residents of Virginia until such person “has been a bona fide citizen or resident of Virginia for a period of at least one year prior to admission to said institution.”

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

RETIREMENT SYSTEM—School Teachers’ Contribution to Be Deducted From Salary.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 5, 1943.

Honorable M. A. Cogbill,
Attorney for the Commonwealth,
Chesterfield Court House, Virginia.

My dear Mr. Cogbill:
I am in receipt of your letter of August 4, from which I quote as follows:

“A member of the board of supervisors of this county has requested me to ask you for an opinion as to how the retirement pay for teachers
should be paid, that is, should the amount be deducted from the teacher's pay or should or can the same be set aside into a special fund and paid directly from that fund?"

It seems to me that sections 13 and 19 of chapter 325 of the Acts of 1942, establishing a contributory retirement system for certain State employees and for public school teachers, clearly contemplates that each teacher's contribution shall be deducted from his or her salary for each and every payroll period. Section 13, for example, provides that:

"The Board shall certify *** to the employer in the case of teachers, the proportion so computed of the earnable compensation of each member, and the *** employer *** shall cause to be deducted from the salary of each member on each and every payroll for each and every payroll period the proportion of the member's earnable compensation so certified ***."

Section 19 then provides that:

"*** the employer (the school board) *** shall, at the end of each payroll period, transmit to the State treasurer its warrant for the payment of an amount equal to the aggregate amount of the deductions made for such payroll period from the salaries of all employees ***."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RETIREMENT SYSTEM—Withdrawal of Contributions by Employee.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 26, 1943.

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

MY DEAR GOVERNOR DARDEN:
I am in receipt of your letter of July 20, enclosing correspondence concerning the request of Mr. Tom E. Moore to have returned to him his accumulated contributions as a member of the Virginia Retirement System.

It seems that after Mr. Moore became a member of the System he taught for one session in the public schools of Virginia and then severed his connection with the public school system so that since June, 1943, he has not been a teacher in the public school system.

The only authority that I can find for the payment of accumulated contributions to a member of the System is in section 10 of the Virginia Retirement Act (Chapter 325 of the Acts of 1942). This section provides that "should a member cease to be a member otherwise than by death or by retirement under the provisions of this act, at any time after the expiration of two years since he last became a member, he shall be paid, on demand, or within thirty days thereafter, the amount of his accumulated contributions."

From the facts stated by Mr. Moore, he was only a member of the System for approximately one year from its establishment as of July 1, 1942. It is manifest, therefore, that he is not eligible to receive his accumulated contributions under the provisions of section 10, and, there being no other pro-
visions which I can find in the Act for the repayment of such accumulated contributions, I know of no authority which the Board of Trustees of the Virginia Retirement System has to comply with Mr. Moore's request.

I call your attention to the fact that Mr. Moore has not necessarily lost the benefit of the System for, under section 6(c), if he again becomes an "employee," as defined by the Act, within five years from the date he severed his connection with the public school system, he resumes his membership in the Retirement System.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SANITATION DISTRICTS—Powers and Duties to Construct or Maintain Certain Facilities.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 8, 1943.

Hon. H. Clark Thompson, Esq.,
Acting Commonwealth Attorney,
Hampton, Virginia.

My dear Mr. Thompson:

This will acknowledge receipt of your letter of September 4, in which you refer to section 1650-o of the Code (Michie, 1942) relating to the powers and duties of the board of supervisors of a county after a sanitary district has been created pursuant to sections 1560-n and 1560-m of the Code (Michie, 1942). You quote the following from section 1560-o:

"After the entry of such order creating a sanitary district in such county, the board of supervisors thereof shall have the following powers and duties, subject to the conditions and limitations hereinafter prescribed:

"(a). To construct, maintain and operate water supply, sewerage, heat, light and power and gas systems and sidewalks for the use and benefit of the public in such sanitary districts."

and then ask whether or not it is the mandatory duty of the board of supervisors, after the sanitary district has been established, to construct, maintain and operate all of the facilities named in paragraph (a) quoted above.

I think your question must be answered in the negative. You will observe that the section prescribes "the following powers and duties" enumerated in nine lettered paragraphs. It seems to me plain, therefore, that, where the section prescribes the powers and duties, it follows that not everything enumerated is both a power and a duty, but that some of the lettered paragraphs relate to powers and some of them to duties. For example, if the board of supervisors established and operated a power plant, it would obviously be its duty "to fix and prescribe the rates of charge for the use of" the power. On the other hand, it appears to me equally clear that paragraph (a), relating to the construction, maintenance and operation of certain utilities and the construction of sidewalks, is simply a delegation of power to the board of supervisors to do these things as distinguished from the mandatory duties imposed upon the board. Any other construction, in my opinion, would result in an absurdity, for I doubt whether there is a county in the State wherein sanitary districts have been established which operates, or would be financially able to operate, all of the facilities mentioned in said paragraph (a). For example, I do not imagine there is any sanitary district which has established a heating system for the residents of such district.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOL BOARDS—Boards of Supervisors—Powers Respectively Concerning School Expense Items.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 23, 1944.

MR. PLUMMER F. JONES,
Superintendent of Schools,
New Canton, Virginia.

My dear Mr. Jones:

I am in receipt of your letter of February 17, with regard to travel allowance for the Division Superintendent of Schools of Buckingham County included in recent budgets of the School Board of the county, but deleted by the Board of Supervisors of the county.

Since the recent decision of the Supreme Court of Appeals of Virginia in the case of County School Board of Chesterfield County vs. Board of Supervisors of Chesterfield County, it is now settled that, while a board of supervisors is not required to provide the amount of money requested by the school board, it does not have the authority to eliminate or decrease any particular or specific item of charge or expense set up in the budget submitted by the county school board. It follows that a board of supervisors, therefore, may not delete an expense allowance for the division superintendent of schools where such allowance is included in the school budget submitted to it.

Since the action of the Board of Supervisors in deleting the expense allowance from the school budget of Buckingham county for the years 1941-42 and 1942-43 was not contested, I seriously question whether this expense allowance for these past years could now be compelled to be paid. I suggest, therefore, in view of the recent decision of the Court of Appeals, if your School Board now desires that this money be paid to you, that the matter be worked out between the two Boards. Certainly, in making up the school budget for the year 1944-45, if the School Board desires that this travel allowance be made, it should be included in its budget submitted to the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Boards of Supervisors: Authority to Borrow Money.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 28, 1944.

DR. JACK W. WITTEN,
House of Delegates,
Richmond, Virginia.

My dear Dr. Witten:

This will acknowledge receipt of your letter of February 26, from which I quote as follows:

"Request information when it is lawful and under what circumstances and for what purposes governing bodies or school boards of counties can borrow money, by whom this money so borrowed shall be disbursed, and accounted for, etc."

I assume that your inquiry is directed to the power of boards of supervisors and local school boards to borrow money directly without a vote of the people. As you know, there are many statutes authorizing boards of supervisors or school boards to borrow money for various purposes and to issue bonds therefor after a vote of the people, and there are also statutes authorizing the governing bodies of counties to issue bonds to refund loans previously authorized by a vote of the people, but I do not understand that you refer to these classes of borrowings.

The only authority that a board of supervisors has to borrow money directly, other than the loans to which I have previously referred, is that contained in section 2727 of the Code giving the board power to borrow for the purpose of meeting casual deficits in the revenue or creating a debt in anticipation of the collection of the revenue of the county. The amount of such loan may not exceed "one-fourth of the amount produced by the county levy laid in such county for the year in which the loan is negotiated." The other provisions concerning such loans are fully prescribed in the section. The proceeds of such loans are to be disbursed as other county funds are disbursed.

County school boards are authorized by section 675 of the Code to make temporary loans not to exceed one-half of the amount produced by the county school levy for the year in which the money is borrowed or one-half of the amount of the cash appropriation for schools for the preceding year. Such loans must be paid within one year from their date and must first have the approval of the board of supervisors. There are certain other provisions regulating these temporary loans which are fully set out in the section. The proceeds of such loans are disbursed as other county funds are disbursed. A county school board may also borrow from the literary fund for the purpose of erecting or enlarging schoolhouses in the county. Sections 632 to 645 of the Code authorize these loans and prescribe the amount of such loans, how the applications are to be made and how they are to be paid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Purchase of Refrigerator From Member of Board of Supervisors Is Not Prohibited.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 30, 1944.

Honorable M. A. COGBILL,
Attorney for the Commonwealth,
Chesterfield C. H., Virginia.

My dear Mr. COGBILL:
I am in receipt of your letter of March 24, in which you ask the following question:

"Will the county school board have a right to purchase an electric refrigerator for a school from a member of the board of supervisors of Chesterfield county, who is a merchant?"

You refer to section 2707 of the Code, forbidding certain persons to be interested in contracts with or claims against their counties. It is my opinion, however, that this section does not forbid the transaction to which you refer. I think this section wherein it mentions the "furnishing of supplies or ma-
terials to such county" refers to supplies or materials purchased by the
board of supervisors or someone acting in behalf of the board. The board
of supervisors, however, has nothing to do with the purchasing of supplies
for the county school board and does not pass on the bills covering such
purchases, this being a matter entirely within the control of the school board.

Furthermore, I call your attention to section 708 of the Code, which pro-
hibits certain persons from being interested in contracts relating to furnishing
school supplies. This section, it seems to me, insofar as it deals with school
supplies removes this class of purchase from the prohibitions contained in sec-
tion 2707.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—No Authority to Institute Local Insurance Program
for Teachers.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., April 24, 1944.

MR. A. G. CUMMINGS,
Division Superintendent of Schools,
Bedford, Virginia.

MY DEAR MR. CUMMINGS:

I regret that my reply to your letter of April 12 has been delayed on ac-
count of absence from the city on official business.

I have gone over the sick benefit plan proposed by the teachers of Bed-
ford county for adoption by the Bedford County School Board. The plan in
effect provides for the School Board to set aside a sick and accident benefit
fund from the teachers' salary fund appropriated to the Board, and all teachers
who can submit a certificate of physical fitness are required to participate.

In my opinion, the School Board would not have the power to set up
such a plan without legislative authority, and I have been able to find no
statute which confers upon the Board such authority. It may be that a
workable plan could be devised, the participation therein being purely volun-
tary on the part of the teachers, but, even then such a plan should be sub-
mitted to the Bureau of Insurance of the State Corporation Commission to
ascertain whether or not it would come within the scope of the laws regu-
lating insurance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Representation on Board Where a Town Comprises a
Separate District.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 5, 1944.

MR. C. D. BORDEN,
Chairman School Trustee Electoral Board of Shenandoah County,
Toms Brook, Virginia.

MY DEAR MR. BORDEN:

I am in receipt of your letter of June 1, in which you ask if your board
has the authority to appoint on the School Board of Shenandoah County

a member to represent the town of Woodstock. You state that such a member has been appointed since 1928 and that the town now has a representation on the board.

Section 653-a-2 of the Code (Michie, 1942), dealing with county school boards, provides in part that "* * * incorporated towns having a population of not less than one thousand inhabitants, according to the last United States census, may, by ordinance of the town council and by and with the approval of the State Board of Education, be constituted separate school districts either for the purpose of representation on the county school board, or for the purpose of being operated as a separate school district under a town school board of three members, appointed by the town council." You will observe that the section provides that towns of no less than one thousand inhabitants may be made separate school districts either for the purpose of representation on the county school board or for the purpose of being operated as a separate school district. Since you state that Woodstock has had a representative on the county school board since 1928, I assume that the town council has passed the necessary ordinance and that the State Board of Education has indicated the necessary approval. Upon this assumption I am of the opinion that the town, having a population of more than one thousand inhabitants, is entitled to representation on the county school board as a separate school district.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOL BOARDS—Not Nepotism for Board to Re-employ Daughter of New Member of Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., February 21, 1944.

HONORABLE J. SLOAN KUYKENDALL,
Attorney for the Commonwealth,
Winchester, Virginia.

MY DEAR MR. KUYKENDALL:

I am in receipt of your letter of February 18, in which you ask if under the provisions of section 660 of the Code two daughters of an individual may continue to be employed as teachers by the School Board of Frederick County if such individual is appointed as a member of the School Board. The daughters have been employed by the Board as teachers in the public schools of Frederick county for the past three years.

In my opinion, the prohibition contained in section 660 against employing as teachers by a school board persons related to a member of such board is not applicable in the case you put in view of the following language in the said section 660:

"* * * and provided, further, that this provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board, or division superintendent of schools."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS; TAXATION—Levy for Operation of School Buses Should Be County-wide Levy.

HONORABLE FRED B. GREEAR,
Commonwealth's Attorney,
Wise County,
Wise, Virginia.

MY DEAR MR. GREEAR:
This will acknowledge receipt of your letter of July 15, from which I quote as follows:

"A question has arisen here in Wise County, with reference to the levying of taxes for the purpose of operating and maintaining school buses. The County has been proceeding in the school bus business on a District basis, and some of the Supervisors contend that it should be treated as a County-wide operation and the funds levied accordingly.

"Section 698A of the Code provides that each County and City is authorized to raise money by taxes on property subject to local taxation, to be expended by the local school authorities, in establishing, maintaining and operating schools. This Section also states as follows:

"Provided, that in the counties of Russell and Wise, the Board of Supervisors may levy such district school taxes in the several districts of their respective counties for capital outlay expenditure within the counties and for the payment of district school indebtedness, as may be necessary, and such district school taxes may also be used to pay the rent for buildings necessary to be leased by either of said counties and used as schoolhouses in any district of such county.'

"I would be pleased to have your opinion as to whether under the statutes as they now exist, the operation of school buses is a County-wide or a District proposition."

As you know, under section 653a2, except for the purpose of representation on the school board, the county is the unit of school administration including "taxation, management, control and operation." It has always been my view under the county unit system that the operation and maintenance of school buses is a county-wide matter and not a district matter and that taxes for this purpose should be levied on a county basis rather than on a district basis. It does not seem to me that the proviso which you quote in section 698a of the Code is in conflict with this view, since the district taxes therein authorized are limited to "capital outlay expenditure" and to the payment of "district school indebtedness." It does not appear to me that the operation and maintenance of school buses come within the scope of the quoted language.

I realize that the question you ask is not in terms answered by the statutes but it appears to me, as I have stated, that under the county unit system the operation of school buses is clearly a county matter.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS; TAXATION—Levy to Accumulate Funds for Erection of School in Future.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 27, 1944.

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR DR. NEWMAN:
This will acknowledge receipt of your letter of January 26, from which I quote as follows:

"I would appreciate it very much if you will give us an opinion covering the following request that has come to us.
"The Board of Supervisors of a Virginia county in which there is at present an 85c school levy desires to add an additional 15c to the present levy and earmark the proceeds to be derived from this levy to be used only for the erection of a consolidated high school in said county. I am told that the building cannot be erected until building materials are available after the present emergency, but both the County Board of Supervisors and the School Board are anxious to build up this reserve in order that they will be in a better financial condition to start this construction after the war."

I assume that the request for the additional levy for the erection of the proposed school will be included in the estimate of money needed for schools submitted to the Board of Supervisors pursuant to section 657 of the Code, and that notice of the proposed increase in the local tax levy will be given as required by section 2577-m(4) of the Code (Michie, 1942). If these statutory requirements are met, I know of no reason why this permanent capitalization fund may not be set aside for the purpose of constructing the school. Of course, you realize that a county budget is made up annually and, if it is desired to add to this building fund each year, the item therefor should be included in each budget.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS; TAXATION—Where Town Comprises a Separate School District.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 25, 1944.

HONORABLE JOHN ROBERTS,
Attorney for the Commonwealth,
Wise, Virginia.

MY DEAR MR. ROBERTS:
I am in receipt of your letter of January 19, in which you ask the following question:

"If a certain town in Virginia, by ordinance of the Town Council and by and with the approval of the State Board of Education, be constituted a separate school district for the purpose of being operated as a
REPORT OF THE ATTORNEY GENERAL

separate school district under the Town School Board of three members, as set forth in section 653a2 of the Code of Virginia, does the county continue to levy and collect the school taxes in said town, under section 653a3 of the Code, or does the Town Council provide for the levy and collection of such local school taxes under section 136 of the Constitution of Virginia."

Our Court of Appeals has decided that, where a town, even though constituting a separate school district, lies within the territorial limits of a county, such county may continue to impose a tax for county school purposes on property within the limits of such town. See Brunswick County v. Peebles, etc., Co., 138 Va. 348. When such a levy is made on town property the county treasurer is by section 653a3 of the Code required to pay over to the town treasurer for the use and benefit of town schools an amount derived from the county levy for school purposes equal to the pro rata amount from such levy derived from the town. The Town Council also, where such town constitutes a separate school district, may under section 136 of the Constitution and section 698a of the Code make a town levy for town school purposes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS—Compulsory Attendance; Powers of Attendance Officer to Serve Warrants.

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

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

MY DEAR MR. TALIAFERRO:

I am in receipt of your letter of November 17, with reference to the duties and powers of a school attendance officer appointed under the authority of section 685 of the Code. You are particularly interested in the authority of this officer to serve notices and summonses and to execute warrants of arrest in connection with the enforcement of the compulsory school attendance law.

Section 685 of the Code provides that the attendance officer is primarily charged with the enforcement of the preceding sections (683 and 684) and "for such purpose only" they are vested with the powers and authority of a sheriff. The compensation of these officers is fixed by the school board, and they are not entitled to any fees as such officers.

Section 684 of the Code further provides in part that:

"** It shall be the duty of the division superintendent, or the attendance officer, if one be employed, to investigate all cases of non-enrollment and, when no valid reason is found therefor, to notify the parent, guardian or other person having control of the child, to require the attendance of such child at the school within three days from the date of such notice. A list of persons so notified shall be sent by the superintendent of schools, or the attendance officer, if there is one, to the principal teacher of the school. If the parent, guardian or other person having control of the child or children fails, within the specified time, to comply with the law, it shall be the duty of the division superintendent or the
chief attendance officer, if there be one, to make complaint in the name of the Commonwealth before the juvenile and domestic relations court of his city or before the trial justice court of his county. If there be no such juvenile and domestic relations court in his city or trial justice court in his county, then the prosecution shall be instituted against such person in the circuit or corporation court of the county or city in which the offense occurred, and, in addition thereto, such child or children may be proceeded against as a neglected child or children in the manner provided by chapter seventy-eight of the Code, as amended.”

In my opinion, the notice to the parent or guardian of a child requiring such parent or guardian to send the child to school within three days from the day of such notice should preferably be in writing, but may be given orally, and it is further my opinion that this notice should be given by the school attendance officer.

Where the parent or guardian fails to send the child to school pursuant to the notice, the attendance officer is required to make complaint in the name of the Commonwealth before the trial justice of his county. Where as a result of such complaint the trial justice issues a summons directing the parent or guardian to appear before him or a warrant for the arrest of such parent or guardian, I am of opinion that such summons or warrant of arrest may be directed by the trial justice to be served either by the school attendance officer or by the sheriff. I have reached the conclusion that such summons or warrant of arrest may be executed by the attendance officer because that official is expressly given the powers of a sheriff for the enforcement of the compulsory attendance law, and the bringing of the parent or guardian before the trial justice, either by a summons or warrant, would certainly appear to be a part of the enforcement of such law. It is plain that the school attendance officer is not entitled to any fee for executing such summons or warrant.

It is entirely plain from section 685 of the Code that the school attendance officer only has the powers of a sheriff in connection with the compulsory attendance law and that when acting as such school attendance officer he is entitled to no fees for any services rendered, his compensation being fixed by the school board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Escaping Prisoners Held in Another State Not Entitled to Credit on Sentence.

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

HONORABLE W. F. SMYTH, JR.,
SUPERINTENDENT STATE PENITENTIARY,
RICHMOND, VIRGINIA.

MY DEAR MR. SMYTH:

This is in reply to your letter of October 19 requesting my opinion as to whether convicts who escape from the prison system of Virginia and are apprehended out of the State should be allowed any credit for the time they are held in confinement in other States awaiting their return to Virginia. You point out that quite frequently men are held in jail in other States for some time while extradition papers are being prepared or while they are fighting extradition to Virginia.
Such persons are not being held by the Virginia authorities for service of their sentences, but are being held by the authorities of the other States as fugitives from justice of Virginia. Until their return to this State they are not held pursuant to the criminal process of Virginia. The delay in their return is due to their own action in resisting extradition instead of returning voluntarily.

Since there is no statute of Virginia allowing fugitives from justice from this State any credit for the time they are held in confinement in other States awaiting return to Virginia, it is my opinion that you have no authority to allow such a credit.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Calculation of Date of Conviction Where Imposition of Sentence Is Suspended.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 16, 1943.

HONORABLE W. FRANK SMYTH, JR.,
Superintendent State Penitentiary,
Richmond, Virginia.

MY DEAR MR. SMYTH:

This is in reply to your request as to whether or not the provisions of Section 7, Chapter 218, Acts of Assembly of 1942, are applicable to the case of Harold Wadsworth, #48007.

I have examined the papers in this case and it appears that Harold Wadsworth was indicted on the 4th day of March, 1940, in the Corporation Court of the City of Norfolk, Virginia, for the crime of bigamy. He was arraigned on March 18, 1940, and on that day, after he tendered a plea of guilty, was adjudged guilty of the crime charged in the indictment. Upon motion of his counsel, the imposition of sentence was suspended during the period of his good behavior. On March 16, 1943, after a rule to show cause why the order suspending the imposition of sentence should not be revoked had been issued, Harold Wadsworth was sentenced to be confined in the Penitentiary for a term of three years.

Section 7 of Chapter 218 of the Acts of Assembly of 1942 reads as follows:

“No person convicted, on or after October first, nineteen hundred and forty-two, of a felony and sentenced to confinement in any penal institution shall be entitled to a deduction of any time for good behavior from the term of such sentence.”

This provision applies only to persons convicted on or after October 1, 1942. For some purposes, a person is said to be “convicted” when he pleads guilty or is found guilty by a jury. For other purposes, he is not held to be convicted until there has been a final judgment of the Court trying him. Blair v. Commonwealth, 66 Va. 850.

In the case of Harold Wadsworth, there was not only a plea of guilty before October 1, 1942, but there was also a judgment of the Hustings Court of Norfolk adjudging him guilty before that date. While the decisions are not unanimous, it is held in most States that such action, though it is followed by a suspended sentence, constitutes a conviction which subjects the person
involved to the usual disabilities attaching to persons convicted. See the cases collected in Volume 9 of Words and Phrases, Permanent Edition, at pages 612, et seq.

Since the statute (Section 1922b of the Code of Virginia, Michie’s, 1942) which authorizes the suspension of sentence, in dealing with the duties which may be imposed upon persons whose sentence has been suspended, speaks of the “offense for which conviction was had,” it appears that the Legislature regarded a person who had been found guilty but whose sentence had been suspended, as a convicted person. You will note also that Section 7 of Chapter 218 of the Acts of 1942 uses both the words “convicted” and “sentenced,” which indicates that they are considered separate actions.

Therefore, it is my opinion that, where as in the case under consideration, there has been an adjudication of guilt followed by the suspension of imposition of sentence, the person has been convicted and that, if the adjudication of guilt occurs prior to October 1, 1942, Section 7 of Chapter 218 of the Acts of Assembly of 1942 is inapplicable even though the order suspending the imposition of sentence is not revoked and sentence is not actually imposed until after October 1, 1942. While the question is not free from all doubt, I think the doubt should be resolved in favor of the prisoner and that he should be entitled to receive such credit as he may earn for good behavior.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—When Credits for Good Behavior to Be Given; Successive Sentences.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., May 3, 1944.

HONORABLE W. FRANK SMYTH, JR.,
Superintendent Virginia State Penitentiary,
Richmond, Virginia.

MY DEAR MR. SMYTH:

This is in reply to your letter of April 26, 1944, addressed to Mr. Walter E. Rogers of this office, in which you ask the following questions regarding Section 5017 of the Code of Virginia as amended by the Acts of Assembly of 1944:

1. When an inmate is received with a two-year sentence from which he receives no good time and is tried for second conviction, receiving an additional year, making a total sentence of three years, is he to receive good time credits? If so, should they start on the date he receives the additional sentence or be retroactive to the date he was received at the institution.

2. Will this Act apply to inmates serving a 2-year sentence, and after having served one year, escapes, and receives an additional year? Will he receive credits under this Act?

The pertinent provision of Section 5017 of the Code, as amended, reads as follows:

"Every person who on or after October first, nineteen hundred forty-two, has been or is convicted of a felony and sentenced to confinement for a period of more than two years * * * shall, for every twenty
days he is or has been held in confinement after sentence * * * without violating any jail or prison rule or regulation, be allowed a credit of ten days upon his total term of confinement in addition to the time he actually serves or has served * * *.

Whenever a person is given two or more sentences, none of which is for more than two years, but the sentences are required to be served consecutively and together total more than two years, it is my opinion that such person has been "sentenced to confinement for a period of more than two years" within the meaning of the above statute and that he is entitled to the specified credit if his behavior is good.

If the subsequent sentence which brings the total sentence to be served to more than two years is imposed while the prisoner is serving the prior sentences, as in the examples set out in your letter, it is my opinion that the good conduct credit should be allowed only from the date of the subsequent sentence and then only if the unserved portion of the prior sentences added to the new sentence totals more than two years. It is only then that the prisoner would stand "sentenced to confinement for more than two years" and, in my opinion, the statute in providing that the good conduct credit shall be upon the time served after sentence, means that the prisoner is entitled to the credit only upon the time served after the sentence which, added to the unserved portion of previous sentences, would make the total sentence to be then served more than two years.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Suspension of Sentence Pre-Supposes Finding of Guilt.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., February 3, 1944.

HONORABLE CHARLES R. PURDY,
Clerk Hustings Court, Part II,
Richmond, Virginia.

My dear Mr. Purdy:
I am in receipt of your letter of January 29, in which you raise the following question:

"Under section 1922-b of the Code of 1922, provision is made under which the court may suspend imposition of sentence where conditions justify. Quite often we have cases where the accused will come in entering a plea of guilty, and the court suspends imposition of sentence for a specified time.

"The question in my mind is whether or not this constitutes a conviction.

"Under section 4964 of the Code, it is provided 'In every criminal case the Clerk of the Court in which the accused is convicted * * * shall, as soon as may be, make up a statement of all the expenses incident to the prosecution, including such as are certified under the preceding section and execution for the amount of such expenses shall be issued and proceeded with * * *.'"
"If the action of the court constitutes a conviction, I have no choice as to issuing the execution provided for, but, if the court’s action does not constitute a conviction, then apparently no costs should be taxed against the accused."

It is my opinion that before the imposition of sentence can be suspended there must be the finding of guilty. Otherwise, there would be no basis upon which to suspend the imposition of sentence. It would, therefore, appear to me to be proper upon a plea of guilty for an order of record to be entered finding the defendant guilty and then for the court, if it so desires, to suspend the imposition of sentence. Specifically answering your question, therefore, I am of opinion that for the court to suspend the imposition of sentence there must first be a conviction.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Suspension of Sentence in Felony Case Must Be Made at Term When Conviction Is Had.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., May 26, 1944.

HONORABLE L. H. MEARS,
Commonwealth’s Attorney,
Eastville, Virginia.

MY DEAR MR. MEARS:
I acknowledge receipt of your letter of May 23, in which you state the following:

"At the March term of our Circuit Court Jane Doe was indicted for malicious maiming with intent to kill. The case came up for trial at the same term and the defendant pleaded guilty, whereupon the court, after hearing the evidence, imposed a penalty of two years and sentenced the defendant to serve that time in the penitentiary. It so happens that the penitentiary officials have not as yet found it convenient to call for the prisoner and therefore she still remains in jail awaiting to be transferred to Richmond."

You then state that subsequent to the close of the March term of court, you have received information bearing upon the previous good record and character of the prisoner and also that she is pregnant. You then ask whether in my opinion the Judge of the Circuit Court has any authority to suspend sentence in the case or release her on probation.

The accused was, of course, charged with, plead guilty to, and found guilty of a felony. Prior to the 1919 Revision of the Code, trial courts often suspended sentence in criminal cases supposing that such power existed at common law. The revisors believed otherwise, and as a result, the Code of 1919 included section 4925, which forbade such practice "except where expressly authorized by statute."

The General Assembly of 1918 (whose acts are amendatory of the Code of 1919) passed an act, designated as Chapter 349 of the Acts of 1918, section 1 of which provided as follows, and was carried in Michie’s Code as section 1922a:
The judges of all courts of record of this State having jurisdiction of criminal cases, police justices and the justices of juvenile and domestic relations courts may appoint one or more reputable persons, male or female, to act as probation officers.

Section 2 of this act provided, in part, as follows, and was carried in Michie's Code as section 1922b:

"After a plea or a verdict of guilty in any court having jurisdiction to hear and determine the offense with which the prisoner at the bar is charged, if there be circumstances in mitigation of the offense, and if it appear compatible with the public interest, or in any case after a child has been declared delinquent or dependent, the court may suspend the imposition or the execution of sentence, or commitment and may also place the defendant on probation under the supervision of a probation officer, during good behavior, for such time and under such conditions of probation as the court shall determine."

In my opinion, it is clear from this original legislation, that the General Assembly intended that courts of record should have power to suspend the imposition or execution of sentence in any case falling within the conditions set forth in the statute.

There is no adjudication by the Supreme Court of Appeals in any case dealing with a felony conviction, nevertheless, the Court, in White v. Commonwealth, 170 Va. 641, which involved the question of when a court could revoke a suspended sentence, used a felony example to illustrate its reasoning:

"If upon an indictment for murder one is found guilty of involuntary manslaughter and given a suspended jail sentence and fine, the statute does not contemplate that the suspension of sentence could be revoked at any time during the life of accused because he was simply indicted for murder which carries a punishment of death or life imprisonment."

The statute remained as originally enacted until 1938. In that year, the General Assembly extended the power of the courts to suspend sentences in cases of misdemeanor beyond term time, the following sentence being added:

"In case the prisoner has been sentenced for a misdemeanor and committed, the court, or the judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence."

The statute remained as originally enacted until 1938. In that year, the General Assembly extended the power of the courts to suspend sentences in cases of misdemeanor beyond term time, the following sentence being added:

"In case the prisoner has been sentenced for a misdemeanor and committed, the court, or the judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence."

It is significant that misdemeanors are singled out for this exception, the inference being that felonies were considered as having always been within the general provisions of the statute.

It is my opinion, therefore, that courts of record may suspend the imposition or execution of sentence in either felony or misdemeanor cases; but that in felony cases, the order suspending sentence must be entered before the end of the term at which the final order adjudicating guilt is entered.

The case you put commands sympathy to be sure, but I can find no authority for the Court at this late date to suspend the sentence. The accused, upon her allocution, should have assigned her delicate condition as a reason why sentence should not have been imposed. Pregnancy was one of the reasons at common law which the accused might advance in delay of imposition of sentence.
REPORT OF THE ATTORNEY GENERAL

The condition of the accused should, of course, be called to the attention of the Superintendent of the Penitentiary when she is committed there in order that she may receive proper hospitalization at the Penitentiary hospital.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Suspension of Sentence by Trial Justice.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 8, 1944.

HONORABLE JULIUS GOODMAN,
Commonwealth's Attorney Montgomery County,
Christiansburg, Virginia.

My dear Mr. Goodman:

This is in reply to your letter of May 2, 1944, in which you set out facts which presume that a person, whose operator's license has been revoked, drives an automobile a very short distance in moving it from one parking place to another. You then ask:

"May I ask your opinion as to whether or not a Trial Justice is forced, in the face of section 2154(198), to require the defendant to serve at least two days in jail or can the Trial Justice suspend such sentence or take same under advisement?"

It would be inappropriate for me to express an opinion on the question of whether a Trial Justice should or should not convict a person on a given set of facts. That is a judicial question for the Trial Justice to decide.

However, the law is quite clear that, should the Trial Justice determine that the acts done are sufficient to constitute a violation of the statute referred to in your question, then it becomes his duty to fix the punishment within the limits prescribed.

I have had occasion frequently to express the opinion that a Trial Justice may, under Section 1922b of the Code (Michie's), suspend execution of sentence in cases which he determines to fall within the spirit of that legislation. These opinions may be found by referring to the index of code sections in the back of recent volumes of the Opinions of The Attorney General. I know of no statute which would make a conviction under Section 2154(198) an exception to the rule.

Very sincerely yours,

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

SENTENCE AND PUNISHMENT—Suspended Sentences in Second Offense for Drunk Driving.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 19, 1943.

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

MY DEAR MR. DENNIS:

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

"The above named party, as you will note from the letter was convicted upon a charge of drunken driving during the year of 1936, and recently I had him before me on this charge to which he confessed, and I am of the opinion that the mandatory jail sentence cannot be suspended.

"This law was enacted prior to the law of probation and parole and I am wondering if I have the authority under the law, to suspend this jail sentence of John Fuller and place him on probation as suggested by Mr. E. R. Beverly, probation and parole officer for district No. 18."

Under Chapter 87 of the Acts of 1940, section 3 (Michie's Code of 1942, §4722a), in my opinion you plainly have power to suspend the sentence of a person convicted for the second time of driving while drunk. The so-called driving while drunk statute formerly contained a prohibition against suspending the sentence of a second offender but this prohibition was removed by the Acts of 1940 to which I have referred.

It is true that the last paragraph of section 1922b of the Code (Michie, 1942) provides that nothing therein contained shall be construed as permitting a suspension of a jail sentence imposed upon a second offender under the provisions of section 4722 of the Code, but this provision must bow to the specific provision contained in Chapter 87 of the Acts of 1940. Furthermore, section 4722 of the Code was repealed by Chapter 419 of the Acts of 1932.

I do not think that you have power to suspend the revocation of the driving permit of a person convicted of driving while drunk under Chapter 87 of the Acts of 1940. The judgment of conviction of itself operates to deprive the person convicted of his right to operate a motor vehicle and there is no discretion in the trial justice in this respect.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Insanity Intervening After Sentence of Death Penalty.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 3, 1944.

HONORABLE R. M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

MY DEAR MAJOR YOUELL:

This is in reply to your letter of May 2, 1944, in which you ask my opinion on the following questions:
"1. Is a man sentenced to be electrocuted considered a convict?
2. Whose duty is it, and what is the procedure, in determining the sanity of a man sentenced to be electrocuted after he has been received in the death chamber?"

At common law the power of reprieve rested both in the Court and the Crown. One of the well recognized grounds upon which a reprieve was granted in cases involving capital punishment was insanity intervening between the date of conviction and the date for execution.

The same principle is announced in varying form in the jurisdictions in America where the question has arisen, even in the absence of a statute expressly covering the situation.

In those states where the Courts do not possess the general power of reprieve, the matter is one for the Governor, for it is said that, even though the prisoner is not entitled to a reprieve as a matter of right, nevertheless upon the broad humanitarian principle that one who is incapacitated by insanity from understanding the purpose of the law in subjecting him to punishment should not be thus punished until he is sufficiently capable of so understanding it. It is also said that the general public would not approve the execution of a prisoner while insane and that respect for the law might be impaired by such execution. A few states have held, even in the absence of statute, that a court may exercise this power of reprieve.

Section 4910 of the Code provides in part as follows:

"... 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 feebleminded, 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; ..." 

It will be observed that this section is not limited to convicts in the narrow sense, but includes "any person" convicted of any crime.

Section 5007 of the Code provides in part as follows:

"... If at any time there is reasonable ground to doubt the sanity of a convict, the superintendent shall report it to the governor, who shall order such convict to be examined by the State board of mental hygiene; ..."

According to the foregoing, it is my opinion that a person held in the Penitentiary to be electrocuted, while not a convict in the strict sense of that term, is nevertheless subject to many of the principles of law relating to convicts.

The duties of the Superintendent of the Penitentiary are set out in section 5007 of the Code, i. e., if he has reasonable doubt as to the sanity of the convict, he should report the fact to the Governor.

I may add, that if the Superintendent of the Penitentiary does not entertain such doubt and therefore does not make a report to the Governor, it would be proper, under the view entertained in most of the States, for any person in interest to make a request to the Governor on behalf of the convicted person.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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SENTENCE AND PUNISHMENT—Insanity Intervening After Sentence of Death Penalty.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 10, 1944.

Dr. James Asa Shield,
Secretary Governor’s Advisory Board of Mental Hygiene,
212 West Franklin Street,
Richmond, Virginia.

MY DEAR DOCTOR SHIELD:

This is in reply to your letter of June 5, which I quote in full as follows:

"The Governor’s Advisory Board on Mental Hygiene has under consideration the question whether Thomas William Clatterbuck, a convict in the State Penitentiary under sentence of death, is insane within the meaning of section 5007 of the Code of Virginia. The question of his sanity was submitted to the jury by the Circuit Court of Loudon County in which he was convicted, and the verdict of the jury found him to be sane. The Board would like to have your opinion upon the following two questions:

"1. Is the Board bound by the verdict of the jury which, in effect, held the condemned prisoner to be sane at the time of the murder; that is is the Board's consideration of the present sanity of the prisoner restricted to the question whether his mental condition since the murder was committed has become so changed as to render him insane at this time though he was then sane?

"2. What is the legal test of sanity to be applied by this Board in determining the mental condition of a convict sentenced to death, under the proper interpretation of the word 'insane' as used in section 5007 of the Code?"

Your questions require an interpretation of certain provisions of section 5007 of the Code of Virginia. So far as here pertinent said provisions are as follows:

"* * * If at any time there is reasonable ground to doubt the sanity of a convict, the superintendent shall report it to the governor, who shall order such convict to be examined by the State board of mental hygiene, and if, after due examination, they shall find him insane, he shall be transferred to one of the State hospitals for the insane, as provided in sections one thousand and twenty-two to one thousand and twenty-five, inclusive, and section one thousand and twenty-seven; and when restored to sanity he shall be returned to the penitentiary in the manner prescribed in section four thousand nine hundred and eleven."

While there is some question as to whether or not the quoted provisions apply to a convict who has been sentenced to death, it is my view that they are intended to so apply, and that when so applied they are merely declaratory of the common law on the subject.

As stated in your letter, the question of the sanity of this convict was passed upon by the jury which tried him in the Circuit Court of Loudoun County. With respect to the nature and degree of insanity which would constitute a defense to the charge of murder, the Court instructed the jury as follows:
"THE COURT INSTRUCTS THE JURY that in every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possessed withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes."

The record in the case shows that very full and complete evidence was introduced before the jury, and that the views of the physicians as to the mental condition of the accused were in direct conflict. The jury, however, rejected the defense of insanity at the time of the commission of the crime and found the accused guilty of murder in the first degree and imposed the sentence of death. The trial court, which likewise heard the evidence and also observed the prisoner at the trial, overruled the motion to set aside the verdict of the jury and rendered judgment and sentence of death thereon. An application was made by the attorney for the prisoner to the Supreme Court of Appeals of Virginia for a writ of error to review the judgment of the Circuit Court. The Supreme Court of Appeals, having considered the petition for the writ of error, entered an order stating that the verdict and judgment of the Circuit Court were plainly right and declined to further review same.

It is my opinion that these court proceedings above narrated have the effect of a legal adjudication that at the time of the commission of the crime the prisoner was possessed of the mental power which the Court instructed the jury was requisite for him to possess before he could be found guilty under the defense of insanity which was interposed. This being my view of the effect of the verdict of the jury and the judgment of the courts, the answer to your first question is that I am of opinion that the Governor's Advisory Board on Mental Hygiene is legally bound to accept it as a fact that the prisoner was possessed of the mental capacity stated in the instruction at the time the crime was committed, and, therefore, the inquiry of the Board must be restricted solely to the changes, if any, in the mental condition of the prisoner which have occurred since the crime was committed.

Your second question relates to the test of sanity to be applied by the Board in determining whether or not the mental condition of the prisoner has so changed since the commission of the crime as to now render him insane within the meaning of the quoted provisions of section 5007 of the Code.

It is my opinion that, if the Board is satisfied that the mental faculties of the prisoner have undergone a change since that time, and that the result of such change is to render him now incapable of understanding the nature and purpose of the punishment to be inflicted upon him, or that such change has resulted in his being now unconscious of the situation and without sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, or in his being deprived of the intelligence requisite to convey information of such fact to his attorney, then, as a result of such change in his mental condition, he would be considered to be now insane within the meaning of the statute. Unless it be true that the mental condition of the prisoner has undergone a change with the result above stated, then he is, in my opinion, deemed to be sane within the meaning of said statute, although on some other subject his mind may be deranged or unsound.

Sincerely yours,

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

SHERIFFS, SERGEANTS AND CONSTABLES—Fees as Administrator of Estate Where Qualification Thereon Was Prior January 1, 1943.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 30, 1943.

HONORABLE E. R. COMBS,
Chairman State Compensation Board,
Richmond 19, Virginia.

MY DEAR MR. COMBS:

I am in receipt of your letter of November 26, enclosing a communication addressed to you, dated November 23, from Sheriff A. A. Fleming, of Dickenson County, in which the sheriff raises the following question:

"On March 9, 1942, I was appointed administrator of the estate of Abednago Kiser, deceased. Eight hundred seventy dollars and five cents was paid into my hands at that time by W. M. Ritter Lumber Company, Inc. In the year 1942 I paid out in advance cost in suit, approximately four hundred dollars. "I was appointed administrator by the court, owing to my being sheriff of the county. I am now ready to settle up this estate. The commissioner of accounts has allowed me five per cent of the money handled in settling up this estate. Owing to this matter starting before I was placed on a salary, I am at a loss to know whether I should keep this commission as my own or to remit it to the state. Please advise me as to the matter at once."

In view of the fact that Sheriff Fleming was appointed administrator of the estate in question prior to the effective date of chapter 386 of the Acts of 1942, insofar as that Act places sheriffs and sergeants on a salary basis, I think the better view is that he is entitled to the commissions allowed him in settling this estate. While it might be argued that the commission should be prorated, the sheriff being entitled to commission for such services as were rendered by him before the effective date of chapter 386 and that the commission earned subsequent to such date should be paid to the treasurer of the county for division between the state and the county, I surmise that accurate determination of the amount which the sheriff should retain and the amount which he should pay in would be exceedingly difficult, if not almost impossible. The view I am expressing is in line with previous opinions of this office to the effect that sheriffs' fees or commissions which accrue prior to the effective date of chapter 386, but collected after such date, may be retained by the officers in accordance with the law as it existed before such effective date.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees: Appraisal of Confiscated Automobile.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 17, 1943.

MR. W. E. CURTIS,
Sheriff of Stafford County,
Fredericksburg, Virginia.

MY DEAR MR. CURTIS:

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

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
"Will you kindly advise what fee, if any, the sheriff should charge in making an appraisal of an automobile under section 4675-38-A of Virginia Code?"

No specific fee for making an appraisal of an automobile seized under this section is provided. The section stipulates that actual expenses incident to the custody of the seized property and the expense incident to the sale shall be taxed as costs in the forfeiture proceedings. Nor do I find in any other section of the Code any specific fee allowed a sheriff which would cover his services in appraising an automobile under the circumstances you mention.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., September 16, 1943.

MR. W. C. WHITEHEAD,
Sheriff of Isle of Wight County,
Smithfield, Virginia.

MY DEAR MR. WHITEHEAD:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has referred to me your letter to him of August 31, in which you request a construction of the following language in section 3487 of the Code, relating to fees of sheriffs and sergeants in civil cases:

"* * * and when, after distraining or levying on tangible property he neither sells nor receives payment, and either takes no forthcoming bond, or takes one which is not forfeited, he shall, if in default, have (in addition to the sixty cents for a bond, if one was taken) a fee of three dollars.

"Unless this is more than one-half of what his commission would have amounted to if he had received payment, in which case he shall (whether a bond was taken or not), have a fee of at least one dollar, and so much more as is necessary to make the said half."

In my opinion, the quoted provision means that, where an officer actually distrains or levies on tangible property and where the parties make a settlement between themselves as a result of which the officer does not have to sell and does not make the collection, then he shall be entitled to a fee of $3, provided this fee is not more than one-half of what his commission would have been if he had actually made the collection. If this fee of $3 does amount to more than one-half of what his fee would have been if he had made the collection, then he is entitled to a fee of at least $1 and so much in addition as will amount to one-half of his commission if the collection had been made by him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SHERIFFS, SERGEANTS AND CONSTABLES—Fees Where Levy Is Released.

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

MR. GRADY W. GREGORY,
Sheriff of Franklin County,
Rocky Mount, Virginia.

MY DEAR MR. GREGORY:
I am in receipt of your letter of September 27, in which you ask the following question:

"If I make levy on a lot of tobacco under execution issued by John Doe against John Smith to collect $300, and John Doe then makes a compromise with John Smith and settles the claim for less than $300 direct with John Smith, and John Doe directs me to release the levy, is it necessary for me to collect the 10 per cent collection fee on the amount paid by John Smith to John Doe?"

Section 1, subsection (b) of chapter 386 of the Acts of 1942 provides that the sheriff shall continue to collect all fees and mileage allowances provided by law for his services. The fees so collected are paid into the treasury of the county and by the treasurer of the county distributed one-third to the county and two-thirds to the State.

It is my opinion, therefore, that in the case you put you should collect the fee prescribed by section 3487 of the Code, the amount of the fee being $3, unless such sum is more than one-half of what your commission would have amounted to if you had made the collection, in which case your fee would be an amount equal to one-half of what your commission would have been, in no event to be less than $1.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees: Executions; Not Required to Be Paid in Advance.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., June 22, 1944.

HONORABLE B. H. WAYLAND,
Sheriff Culpeper County,
Culpeper, Virginia.

MY DEAR MR. WAYLAND:
This is in reply to your letter of June 20, from which I quote as follows:

"I have a party here who desires that I handle an execution on a judgment of the court without payment of the fee of $1.50 in advance and I told him the fee I thought should be paid in advance and he says that is not the law.

"I have a digest of statutes relating to activities of Sheriffs, etc., and I am a little confused as to the law on the subject and I would appreciate it if you would give me your opinion on the subject."
Section 6480 of the Code makes it the duty of a Clerk of the court to issue an execution for a judgment for money obtained in his court and to "place the same in the hands of the proper officer of such court to be executed." The execution is, in effect, an order of the court to the officer to whom it is directed and I am of opinion, therefore, that the Sheriff, pursuant to Section 6480, may not require the judgment creditor to pay his fee in advance.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees; Execution of Judgment.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 7, 1943.

Mr. H. E. Valentine,
Sheriff of Brunswick County,
Lawrenceville, Virginia.

My dear Mr. Valentine:

Your letter of September 27 addressed to Honorable L. McCarthy Downs, has been referred to this office for reply. You ask the following questions:

"When an execution is now issued on a judgment by a clerk, at the instance of a judgment creditor, and placed in my hands for levy and sale, should I collect in advance from the execution creditor the fee of $1.50, allowed me by section 3487 of the Code, for making the levy?

"In event I make the collection of $1.50 in advance from the judgment creditor, and subsequently find that the judgment debtor has no property on which levy can be made, should I return any part of the fee to the judgment creditor, and if so, how much?

"Should the fees in both instances, as aforesaid, be collected by the clerk at the time the execution is issued by him and he collects his fee of seventy-five cents?"

Since the sheriff when he receives an execution does not know that the judgment debtor has any property on which a levy can be made, I do not think that the sheriff should be required to collect in advance the fee for making a levy, although he may do so.

If the sheriff finds no property on which to levy and no levy is made, the sheriff is, nevertheless, entitled to a fee of 50 cents for making a return on the execution. Section 3488 of the Code. Where a sheriff makes a return, therefore, even though he does not make a levy, the balance of $1 should be returned to the judgment creditor if the sheriff has collected in advance the levy fee of $1.50.

I know of no statute making it the duty of the clerk to collect fees to which a sheriff may be entitled at the time the execution is issued by him.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SHERIFFS, SERGEANTS, AND CONSTABLES—Special Allowance to Sergeants, etc., for Service of Criminal Process.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 30, 1943.

Honorabie H. G. Gilmer,
State Comptroller,
P. O. Box 6-N,
Richmond 15, Virginia.

My dear Mr. Gilmer:

Referring to the attached file with reference to an allowance made by the Corporation Court of the City of Newport News to J. B. Layton, Detective Sergeant on the Police Force of the City of Newport News, under section 3511 of the Code, I am of opinion that the entry of the order making the allowance is authorized by law and that the allowance may be paid out of the appropriation for criminal charges. Section 3511 of the Code expressly provides that the Judge of the Corporation Court of a city may make an allowance not exceeding $200 a year to each of two constables, sergeants, or policemen of such city, to be paid in lieu of all fees for serving criminal processes of any kind, which allowance shall be paid out of the treasury (of the State). I do not find anything in chapter 386 of the Acts of 1942, placing sheriffs and sergeants on a salary basis, which repeals the aforesaid section, nor do I find anything in said chapter which requires that all criminal processes shall be served by the sergeant of a city or one of his deputies.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees: Service of Summons on Behalf of Defendant.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 15, 1943.

Honorabie Chas. L. Hutchins,
Clerk Circuit Court of the City of Suffolk,
Suffolk, Virginia.

My dear Mr. Hutchins:

This will acknowledge receipt of your letter of July 14, in which you ask the following question:

"Under the new law applicable to sheriffs and city sergeants, is it the duty of the sheriff or city sergeant to collect the service fee on a summons issued for the defendant in cases where the Commonwealth or city is plaintiff?"

This office has heretofore expressed the opinion that in criminal cases a defendant should not be required to advance the fees of a sheriff for summoning defendant's witnesses, and I am further of the opinion that this
would also apply to other process served for the defendant in a criminal case. Of course, the sheriff's fees for such services would be taxed as a part of the costs and, if the judgment is against the defendant, he would be liable therefor.

In civil cases a sheriff or sergeant, as you know, may require that his proper fee be paid in advance where he renders a service to the defendant (section 3495 of the Code) except where the defendant is defending a suit as a pauper (section 3517 of the Code). If, however, the sheriff or sergeant has not required the defendant to pay his fee in advance, then I am of opinion that he should exercise his best efforts to collect such fee.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Fees: Service of Notices Issued by Board of Tax Equalization.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., June 12, 1944.

HONORABLE JAMES M. SETTLE,
Clerk Circuit Court of Rappahannock County,
Washington, Virginia.

My dear Mr. Settle:

I am in receipt of your letter of June 10, from which I quote as follows:

"The Chairman of the Board of Supervisors of Rappahannock County has requested me to write you for a ruling in the following case:

"Pursuant to section 344 of the Tax Code, a Board of Equalization was appointed for Rappahannock County for the year 1944. The said Board gave legal notices of each public sitting as required by section 345.

"The said Board increased the assessments in numerous cases, and section 346 provides 'that no assessments shall be increased until after the owner of the property has been notified and given an opportunity to show cause against such increase, unless such owner has already been heard.' The Equalization Board has necessary notices prepared, and employed Jas. M. Lillard to serve said notices personally on all property owners where increases had been made, agreeing that he would be compensated by the Board of Supervisors from county funds. Section 346 does not state specifically how or by whom said notices shall be served. The Board took the position that in every case where increase in assessment was made, the property owner should be served personally with such notice of increase; that it had the right to employ Mr. Lillard, not in his official capacity as sheriff, but as a layman, to serve said notices.

"The Board of Supervisors is ready and willing to compensate Mr. Lillard for services rendered, but this question has arisen as to whether or not it can legally do so."

The Board of Equalization is a county agency created by statute. Section 344 of the Tax Code. The notices which the Board sent out were authorized by statute. Section 346 of the Tax Code. In view of this situation, it is
my opinion that the service of such notices comes within the scope of the duties of a sheriff and the sheriff, now being on a salary basis, may not receive any additional compensation from the county for performing this duty of his office. I can see no distinction in principle between this official notice of a duly constituted county agency and the various other types of official notices which a sheriff is required to serve as one of the duties of his office. Of course, the sheriff is entitled to be reimbursed for expenses in performing this service, which expenses should be listed on his expense account which is submitted to the State Compensation Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANT AND CONSTABLES—Sheriff Has No Authority to Accept Fines and Costs Unless He Has Execution Therefor.

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

HONORABLE L. MCCARTHY DOWNNS,
Auditor of Public Accounts,
Richmond 10, Virginia.

MY DEAR MR. DOWNNS:
I am in receipt of your letter of October 30, reading as follows:

"I have been informed that in some few instances sheriffs and city sergeants are receiving fines from prisoners or their representatives. I have been advising them that I know of no legal authority by which such officers may receive fines and costs, unless the officer has an execution. Will you please advise me whether or not I am correct in the position which I have taken.

"As you know, the trial justice court and the corporation, hustings or circuit court clerks are furnished with official fine receipts and are required to give a receipt on this form. Since the sheriffs and city sergeants do not have these receipt forms they would, of course, be unable to give the official fine receipt as required by law."

Unquestionably the statutes contemplate that fines shall be paid either to the trial justice or the clerk of a court of record, as the case may be. Furthermore, section 2546 of the Code, dealing with official receipts for fines, seems to contemplate that such fines shall be paid either to the clerk of a court of record or the trial justice. Sheriffs and sergeants are only expressly authorized to receive fines when they have an execution therefor, and even when collected under an execution the officer pays the same to the clerk. Section 2568 of the Code.

On the whole, therefore, I agree with your position as set out in your letter.

Very sincerely yours,

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

SHERIFFS, SERGEANTS AND CONSTABLES—Compensation Earned Outside Duties of Office May Be Retained.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., AUGUST 30, 1943.

MR. A. H. OVERBEY,
Sheriff of Pittsylvania County,
Chatham, Virginia.

MY DEAR MR. OVERBEY:
This is in reply to your letter of August 28, from which I quote as follows:

"Some friends of mine who recently lost their father want to have me appointed attorney-in-fact for them to sell their farm.
"I would thank you to advise me as soon as you can whether or not in your opinion my fee in a case like this should be turned over to the State or could I qualify same as an individual and retain the fee."

If the sale in question is made by you entirely independent of your office as sheriff and if none of the acts performed by you is required to be performed by virtue of your said office, then I am of opinion that any compensation that you may receive as a result of a private agreement between you and the landowners would not have to be turned over to the State and county as a fee or commission of your office.

Without expressing any opinion concerning its application to you in the transaction you describe, I call your attention to the provisions of sections 4359(77) to 4359(91) of the Code (Michie, 1942) dealing with real estate brokers and real estate salesmen.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Appeals From Order of Compensation Board Fixing Salaries.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JANUARY 13, 1944.

HONORABLE E. R. COMBS,
Chairman State Compensation Board,
Richmond, Virginia.

MY DEAR MR. COMBS:
This will acknowledge receipt of your letter of January 10, in which you ask for my opinion on the following question:
"I hand you herewith notice from the Court of Hustings for the City of Portsmouth in re appeal of Joseph M. Joyner, M. A. Owens, C. W. Draper, M. M. Hughes, and William A. Hickman from the action of the Compensation Board in fixing budget allowances for the office of Sergeant of the City of Portsmouth for the calendar year 1944, which notice states that the undersigned will, on the twenty-first day of January, 1944, at 10:00 A. M., or as soon thereafter as they may be heard, move the Judge of the Hustings Court of the City of Portsmouth, etc.

"Messrs. Joyner, Owens, Draper, Hughes and Hickman, you will notice, are Deputy City Sergeants, and I would like an expression from you as to whether or not, under the provisions of section 4, sub-section b, chapter 386, Acts of Assembly of 1942 (Sheriffs' and Sergeants' Salary Act), deputies have the right of appeal to court from the action of this Board."

Section 2 of chapter 386 of the Acts of 1942, placing sheriffs and sergeants on a salary basis, adopts the procedure prescribed by chapter 364 of the Acts of Assembly of 1934 for fixing the salaries and expenses of sheriffs and sergeants by the State Compensation Board. The provisions for appeal from decisions of the State Compensation Board prescribed by section 12-a of the Act of 1934 is expressly adopted by section 2 of the Act of 1942. Indeed, the effect of section 2 of the Act of 1942 is to incorporate therein sections 10, -11, 12 and 12-a of the Compensation Board Act for the purpose of determining the salaries, expenses and allowances of sheriffs and sergeants, and appeals from the action of the Compensation Board in this respect. Sheriffs and sergeants are, therefore, required to file requests with the Compensation Board for the allowance of their salaries and the expenses of their offices, which expenses include compensation paid deputies. It is plain that the compensation allowed by the Board to be paid a deputy sheriff or sergeant is considered as an expense of the office.

Coming to the appeal provision (section 12-a of the Compensation Board Act), it will be noted that the right of appeal is given to "any officer whose salary or expenses of office are affected by any decision of the Board * * *". In view of this language, I do not think there can be any question about the fact that section 12-a only provides for an appeal by the principal, that is the sheriff or sergeants. The section plainly contemplates that, if the sheriff or sergeant is dissatisfied with the salary allowed him, he may appeal, or, if he is dissatisfied with the compensation allowed a deputy, which compensation is one of the "expenses of office," he may appeal, but, in my opinion, there is no provision for an appeal by the deputy himself. Not only does the plain language of the statute support this construction, but it is also supported by sound reasoning, since an anomalous situation would exist if a deputy, who may be removed by his principal at any time (section 2701 of the Code), should have the right of appeal from an action of the Compensation Board which is approved by his principal and from which his principal does not desire to appeal.

You mention in your letter section 4, sub-section (b) of chapter 386 of the Acts of 1942, but for the reasons I have already given it is entirely plain that the right of appeal there referred to also applies to the principal and not to the deputy.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SHERIFFS, SERGEANTS AND CONSTABLES—Deputy Sheriff: Bond.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 13, 1943.

Hon. W. Y. C. White,
Clerk Washington County,
Abingdon, Virginia.

My dear Mr. White:

I am in receipt of your letter of December 8, in which you ask the following question:

"The question has arisen as to whether a bond should be required of a deputy sheriff and if so, should that bond be drawn to the protection of the Commonwealth or to the sheriff himself. I will thank you to advise me as soon as possible."

The general law as to deputies, section 2701 of the Code, makes no provision for a bond to be given by deputy sheriffs, nor does section 2698 of the Code, prescribing bonds to be given by public officers, require a bond of a deputy sheriff. I am, therefore, of the opinion that since no bond is required of a deputy sheriff, if his superior chooses to require of him a bond, such bond should not be for the benefit of the Commonwealth. The Commonwealth is protected by the bond of the sheriff himself, which bond would cover the actions of his deputy.

Very sincerely yours,

Abram P. Staples,
Attorney General.

SHERIFFS, SERGEANTS AND CONSTABLES—Deputy Sheriffs; Special County Police: Compatibility of Office.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., January 18, 1944.

Honorable J. G. Jefferson, Jr.,
Judge Circuit Court of Amelia County,
Amelia Court House, Virginia.

My dear Judge Jefferson:

This will acknowledge receipt of your letter of January 13.

While I recognize the force of your suggestion that the effect of section 113 of the Constitution, read in connection with section 110, is to prohibit a deputy sheriff from holding any other county office such as a special policeman, I have always considered that the better view is that the prohibition against one person holding more than one office refers to the offices expressly named in article 7 of the Constitution. It seems to me that the use of the word "mentioned" in section 113 supports this construction, since the word carries with it the idea of a specific reference by name. Apparently this is the construction adopted by the General Assembly, as evidenced by the exceptions contained in section 2702 of the Code.
However, I must adhere to my view that a full-time deputy sheriff may not also hold the office of special county policeman. Aside from the fact that the powers and duties of a deputy sheriff in large measure parallel those of a special county policeman so that, if the same man held both offices, he would, in part at least, receive two salaries for performing the same duties, also the very term "full-time deputy sheriff" clearly implies that such an officer may not hold another public office and receive a salary therefor. Certainly, if a deputy sheriff held another county office and received a regular salary for performing the duties of such other office, he could not be said to be a full-time deputy.

I note that you say in your letter that the deputy sheriff involved in my correspondence with Mr. Farrar is only a part-time deputy. In such a case I see no reason why he should not be appointed a special county policeman, provided the arrangement with him is that while he is acting as a deputy sheriff he is not to receive any compensation as a special county policeman and vice versa. If you agree with me in this view, I trust it will be a solution to the problem.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SOIL CONSERVATION—Eligibility of Voters in Elections.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., March 29, 1944.

Mr. E. W. Mundie,
Acting Administrative Officer,
State Soil Conservation Committee,
Box 363,
Blacksburg, Virginia.

My dear Mr. Mundie:

This is in reply to your letter of March 29, 1944, in which you ask my opinion on several questions dealing with the eligibility of voters under the Soil Conservation Districts Law of 1938 (Michie's Code of Virginia, §1289(13)-(29)).

Respecting the eligibility of voters in an election to create such proposed districts, the act provides: "All owners of land lying within the boundaries of the territory, as determined by the State Soil Conservation Committee, shall be eligible to vote in such referendum." In my opinion, it would be immaterial where such owner resided; his eligibility would be determined by his ownership of land in the proposed district.

Respecting the eligibility of voters in the election to elect supervisors for such district, the act provides: "All qualified electors residing within the district shall be eligible to vote in such election." In my opinion a person residing in a city or town excluded from the district would not be eligible to vote in such election even though he did own land lying in the district. The qualifications for eligibility to vote in the election of supervisors are different from those prescribed for voting in the referendum. As to those persons who claim to reside in the district but are absent therefrom, the question of whether they are deemed in law to reside in the district is largely a question of their intention and is a matter to be determined by the judges of election.
Respecting those instances in which precincts of a city or town project out into an area served by the district, the electors who reside in such projected area should of course be given opportunity to vote for supervisors and in the absence of any other provision they would vote at their customary precincts. The judges of election would be the proper persons to determine whether the prospective voter resided in the district.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE ART COMMISSION—Extent of Authority to Pass on Architectural Aspects of State Buildings.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., April 12, 1944.

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

MY DEAR GOVERNOR DARDEN:

This is in response to your request for the opinion of this office as to the scope of the authority of the State Art Commission in approving or disapproving the proposed location and artistic character of buildings to be constructed on State property and with State funds. Your request is prompted by the reasons assigned for the action of the Commission in disapproving the plans submitted for the construction of two temporary employee cottages at the Piedmont Sanatorium at Burkeville. It is planned that these cottages may be readily converted into and used in the future building program of the institution as duplex apartments, garages or warehouses. You have furnished me with the file of your office (Division of the Budget) pertaining to this matter.

The Art Commission is provided for and its duties prescribed by sections 581 to 585 of the Code of Virginia. It consists of the Governor and five members appointed by him. No compensation is provided for the members and indeed the current appropriation for the entire expenses of the Commission is only one thousand dollars per annum. Originally the chief function of the Commission was to pass on the merits of works of art before acquisition by the State by purchase, gift or otherwise and to approve or disapprove the removal or alteration of existing works of art owned by the State. Acts 1916, page 701. Subsequently (Code section 582 as amended by Acts 1920, page 393) the Commission was given additional duties relative to buildings and certain other structures proposed to be erected on State property and with State funds. Section 582 now provides that the construction of no such building shall be begun unless “* * * the design and proposed location thereof shall have been submitted to the commission and its artistic character approved in writing by the majority of the members of the commission * * *. ” (Underscoring supplied.) Failure to disapprove within thirty days is equivalent to approval.
Detailed working plans for the proposed buildings (their combined cost approximately $23,000) were prepared by an architect and submitted to the Commission early in March. These plans, after careful consideration, had previously been approved by the State Health Department and the superintendent of the sanatorium. However, they were disapproved by the Commission, the reasons therefor, as stated in a letter of its Chairman of March 18, being: "1. Building poorly planned with inadequate size rooms, light and ventilation; 2. Needless expensive construction of walls, wall footings and roof framing." It will be observed that the Commission does not criticize or even discuss the "artistic character" or location of the buildings, nor are these subjects mentioned in the only other letter from the Commission relative to the matter in the file furnished me.

Subsequently at a called meeting of the Commission it elaborated its suggestions for changes in the plans. There existing an immediate and urgent need for the proposed buildings and, in order that construction might be promptly begun, the plans were revised in an attempt to meet most of the objections of the Commission and to comply with its suggestions, some of which were considered to be quite helpful. These revised plans were promptly disapproved by the Commission, the reasons assigned for this action being that its previous objections had not been met. The Commission also still seemed to be concerned about the size of the rooms (although the State Health Department considers "them adequate for this type of building") and about the cost.

Being an administrative agency created by the Legislature, The Art Commission possesses only those powers conferred upon it expressly, or by necessary implication.

It is my opinion that, whatever the merits of the suggestions made by the Commission, insofar as they do not affect the "artistic character" of the buildings, they are not proper factors to be considered by the Commission in performing the duty imposed upon it by the statute. It is further my opinion that both the spirit and language of the statute contemplate that in passing on the "artistic character" of a proposed building the Commission, generally speaking, shall only be concerned with its appearance and whether or not the particular type of architecture adopted reasonably conforms to that of the existing buildings, and with aesthetic considerations generally. The very name adopted by the Legislature, "The Art Commission," also supports this view. I can find nothing in the statute to make tenable the theory that the Commission in discharging its legal duty has any authority to pass upon the structural features of a building, its cost or its adequacy for the purpose for which it is to be used, these being matters, it seems to me, which would more properly come within the scope of the duties of the agency for which the building is being constructed and of a consulting or reviewing architect. I cannot believe that the General Assembly intended to assign to a commission, only one of whose appointed membership of five is required to be an architect, whose members receive no compensation and with practically no appropriation for an administrative or clerical staff, the sizeable task of reviewing in detail and passing upon the working plans of all buildings constructed by the State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE BOARD OF ACCOUNTANCY—Waiver of Examination Must Comply Strictly With Its Statutory Exemptions.

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

MR. FRANK S. CALKINS,
Secretary-Treasurer Virginia State Board of Accountancy,
State Planters Bank Building,
Richmond, Virginia.

MY DEAR MR. CALKINS:

This is in reply to your request for my opinion as to whether or not the Virginia State Board of Accountancy may issue a certificate of Certified Public Accountant to Mr. H. B. Conlin without requiring him to take the examination prescribed by Section 567 of the Code of Virginia.

Section 569 of the Code of Virginia prescribes the conditions under which the Board may waive the examination. This section reads in part as follows:

"The board may, in its discretion, waive the examination provided in this chapter, and may issue a certificate of certified public accountant to any person who possesses the other qualifications stated in section 567, and who is the holder of a certificate of certified public accountant issued under the laws of any state or territory or the District of Columbia which extends similar privileges to certified public accountants of this state, provided the requirements for such certificate in the State or territory or the District of Columbia which has granted it to the applicant are, in the opinion of the board, equivalent to those herein required • • • ."

From the file which you have submitted to me, it appears that in 1921 the National Association of Certified Public Accountants issued a certificate of certified public accounts to Mr. Conlin. The National Association of Certified Public Accountants is a private corporation formed on June 6, 1921, under what was then Section 599 of the Code of the District of Columbia. This section was a part of the general corporation laws for the District of Columbia which authorized citizens of the United States, a majority of whom being also citizens of the District, who desired to associate themselves for benevolent, charitable, educational, literary, musical, scientific, religious, or missionary purposes, and societies formed for mutual improvements or for the promotion of the arts, to form a corporation by filing in the office of the Recorder of Deeds a certificate stating the name adopted, the term for which the corporation was organized, its business and objects, and the number of its managers for the first year of its existence.

In the certificate filed by the founders of the National Association of Certified Public Accountants, the purposes of the corporation were stated to be:

"To bring together in one common union certified public accountants who are now, or heretofore have been, engaged in the practice of professional accounting; also those who, by virtue of education, personal endowments, technical training and experience are qualified to perform the duties pertaining to professional accounting; to provide for the admission of members; and when said members shall have presented satisfactory evidence of knowledge in the theory and practice of accounting, and shall have satisfactorily passed the prescribed qualifying examination of the Association to admit said members to the degree of certified public accountant, and to issue to such members the Association's formal certificate to that degree pertaining; to safeguard the rightful professional interests and promote the friendly, and social, and public
relations of the members of this corporation; and to do all else inci-
dent, appurtenant, and germane to the purposes and objects of this cor-
poration."

It is contended that the certificate issued to Mr. Conlin by this corporation
was a certificate issued under the laws of the District of Columbia. If it
were conceded that the corporation had the legal right to issue such certifi-
cates, it could not be held that a certificate issued by the corporation is a
certificate issued under the laws of the District of Columbia within the mean-
ing of Section 569 of the Code of Virginia. That Section, in my opinion,
only contemplates the recognition of certificates issued by some agency of
government created for the purpose of regulating the profession of account-
ing. That part of the statute which reads "provided the requirements for
such certificates in the State or territory or the District of Columbia which
granted it are," etc., indicates that the certificate must be granted by the State,
territory or District, itself, acting through one of its governmental agencies,
and not by a private association or corporation.

The National Association of Certified Public Accountants was not created
directly by statute for the purpose of regulating the profession of accounting
but simply was organized by the voluntary action of private individuals
under a general law for the creation of corporations. So, if it be assumed
that the corporation had the right under its charter to issue certificates of
certified public accountants, such certificates were issued simply under the
charter of a private corporation and not "under the laws of the District of
Columbia."

Moreover, it appears that on July 12, 1922, a little over a year after it
was created, the National Association of Certified Public Accountants was
perpetually enjoined from issuing such certificates by the Supreme Court of
the District of Columbia. This decision was affirmed by the Court of Appeals
of the District of Columbia on June 4, 1923. See National Association of Certified
Public Accountants, a Corporation, vs. United States of America, 292 Fed. 668.
This decision was based upon the fact that the statute under which the corporation
was created gave no authority to corporations formed thereunder to issue
such certificates. It was held, therefore, that the corporation had no such
power even though by its articles of incorporation it purported to assume
such. While this decision only enjoined the future issuance of such certifi-
cates (this being all that was asked by the United States as plaintiff), under
the reasoning of the Court, certificates previously issued were without legal
basis and would, therefore, be of no legal effect.

It has been suggested that the corporation was the legal predecessor
of the Board of Accountancy of the District of Columbia and that the de-
cision in that case may have been for the purpose of settling conflicting juris-
dictions. This was not the basis of the decision and, in fact, the decision
of the lower court in granting the injunction was handed down in 1922,
while the District Board of Accountancy was not created until 1923.

Moreover, you have stated that the District Board, when created, gave
no recognition to certificates previously issued by the corporation. The
statute creating the Board contained no provision for such recognition and
if none has been given, this is additional evidence that the corporation was
not considered as having any legal status as the public agency set up for
the District of Columbia for the regulation of the profession of account-
ing.

For the reasons stated, it is my opinion that the State Board of Ac-
countancy of Virginia has no authority to waive examination of applicants
for certificates on the basis of certificates issued by the National Association
of Certified Public Accountants.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE BOARD OF MEDICAL EXAMINERS—Issuance of New Certificate Where Licensee Has Changed His Name.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 26, 1944.

DR. J. W. PRESTON,
Secretary-Treasurer State Board of Medical Examiners,
Roanoke, Virginia.

MY DEAR DR. PRESTON:
This will acknowledge receipt of your letter of May 25, from which I quote as follows:

"One, Dr. David Dexter Abeloff, who graduated from the Medical College of Virginia December 18, 1943, whose credentials were filed in this name, and whose diploma was likewise issued in this name, on April 13, 1943, by court order, had his name changed to David Dexter. He now requests that a new certification of licensure be issued him under the name of David Dexter.

"In substantiation of the legality of the change of his name, he has filed with the Board of Medical Examiners a court certification to this effect. Likewise he has supplied us with a statement from the Dean of the Medical College of Virginia, advising that a diploma will be issued him under the name of David Dexter in case he returns the original diploma which was issued as above stated.

"Our problems are two: First, can we legally substitute one certificate for the other? Second, in the event substitution can be legally made, then whether or not it be proper to date the new certificate as of the date of the original, and if so, what is the proper procedure of explanation in our records?"

Under the circumstances stated by you I know of no reason why the original certificate issued to Dr. David Dexter Abeloff may not be recalled and a new one issued to the same person in the name of Dr. David Dexter. I further see no reason why the new certificate cannot bear the same date as the original certificate and, so far as your records are concerned, I would simply note thereon that in accordance with a decree of the court the name has been changed to Dr. David Dexter and the certificate issued in that name. After all, the effect of the change would be simply that the records are altered to conform to the actual facts.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF EDUCATION—Authority to Accept Federal Funds Deposited in Condemnation Proceeding.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JULY 6, 1943.

DR. DABNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR DR. LANCASTER:
I am advised that the United States of America has by proceedings instituted in the District Court of the United States for the Eastern District of Virginia condemned certain land owned by the Virginia State School for
Colored Deaf and Blind Children, at Newport News, and that the sum of $4,852.72 has been deposited as just compensation for the property so condemned. You desire the opinion of this office as to the proper agency authorized by State law to stipulate that the amount of the deposit is the equivalent of just compensation for the property taken and to receive check in payment for such property.

By section 979 of the Code of Virginia, the State School for Colored Deaf and Blind Children is continued, and by section 982 the former Board of Visitors of this school is abolished and "all the rights, powers, authority and duties heretofore conferred and imposed by law upon the said Board of Visitors are hereby transferred to, vested in, and imposed upon the State Board of Education, as created and established by law." It is my opinion, therefore, that the State Board of Education now in effect constitutes the Board of Visitors of the Virginia State School for Colored Deaf and Blind Children, and that it is the proper agency to stipulate concerning whether or not the amount deposited is just compensation for the property of the school which has been condemned and to receive the check in payment therefor.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF EDUCATION—Contracts With Publishers of Textbooks; Cost of Books.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 30, 1943.

Honorabie Colgate W. Darden, Jr.,
Governor of Virginia;
Richmond 12, Virginia.

My dear Governor Darden:
The legal question presented by the attached letter written to you by Mr. Frank P. Hough is an interpretation of section 618 of the Code relating to contracts of the State Board of Education with publishers of textbooks. The pertinent portion of the section provides that "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. * * * 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, * * * 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 * * *

As I understand Mr. Hough's letter, he contends that the quoted language means that irrespective of whether or not Virginia operates a central depository "publishers must sell books to Virginia at the same number of cents per copy as would be received by the publisher if books were sold through a depository, so it would be said that no state is buying books at lower prices or on better terms than Virginia."

I cannot agree with Mr. Hough's contention. In my opinion the section requires that the contract shall set forth the lowest state depository price at which books are sold under contract anywhere in the United States so that, if the State Board of Education should determine to adopt a central depository, as it is authorized to do under section 622 of the Code, it will then be able to avail itself of the central depository prices. In other words, the contract requires the setting forth of the central depository price so that the
State Board may thus be placed in possession of these facts and may have the option of availing itself of this price if it decides to establish a central depository in the light of such facts. However, the central depository price is not applicable unless a central depository system is established in Virginia.

Mr. Hough further quotes a question from a questionnaire submitted to textbook publishers by Honorable L. McCarthy Downs, Auditor of Public Accounts, in the course of an investigation of the matter of textbook prices made by Mr. Downs pursuant to Senate Resolution No. 7, adopted by the Senate at the 1940 Session. Mr. Downs' report was submitted to the General Assembly at its 1942 Session and is printed as Senate Document No. 9. The specific answer to this particular question quoted by Mr. Hough is contained on pages 19 and 20 of the Senate Document.

I am attaching for your information a copy of Mr. Downs' report from which it appears that North Carolina has adopted the depository system. In this report Mr. Downs discusses in some detail the advantages and disadvantages of the central depository system and although the last General Assembly had this report before it, it did not amend the statute which vested in the State Board of Education the discretion and authority of determining whether the depository system is better adapted to Virginia needs than the purchase system now in use pursuant to said statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF OPTOMETRY—Applicants Under Twenty-one Years of Age May Take Examination But Cannot Be Licensed.

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

DR. H. E. CROSS,
Secretary-Treasurer State Board of Examiners in Optometry,
202 Doniphan Building,
Alexandria, Virginia.

MY DEAR DR. CROSS:
I am in receipt of your letter of November 3, from which I quote as follows:

"The Virginia State Board of Examiners in Optometry would like your opinion on a question that has come up due to present conditions. As you know, all colleges are now giving an accelerated course, that is, a student gets four years of work in approximately three years. As a consequence, there are a limited number of students that are graduating before they are twenty-one. Our law states that a student must be twenty-one years of age or over before he can apply to this Board for examination. We now have several applications for examination from boys who will not be twenty-one until after the examination, one of them not until next June. Can we accept these applications and give these students the examination and hold their licenses, if successful, until they have reached the age of twenty-one?"

I quote below the statute to which you refer (section 1629 of the Code):

"Every person not having been duly registered under the act approved March eleventh, nineteen hundred and sixteen, regulating the practice of optometry, who desires to practice optometry in this State, upon
presentation of satisfactory evidence, verified by oath, that he is of more than twenty-one years of age, of good moral character, has a preliminary education equivalent to at least four years in a public high school and has graduated from a school of optometry, maintaining a standard satisfactory to the board of examiners in optometry, shall stand an examination before said board of examiners in optometry, which examination shall include, anatomy, physiology, pathology of the eye, and the use of the ophthalmoscope to determine his qualifications therefor. Every candidate successfully passing examination shall be registered by said board of examiners in optometry as possessing the qualifications required by law, and shall receive from said board of examiners in optometry a certificate to that effect."

The requirements of the section, you will observe, apply to the registration of the candidates successfully passing the examination and to the granting of a certificate to that effect, as well as those who shall be allowed to take the examination. Certainly the Board should not grant a certificate permitting a person to practice optometry until such person is twenty-one years of age. However, while the question is not free from doubt, in view of the unusual circumstances existing in the present emergency I am inclined to think that the Board would be justified, where the other requirements of the section are present in any case, in allowing a candidate to take the examination before he becomes twenty-one, but withholding the certificate, if the candidate passes the examination, until he does become twenty-one. I think that such action would certainly comply with the spirit of the section and would in no way injuriously affect the public.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., July 14, 1943.

Dr. W. T. SANGER,
President Medical College of Virginia,
Richmond 19, Virginia.

My dear Doctor Sanger:

This is in reply to your letter of June 28, in which you request my opinion upon the question whether it will be necessary for a separate corporation to be formed to administer an endowment fund contributed by the alumni of the Medical College of Virginia.

Section 1003 of the Code provides that the Medical College of Virginia, and the visitors thereof and their successors, shall be and remain a corporation under the name and style of "The Medical College of Virginia." Gifts, therefore, made to this corporation are as valid as if made to a new one which might be chartered.

I suggested that the Board of visitors consider adopting a resolution specifically providing for this endowment fund, for the purposes thereof, and the uses to which the funds can be devoted, and that such resolution provide
that all securities and moneys constituting the said fund shall be under the control, management, and direction of the board of visitors of the college. It seems that it will be wise to have this definite character impressed upon the fund, so that there will be no uncertainty as to the authority of the board of visitors to manage and invest same, and also no uncertainty as to the uses to which the interest of the fund may be devoted, or perhaps the principal also if it is desired to authorize its use for purposes other than investment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE COLLEGES AND UNIVERSITIES—When Radford College Students May Reside at V. P. I.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 12, 1944.

COLONEL JAMES P. WOODS,
Rector, Board of Visitors of the Virginia Polytechnic Institute
306 Boxley Building,
Roanoke 4, Virginia.

MY DEAR COLONEL WOODS:

I am in receipt of your letter of June 2, relative to certain questions which have arisen calling for an interpretation of chapter 240 of the Acts of 1944, consolidating the State Teachers' College at Radford with the Virginia Polytechnic Institute. You state that:

"The question on which I ask your opinion is in reference to approximately forty women student applicants who wish to take courses in biology, chemistry, physics, mathematics, etc., which are not given at Radford and for which no adequate equipment is provided there. These girls wish to be quartered in the women's dormitories at V. P. I., for which there is room. You will understand that these applicants are under twenty-one years of age and are not taking post graduate work."

You further advise that the young women, under twenty-one years of age and not taking post graduate work, who desire to be quartered in the women's dormitories at V. P. I. are embraced within the following categories:

"(a) Students who have completed successfully one or more years at another accredited institution and desire to transfer to V. P. I. for advanced work;

"(b) Students taking certain curricula and advanced courses in agriculture, engineering and science, except, of course, local Blacksburg students;

"(c) Students taking certain fundamental courses, such as biology, chemistry, physics, mathematics, etc., which under the Radford College curricula are not equivalent to the requirements at V. P. I."

You request my opinion specifically upon the question whether these women students may be permitted by the Board of the Institute to live on the campus at Blacksburg.

The portion of the Consolidation Act pertinent to your inquiry reads as follows:
Within four years from the effective date of this act, Radford College, Woman's Division of the Virginia Polytechnic Institute shall serve as the Woman's Campus and all women undergraduate students of the Virginia Polytechnic Institute shall be domiciled in living quarters on the Woman's Campus, except that this provision shall not apply to mature women students, twenty-one years of age and over, and to women students living at the homes of their parents or legal guardians and prefer to attend college as day students, and where the course of study pursued by an undergraduate woman under twenty-one years of age is such that to require her to reside on the campus of Radford College would, in the opinion of the Board of Visitors, result in undue hardship, the Board of Visitors by resolution may permit such student to reside on the campus of Virginia Polytechnic Institute; * * *. During the four year period above provided for * * * no new women undergraduate students shall be permitted to enter at Virginia Polytechnic Institute and to live on its campus at Blacksburg except in accordance with the provisions of this act.

The prohibition against these new undergraduate women students living on the V. P. I. Campus is subject to the exception that, where, due to the course of study pursued, in the opinion of the Board this prohibition would "result in undue hardship," the Board may by resolution permit such students to reside on said campus. It is my view that, if in the opinion of the Board, due to the course of study pursued, it would work an undue hardship on young women coming within any one of the categories outlined by you to require their domicile at Radford, the Board is possessed of authority in its discretion to allow them to live in the Women's dormitory at V. P. I. Of course, I know you will agree that the Board cannot abuse this discretion by taking purely arbitrary action. But if the Board after consideration determines that, due to the course of study pursued, "undue hardship" would result in the cases you refer to from denying domicile at V. P. I., in my opinion it would be a proper exercise of its discretion to allow such women students to live there.

You also inquire whether the Board has power to delegate its discretion with respect to the determination of hardship cases to the dean or some other administrative officer of the Institute.

While I do not think the Board possesses the authority to delegate its discretion in such matters, I am of opinion that, if the Board defines with sufficient preciseness the classifications of women students which it considers to be "undue hardship" cases, then it may impose upon the dean or some other administrative officer the ministerial duty of ascertaining whether any particular case comes within any of the classifications prescribed by the Board. The classifications would seem to be controlled largely by the courses of study pursued.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE COLLEGES AND UNIVERSITIES—Temporary Residents Not Entitled to Reduced Tuition.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 29, 1943.

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

My dear Governor Darden:

I am in receipt of your letter of October 28, with enclosures, from which it appears that the following classes of students have been allowed to pay tuition at Virginia Polytechnic Institute as Virginia residents:

1. Those whose parents are residents of the District of Columbia;
2. Those whose fathers are temporarily in Virginia (but not residents thereof) on active duty as officers of one of the branches of the armed services;
3. Those whose parents are residents of foreign countries, this class embracing one student of a Latin-American Republic and one European refugee student.

You desire my opinion concerning whether or not the students in the classes described above are entitled to the reduced tuition charges paid by students whose parents are residents of Virginia.

Section 1003-1(a) of the Code (Michie, 1942) provides as follows:

"No person shall be entitled to the admission privileges, or the reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia, in the State Universities, Colleges and other institutions of higher learning unless such person has been a bona fide citizen or resident of Virginia for a period of at least one year prior to admission to said institution, provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

It seems to me perfectly plain that neither the students embraced in the classes I have mentioned nor their parents are residents of Virginia within the meaning of the section I have quoted and that, therefore, these students are not entitled to the reduced tuition charges which are paid by Virginia students at the Virginia Polytechnic Institute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
"Was the Virginia Commission for the Blind created by the Acts of the General Assembly to provide rehabilitation and educational services to the blind?"

The Virginia Commission for the Blind was created by chapter 369 of the Acts of the General Assembly of 1922. One of the reasons for the creation of the Commission and for making an appropriation for its maintenance was, as appears from the preamble to the Act, the fact that "the State of Virginia now makes no provision for the vocational and educational training of its adult blind citizens." The Act prescribes in detail the duties of the Commission and among other things provides that "the Commission shall act as a bureau of information and industrial aid, the object of which shall be to assist the blind in finding employment, and to teach them industries which may be followed in their homes," and that "the Commission may establish, equip and maintain schools for industrial training and workshops for the employment of suitable blind persons ** **." From a consideration of the quoted provisions of the Act creating the Commission and other provisions of the Act there can be no question but that your inquiry must be answered in the affirmative.

You next ask:

"Does the Virginia Commission for the Blind maintain facilities for placing blind persons in industry or other gainful occupations?"

This inquiry presents more a question of fact than of law. However, from my conversation with you and from an examination of the annual report of the Virginia Commission for the Blind to the Governor for the year ending June 30, 1943, made pursuant to the requirement of the Act creating the Commission, it is entirely clear that your second question must also be answered in the affirmative. A copy of the annual report of the Commission is attached hereto.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Classification of for Purpose of Fixing Compensation.

COMMONWEALTH OF VIRGINIA,
Office of the ATTORNEY GENERAL,
RICHMOND, VA., September 14, 1943.

HONORABLE J. H. BRADFORD,
Director of Personnel,
Governor's Office,
Richmond 12, Virginia.

MY DEAR MR. BRADFORD:

This is in reply to your letter of August 20, which I quote in full as follows:

"In accordance with the provisions of Chapter 370 of the Acts of Assembly of 1942, the Governor has prepared a classification and compensation plan for all employees in the service of the Commonwealth of Virginia included in the provisions of the Personal Act, and has allocated each position to the appropriate classification title therein."
The compensation plan established by the Governor includes twelve grades, with a minimum and maximum rate of pay, and certain intermediate rates for each grade. In Grade 1 the minimum is $660 and the maximum is $750, and in Grade 2 the minimum is $780 and the maximum is $870. These are annual rates.

"Please advise me whether, in your opinion, a position heretofore allocated by the Governor to Grade 1 can be changed by the head or governing board of a department or institution to Grade 2, or from Grade 2 to Grade 3, without the Governor's approval.

"Please advise me, also, whether in your opinion the salary of an employee holding a position allocated to Grade 1 by the Governor can be increased to a rate above the maximum of $750 provided by the Governor for Grade 1 without the Governor's approval; and whether the salary of an employee holding a position allocated by the Governor to Grade 2 can be increased above the maximum of $870 established by the Governor for this grade, without the Governor's approval."

The answer to the foregoing inquiry depends upon the interpretation of the last paragraph of section 2 of the Act you refer to (Chapter 370, Acts 1942), which is as follows:

"No establishment of a position or a rate of pay, and no change in rate of pay shall become effective except on order of the appointing authority and approval by the Governor; provided, however, that this paragraph shall not apply to any position the compensation of which is at a rate of twelve hundred dollars per annum or less."

The precise question which arises is whether the "appointing authority" (usually the Department Head), in making appointments to positions or changing the rates of pay of employees, where the pay of the employee appointed or the employee's changed rate of pay is $1,200 or less, may, without the approval of the Governor, establish a position, fix a rate of pay therefor, or change said rate of pay to a figure which is at variance with the compensation and classification plan established by the Governor, and to which you refer. It is my opinion that the "appointing authority" is clearly authorized by the Act so to do. As to positions paying $1,200 or less, it is the obvious intention of the Act to give the appointing authority full discretion to conform the positions and salaries of his employees to said compensation plan if he so desires, or to establish different positions resulting in a different plan with different classifications if he deems such action best adapted to the needs of his agency or department. The Act seems clearly designed to relieve the Governor from all responsibility for the classification of positions and the rates of pay attached thereto, or for changes in rates of pay where the amount of compensation to be received by an employee is $1,200 or less.

In connection with the foregoing, I call your attention to the provisions of section 4 of the Appropriation Act of 1942 which requires the approval by the Governor of the fixing of the salary of any new employee in excess of an annual rate of $1,020, or any increase in salary which would exceed said rate. The Governor may, of course, announce and enforce a policy that he will not approve any salary in excess of said rate which does not conform to the classification and compensation plan, which would have the practical effect of extending the operation of the classification plan so as to include all cases where the compensation is in excess of said annual rate of $1,020.

This section of the Appropriation Act also, in my opinion, would authorize the Governor in any specific case to enter a special order bringing any particular employee within its provisions, regardless of the rate of compensation. I do not believe, however, that the Governor is empowered to enter a general order which would affect more than one employee. The language of the Act contemplates that the Governor shall consider that there is some special reason why a particular employee should be withdrawn from the
general rule established by the Act. Any such power to extend generally the provisions of said section would be, in effect, a delegation of power to amend the Act, which would be, in my opinion, an unconstitutional delegation of legislative power.

I also call attention to a provision contained in said Appropriation Act, p. 881, to the effect that salaries of employees of the Alcoholic Beverage Control board shall be fixed "as provided by the Alcoholic Beverage Control Act." Section 4(i) of said Act referred to empowers said Board to fix all salaries not in excess of $1,000 without the approval of the Governor, but the Governor's approval is required when the salary exceeds that amount. It is my opinion therefore that none of the provisions of section 4 of the Appropriation Act have any application to employees of said Board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Military Leaves of Absence; Re-employment.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., June 12, 1944.

MAJOR J. R. NUNN,
Acting Superintendent Department of State Police,
Richmond, Virginia.

MY DEAR MAJOR NUNN:

I am in receipt of your letter of June 9, from which I quote as follows:

"On December 7, 1942, M. H. Kent, then a member of this department, was granted a military leave of absence in accordance with the provisions of chapter 363, Acts of 1918. Mr. Kent was sworn into the Army of the United States and assigned to the Air Corps. Recently he has been placed on a reserve status by the Army and is not now engaged in any work.

"Mr. Kent has requested that he be allowed to resume his duties with this department pending an assignment to active duty by the Army or his final discharge."

You have further advised me that Mr. Kent, while on a reserve status, is not receiving any compensation from the Army. While Mr. Kent was an active member of the armed forces he was on military leave, and you desire to know whether or not he may now be restored to his position or re-employed by your department.

Insofar as State law is concerned, I know of no reason why he may not now be restored to his former position or reemployed by your department. If it should happen that he is again placed on active duty with the Army, he may then again be granted a military leave of absence. I would suggest that Mr. Kent inquire of the proper Army authorities whether there is any military law or regulation which would prevent his again becoming a member of the State Police.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE HIGHWAY COMMISSIONER—Power of Eminent Domain Does Not Extend to Land Owned by County School Board.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., August 17, 1943.

Mr. A. H. Pettigrew,
Right of Way Engineer,
Department of Highways,
Richmond, Virginia.

My dear Mr. Pettigrew:

This is in reply to your request for my opinion as to whether or not the State Highway Commissioner possesses the power to condemn land which is owned by a County School Board.

By Chapter 380 of the Acts of Assembly of Virginia of 1940 (Section 1969j(1) of the Code of Virginia (Michie's 1942), the State Highway Commission was vested with the power of eminent domain "insofar as may be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State" and for such purposes was authorized to "condemn property in fee simple and rights of way of such width and on such routes and grades and locations as by said commission may be deemed requisite and suitable." While this language conferring the power of eminent domain is broad enough to cover any lands that might be needed for the specified purposes, the language is general and does not specifically authorize the condemnation of land owned by the State or any of its agencies.

It is generally held that a statute conferring the power of eminent domain in general terms, no matter how broad, does not authorize the condemnation of public lands owned by the State or its agencies. Authority to condemn such lands must be conferred specifically or by necessary implication. See 18 Am. Jur., Eminent Domain, Section 83; 29 C. J. S. Eminent Domain, Section 86; State v. Boone County, 78 Neb. 271, 110 U. W. 629; City of Edwardsville v. Madison County, 251 Ill. 265, 96 N. E. 238.

In some cases, general statutory authority has been held sufficient to authorize the taking of public lands if by such taking the previous public use would not be destroyed, and in one case, State Highway Commission v. City of Elizabeth, 140 Atl. (N. J.) 335, it was held that general authority given to the State Highway Commission of New Jersey permitted the condemnation of lands owned by a municipal corporation. Such cases, however, appear to be in the minority.

There have been no Virginia cases which have passed upon the power of the State Highway Commissioner of Virginia to condemn land belonging to other State agencies or to political subdivisions of the State. For this reason, it is impossible to give a conclusive answer to your question. It is my opinion, however, that it is extremely doubtful whether the general authority vested in the Commissioner would be held sufficient to authorize the condemnation of land belonging to a County School Board. Such property does not belong to the county but is owned separately by the School Board which is as much an agency of the State as of the county. As was pointed out in City of Edwardsville v. Madison County, supra, it would indeed be strange if land held by one State agency possessing the power of eminent domain could be taken by a second agency also possessing such power. For, if such a result was permitted, a third agency could take the land from the second and then the first could retake the property from the third, leaving each in its original position.

Very sincerely yours,

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

TAXATION—On Coin Operated Washing Machines.

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

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

MY DEAR MR. BRYAN:

I am in receipt of your letter of October 28, enclosing a communication addressed to you by Mr. Glenn Ulmar Richard, Counsel for Mr. Eugene R. Farny, trading as the Telecoin Company, with reference to the liability of certain coin operated washing machines to the State license tax imposed by section 198 of the Tax Code. Mr. Richard makes the following statement in reference to these machines:

"The arrangement between Mr. Farny's company and the Metropolitan Life Insurance Company is, in general, as follows: The Metropolitan Life Insurance Company furnishes space for the machines in the development, and furnishes the electricity, water, etc., for the operation of the machines. The Telecoin Company installs the machines, retains ownership to them, services the machines, and collects the money placed in the machines. A percentage of the money collected is paid to the Metropolitan Life Insurance Company, in return for the space and utilities furnished by them.

"The tenants of the Parkfairfax development may rent the use of the machines for a given period of time by inserting a coin in a slot device attached to the machine. The proposed rate is ten cents for one-half hour or twenty-five cents for one and one-half hours. It is estimated that the gross receipts annually on each machine will be approximately two hundred dollars for the remainder of the war period, with some decrease after the war."

Section 198 of the Tax Code reads in part as follows:

"Any person, firm or corporation having anywhere in this State a slot machine of any description into which are inserted nickels or coins of larger denominations to dispose of articles of merchandise, for the purpose of operating devices that operate on the coin-in-the-slot principle, used for gain, except as a pay telephone, shall pay for each slot machine or device, as the case may be, a State license tax of twenty-five dollars per year; ** *

The quoted language is quite broad and includes within its scope, with certain exceptions not pertinent here, all slot machines into which are inserted nickels or coins of larger denominations for the purpose of operating devices that operate on the coin-in-the-slot principle used for gain. I can see no escape from the conclusion that the machines described by Mr. Richard are slot machines within the meaning of the quoted language. They are certainly operated on the coin-in-the-slot principle, into which are inserted nickels or coins of larger denominations, and they are used for gain. After all, though I have never heard of this particular type of machine, there is nothing unusual about the principle upon which it operates. The facilities of the machine are made available by the insertion of a coin in the slot, just as is the case with many other slot machines such as coin-operated pool tables, package checking machines and many varieties of amusements.

Mr. Richard advances as an argument for the exemption of these machines and the license tax imposed by the section the principle that where real
doubt exists statutes imposing taxes will be construed liberally in favor of the taxpayer and against the government. But when the broad language which I have quoted is considered I do not see how it can be successfully maintained that any real doubt exists as to the liability of the machines to the tax. It may be that, if the attention of the General Assembly were specifically directed to this type of machine, that body might consider reducing the amount of the tax.

I think that very real doubt exists as to the liability of Mr. Richard's client to the license tax of $1,000 as a "slot machine operator" imposed by the fifth paragraph of section 198, and I think this doubt should be resolved in his favor. I am, therefore, of opinion that the $1,000 license is not applicable.

I am further of the opinion that there is no liability under section 190 of the Tax Code, inasmuch as that section imposes a license tax only on machines vending goods, wares and merchandise.

Very sincerely yours,

W. W. MARTIN,
Assistant Attorney General.

TAXATION—Collection of Delinquent Real Estate Taxes; By Whom; When.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 11, 1944.

HONORABLE L. McCARTHY DOWNS,
Auditor of Public Accounts,
Richmond 10, Virginia.

MY DEAR MR. DOWNS:

This will acknowledge receipt of your letter of April 18, in which you ask the following question:

"The question has been raised as to the right of a board of supervisors to employ a tax collector for the purpose of collecting taxes which have been recorded as a lien against real estate in the county clerk's office. We should appreciate it very much if you would advise us whether, in your opinion, anyone may be appointed by a board of supervisors to collect such taxes other than attorneys, who are provided for by section 2503 of the Code of Virginia and section 403 of the Tax Code."

From my examination of the statutes the only authority given to boards of supervisors to appoint collectors of delinquent taxes on real estate is to be found in sections 251 and 403 of the Tax Code and section 2503 of the Code. All of these sections contemplate that such persons so appointed shall be attorneys.

Your next question is:

"We should appreciate it if you would also advise us whether a board of supervisors may appoint anyone to collect real estate taxes while these taxes, under law, are being collected by a county treasurer. The time referred to during which real estate taxes are being collected by a treasurer is intended by us to include the moment real estate taxes first come into the treasurer's possession for collection until after he has been relieved of the further collection of these taxes by holding the necessary land sale and reporting such unpaid taxes to the county clerk as required by law."
Section 403 does not prescribe in terms the precise date upon which the collection of local taxes, including real estate taxes, may commence to be enforced through an attorney appointed for the purpose. However, the first official notice that a board of supervisors has concerning what taxes on real estate are delinquent is when the treasurer submits to the board the lists of delinquent taxes pursuant to the provisions of sections 387, 388 and 389 of the Tax Code. Such lists are submitted not later than the first day of August of the year immediately following the year in which the taxes were assessed. While the question is not free from doubt, I am of opinion that the better view is that the board of supervisors may not direct the institution of proceedings to collect real estate taxes under section 403 of the Tax Code until the list of delinquents is first reported to the board as outlined above.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Conditions Precedent to Garnishment for Collection of Delinquent Tax.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 19, 1943.

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

MY DEAR MR. WEEMS:

This is in reply to your letter of October 18, in which you ask the following question:

"I would appreciate your advising me whether or not under section 382 of the Tax Code it is necessary for a treasurer to go on the premises of a tax delinquent and search for personal property or to do anything else in order to find personal property before serving the notice and following the procedure outlined in section 382 of the Tax Code."

Section 382 of the Tax Code provides that "when the officer cannot find sufficient goods or chattels to distrain for taxes or levies * * *" he may then proceed by way of garnishment to collect such taxes. In view of the quoted language it is my opinion that before proceeding by way of garnishment to collect delinquent taxes the treasurer should make a reasonable effort to find tangible personal property of the taxpayer to distrain for taxes due. I do not think it would be practicable for this office to attempt to lay down any rule as to what would constitute a reasonable effort, for this would obviously depend on the facts in each particular case.

Very sincerely yours,

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

TAXATION—Refund of Gas Tax; Application Must Be Received Before Time Expires.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 28, 1943.

Honorable E. Blackburn Moore,
Member House of Delegates,
Berryville, Virginia.

My dear Mr. Moore:

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

"The law provides that a gas tax refund may be obtained when the gas is used for certain purposes.

"As I understand it, the law says 'Application for refunds as provided herein must be filed with the said director within sixty (60) days from the date of sale or invoice.'

"I would like a ruling from you on the question of what constitutes 'filing with the director.' Does that mean the application for refund must reach the director's office within the sixty day period or would the post mark on a mailed application for refund provided it is within the sixty day limit comply with the law?"

I am informed by the Director of the Division of Motor Vehicles that, under section 2154(215) of the Code (Michie, 1942) relating to refunds of gasoline taxes, it has been the consistent administrative practice for years to require such applications to be actually filed with the Director, or, if mailed, to be actually received by the Director, within sixty days of the date of the sale or invoice. Since the section uses the word "filed," I am of the opinion that the Director's construction is correct. If there had been any doubt about this construction in the beginning, I feel sure that the long continued and well-recognized administrative practice has removed such doubt.

Very sincerely yours,

Abram P. Staples,
Attorney General.


COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 24, 1943.

Buford Scott, Esq.,
Mutual Building,
Richmond, Virginia.

My dear Mr. Scott:

I am informed of your interest in securing a carillonneur for the carillon located in Richmond and that, since there are no funds now available for employing a carillonneur, you propose to solicit private subscriptions for the purpose of securing the necessary funds. The opinion of this office is desired on the question of whether or not the subscribers may deduct such contributions as they may make in filing their Federal income tax return.
The carillon was erected in Richmond as a memorial to the patriotism and valor of the soldiers, sailors and marines and the women of Virginia who served in the First World War. Funds for its erection were provided principally by an appropriation made by the General Assembly of Virginia, this appropriation being supplemented by private subscription. The carillon was erected on land furnished by the City of Richmond. The structure, including the land on which it is located, is owned by the Commonwealth of Virginia, and the custody, control and supervision "of the Virginia War Memorial Carillon" is by chapter 256 of the Acts of Assembly of 1936 transferred to the State Commission on Conservation and Development, now the Virginia Conservation Commission. The Virginia Conservation Commission was created by chapter 169 of the Acts of Assembly of 1926 "as an agency of the Commonwealth of Virginia" and its powers and duties are prescribed by statute. Section 23 of 26 U. S. Code Annotated provides in part that in computing net income there shall be allowed as a deduction in the case of individuals "contributions of gifts made within the taxable year to or for the use of * * * any State * * * for exclusively public purposes." As I have already stated, the carillon is owned by the Commonwealth of Virginia and is under the custody, control and supervision of the Virginia Conservation Commission, an agency of the Commonwealth of Virginia. There can be no question but that the carillon was constructed and is operated for exclusively public purposes.

While I realize that the construction placed by this office upon a Federal statute is not binding upon any Federal authority, in my opinion contributions made by individuals to the Virginia Conservation Commission to be used exclusively for the operation of the carillon may be deducted by such individuals in filing their Federal income tax returns to the extent prescribed by section 23 of 26 U. S. Code Annotated. I may add that I have conferred with the authorities in the Income Tax Division of the U. S. Collector of Internal Revenue, at Richmond, and they are in accord with the opinion I am expressing herein. As I have indicated, such contributions, to be deductible, should be made to the Virginia Conservation Commission for the operation of the carillon in Richmond.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
that I did not have a complete understanding of the situation when the letter of November 4 was written to you and that I cannot now adhere to the conclusion expressed in that communication, and, therefore, I shall now summarize my views and conclusions.

The Federal Land Bank of Baltimore

This corporation is by section 931 of 12 U. S. C. A. made "* * * exempt from * * * State * * * taxation, except taxes upon real estate * * *." The Supreme Court of the United States has on several occasions in striking down State taxes sought to be imposed on Federal land banks held that they are "instrumentalities of the Federal Government, engaged in the performance of an important governmental function," and that "Congress has authority to prescribe tax immunity" from State taxation, the most recent case being Federal Land Bank v. Bismarck Lumber Company (1941), 314 U. S. 95, 62 S. Ct. 1. There are a considerable number of cases to the same effect in both State and Federal courts, including Federal Land Bank v. Hubard, 163 Va. 860, 178 S. E. 16, many of which are cited in the annotation to section 931 of 12 U. S. C. A. It follows, in my opinion, from the terms of the statutory exemption and the decision of the Supreme Court sustaining the power of Congress to grant the exemption, that Virginia may not impose a State excise tax on the purchase of gasoline by The Federal Land Bank of Baltimore for use in automobiles owned by it and engaged in official business of the bank; nor may Virginia impose a license tax on such automobiles.

Furthermore, I may say that the Virginia statute taxing motor vehicle fuel expressly provides that "motor vehicle fuel used by the United States or any of the governmental agencies thereof shall not be subject to tax hereunder." Chapter 312 of the Acts of Assembly of 1938.

Production Credit Corporation of Baltimore

This corporation is by section 1138c of 12 U. S. C. A. declared to be an instrumentality of the United States and made "* * * exempt from all taxation now or hereafter imposed by * * * any State * * *" except taxes on real estate and tangible personal property. While the Supreme Court of the United States has not directly passed upon the status of these corporations or upon their immunity from State taxation, I can see no escape from the conclusion that the principles announced in the Federal Land Bank cases I have referred to are equally applicable to production credit corporations, the statute under which they are organized declaring that they "shall be deemed to be instrumentalities of the United States." This seems to have been the view of the California appellate court in declaring a production credit corporation exempt from the California sales tax in M. G. West Co. v. Johnson (Cal. App., 1937), 66 P. 2d 1211; certiorari denied and appeal dismissed, 302 U. S. 638, 58 S. Ct. 45; rehearing denied, 303 U. S. 666, 58 S. Ct. 525. Indeed, the case for the production credit corporations would seem to be stronger since my information is they are wholly owned by the United States, while the land banks are only partially so owned.

I reach the same conclusions, therefore, with respect to the Production Credit Corporation of Baltimore as I do in the case of The Federal Land Bank of Baltimore. You are aware, of course, that the exemption given a production credit corporation terminates "after the stock held in it by the United States has been retired." 12 U. S. C. A., Sec. 1138c.

I have confined this letter to The Federal Land Bank of Baltimore and the Production Credit Corporation of Baltimore, not because these corporations necessarily occupy a status different from that of the other organizations making up the Farm Credit Administration of Baltimore (a question on which I do not pass), but because your inquiry seems to be primarily concerned with these two corporations.
REPORT OF THE ATTORNEY GENERAL

The practical method of arranging for the tax immunity of the two corporations involved will, I presume, be worked out between them and the Director of the Virginia Division of Motor Vehicles.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Federal Government Immune From Recordation Taxes; State Agencies Exempt From Writ Tax in Chancery Suit.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., December 9, 1943.

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

MY DEAR MR. STONER:

This will acknowledge receipt of your letter of December 7, in which you inquire if the State recordation tax should be imposed upon the recordation of a contract between the United States of America and the Alleghany Ore & Iron Company, of Buena Vista.

As the party acquiring the mineral rights under the contract, the United States of America is, of course, primarily interested in having the contract recorded, and the tax, if any imposed, would normally be paid by the United States. I have on a number of occasions expressed the opinion that Virginia may not impose a tax upon the United States, and for this reason I do not think that the State recordation tax should be imposed upon the recordation of the instrument in question.

You also inquire if a municipality of this State is subject to a writ tax when it institutes a chancery suit in a State court. The State writ tax is imposed by section 126 of the Tax Code of Virginia. In my opinion, a State statute imposing a tax should not be construed to impose the tax on a political subdivision of the State, unless it is expressly so provided in the statute. Section 126 of the Tax Code does not in terms include political subdivisions within its scope, and I am therefore of opinion that where a political subdivision of this State institutes a suit in any court of record in this State the writ tax should not be assessed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Federal Tax on Oleomargarine Served for School Lunches.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 3, 1943.

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
State Office Building,
Richmond 16, Virginia.

MY DEAR DOCTOR NEWMAN:

This is in reply to your letter of October 28, in which you make the following statement with respect to the operation of the school lunch programs in the public schools of Virginia:
"The School Board authorizes the principal or some other teacher in the school to administer and conduct the school lunch program, and he, in carrying out such activities, either employs persons, or solicits the voluntary services of individuals or groups such as parent-teachers' associations. He is charged with the responsibility of supervising the entire transaction, seeing that proper accounts are kept and all necessary reports submitted to the School Boards."

You refer to my letter to you of October 8 concerning the exemption of schools and educational institutions from the Federal oleomargarine taxes where meals are served as a part of the operation of the schools or other institutions. You then request my opinion upon the question whether or not a school lunch program operated in the manner stated by you as above quoted would be operated by the school board within the meaning of the Virginia laws relating to the operation of schools.

Since the entire school lunch program is operated under and pursuant to the orders of the school board, and by the principal or some other teacher in the school as the designated agent of the board to supervise the operation, in my opinion such an operation as is outlined by you will be legally carried on by the school board as an integral part of the operation of the school itself.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Federal Tax on Oleomargarine Served for School Lunches.

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

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
State Board of Education,
Richmond 16, Virginia.

MY DEAR DR. NEWMAN:

This is in reply to your letter of October 5, upon the question whether or not the serving of oleomargarine for school lunches to pupils attending the public schools is subject to the Federal oleomargarine taxes.

In my opinion it depends upon whether or not this particular activity is so integrated into the operation of the school as to actually constitute a part of same. If the operation is financed by the school board and operated by it through its agents and employees, and the entire proceeds go to the school board and are used to help defray the expense of operating the school, in my opinion, the oleomargarine so served would not be subject to the Federal tax.

You refer to a case where the activity is under the supervision of the school authorities but operated by the Parent-Teachers' Association. Whether an activity of this kind would be subject to the tax is much more doubtful. If the funds go to the Parent-Teachers' Association as funds of that association, I believe the tax would be applied. However, if the school board itself conducts the operation and utilizes the services of the Parent-Teachers' Association solely as an agency of the school board and, if all of the funds are expended on the order of the school board, in my opinion the tax would not be applicable.
REPORT OF THE ATTORNEY GENERAL

You also inquire whether the tax would be applicable to oleomargarine served in connection with lunches where the activity is conducted by persons to whom the school board has granted a concession or privilege to carry on the activity. In this last connection I think the tax would clearly be applicable. Of course, the persons to whom it is contemplated making the concessions might also act as agents of the school board just as the Parent-Teachers' Association might, as suggested above.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Road Tax on Public Conveyances Not Applicable to Carriers Operating on Federal Owned Roads.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 19, 1943.

HONORABLE THOS. W. OZLIN,
State Corporation Commission,
Richmond 19, Virginia.

My dear Judge Ozlin:

I am in receipt of your letter of October 5, relative to the authority of the State to collect "the 2 per cent gross receipts tax on carriers of passengers and property by motor vehicles when operating on Federal reservations, such as the various camps located in this State."

As you state, this gross receipts tax has always been considered as a tax for the use of the public highways of the State; in fact, this is expressly stated in the Act levying the tax, and furthermore the proceeds of the tax, with minor exceptions, are to be expended exclusively for the construction, reconstruction and maintenance of our highways and the regulation of the traffic thereon. See section 4097-y(21) of Michie's Code of 1942. The tax, therefore, being one imposed for the use of the roads, it would seem to follow that in construing our own statute the motor vehicle carrier is not liable for the tax to the extent that the roads of the State are not used.

It is my opinion, therefore, that the liability of a carrier to the tax covering that part of his operations on Federal reservations would depend on whether or not the roads over which such carrier travels on such Federal reservations are owned by the State or by the United States. Our tax being a use tax, as heretofore stated, it would seem obvious that Virginia cannot impose a tax for the use of Federal roads. On the other hand, under the authority of our own statute and of 4 U. S. C. A., section 13, where the roads on a Federal reservation over which a carrier operates are owned by the State, I am of opinion that the tax applies.

Very sincerely yours,

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

TAXATION—Abatement of Penalties in Cases of Soldiers and Sailors.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., January 13, 1944.

HONORABLE H. E. GRIFFIN,
Treasurer of Buckingham County,
Buckingham, Virginia.

MY DEAR MR. GRIFFIN:

This will acknowledge receipt of your letter of January 3, from which I quote as follows:

"I am today in receipt of 1942 tax less penalty which taxpayer writes me he is exempt from paying under the Soldiers' and Sailors' Civil Relief Act of 1940. As this is the first time I have had this to come up and I am not certain that the above mentioned Act applies to county tax, I would appreciate your giving me your advice on the matter."

Section 500, subsection 4, of the Soldiers' and Sailors' Civil Relief Act reads as follows:

"Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

The taxes and assessments referred to are defined by subsection (1) of this section as follows:

"The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid."

It is my opinion that the quoted language means that no penalty imposed by State or local law other than six per cent interest may be collected from persons in the armed services for failure to pay taxes when due on the subjects named, which include taxes on real estate.

I enclose for your information a copy of the Soldiers’ and Sailors’ Civil Relief Act, including amendments adopted in 1942.

I call your attention to chapter 199 of the Acts of Assembly of 1942, which, among other things, authorizes boards of supervisors of counties to abate penalties and interest which otherwise would be imposed for failure to pay real estate and personal property taxes when due.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TAXATION—Last Day for Payment Falling on Sunday.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., November 26, 1943.

Honorable R. Frazier Smith,
Treasurer of Alleghany County,
Covington, Virginia.

My dear Mr. Smith:
I am in receipt of your letter of November 24, in which you ask:

"Will it be legal to collect the 1943 taxes on December 6, 1943, without penalty since the 5th of December falls on Sunday?"

It has been the settled practice in Virginia for many years, I am advised, to accept the payment of State taxes without penalty on December 6 when December 5 falls on Sunday, and on a number of occasions this office has recognized and acquiesced in such practice as valid.

Very sincerely yours,

Abram P. Staples,
Attorney General.

TOLL BRIDGES—Students and Pupils Exempt From Payment of Tolls.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., October 2, 1943.

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

My dear Mr. Powell:

This is in reply to your letter of September 29, which I quote in full as follows:

"Please give me your interpretation of Section 694 of the Code of Virginia relative to students in any school traveling over toll roads, highways or bridges in this State.

"The specific question in mind is this: Is a school teacher who goes to William and Mary for classes each Saturday by way of the James River Bridge exempt from the payment of the bridge toll? I will appreciate an immediate reply."

Section 694 of the Code, to which you refer, makes it unlawful for any corporation, public or private, or any person to collect toll for the use of any of the roads, highways, or bridges in this State by any motor vehicle, or other vehicle, when the same is carrying any pupil or student to or from immediate attendance upon any school, college, or other educational institution in this State.

Your question as to whether or not a local school teacher, who goes to William and Mary College to attend classes each Saturday by way of the James River toll bridge, comes within the provisions of said Code section would seem to depend upon whether or not such person is a student regularly attending such college within the meaning of said section.
In my opinion, the fact that a student at a college may also teach school would not in any way affect or prejudice his status as such a student. Whether or not such person is a regular student at the college would seem to be a question in the first instance for the principal of the college to determine, as said statute provides that a student may apply for and receive from such principal a card certifying that he is a student regularly attending such college, and that such card, when exhibited to the person in charge of the toll bridge, shall be accepted in lieu of all charges for the passage over such bridge of any horse-drawn or motor-driven vehicle carrying such student to or from immediate attendance upon such college.

It would seem, therefore, that, if the principal of William and Mary College issues to the school teacher to whom you refer a certificate that he is a regular student at such college, this would constitute a prima facie correct determination of such fact. Of course, the toll gatekeeper could test in court the correctness of the conclusion drawn by the principal of the college as to whether or not such person is in fact a regular student within the meaning of the statute. In the absence of such a legal determination of incorrectness, however, it would seem to me to be the duty of the toll collector to recognize the correctness and validity of the certificate.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TORTS—Liability of Member of Volunteer Hospital Corps.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 3, 1944.

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

My dear Dr. Sanger:

This is in reply to your letter of April 25, 1944, in which you ask my opinion on the following question:

“What is the responsibility of a member of the Men's Volunteer Hospital Corps to a patient injured while such member is in attendance; such members being purely volunteers, receiving no salary, and having no official connection with the Medical College of Virginia?”

The liability for negligence and for failure to exercise ordinary care is in no way reduced because a person is a volunteer. A voluntary nurse or orderly is required to exercise ordinary care in and performance of the particular task. If the particular task requires skillful knowledge, the volunteer who undertakes such task assumes the risk of performing the act in the manner which a person skilled in such task would ordinarily perform it. If the particular task does not require skillful knowledge, the volunteer would be liable to use that care which the average reasonable person would use under similar circumstances.

Very sincerely yours,

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

TORTS—Immunity of State From Liability for Torts Cannot Be Waived by State Official.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., May 26, 1944.

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

My dear Mr. French:

This has reference to our conversation this morning relative to Japanese beetle inspection as authorized by State quarantine laws. It is desirable, you state, for this inspection in some cases to be conducted from a booth erected on the property of a railroad company. One railroad company has consented to the erection of such a booth on its property under the following condition:

"With the understanding that * * * the Railroad company will be absolved from any and all costs resulting from accidents, etc. * * * ."

You ask if you may make such an agreement on behalf of the State of Virginia. While it is not entirely clear what meaning the company gives to the word "absolved," I must advise you that you have no authority to assume on behalf of the State any liability for injury to persons or property resulting from negligence. It is well settled in Virginia that the State may not be sued without its consent and Virginia has not consented to be sued in tort. The State not being liable in tort, its employees may not assume any such liability in its behalf.

It is equally clear, in my opinion, that you have no authority to release the railroad company from any liability which it may have for injury to others occasioned by the negligence of its employees.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARK, BRANDS, ETC.—Registration of: "Dixie"; "Dixie Canner Co."

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., March 8, 1944.

HONORABLE R. E. WILKINS,
Secretary of the Commonwealth,
Richmond 12, Virginia.

My dear Mr. Wilkins:

This is in reply to your communication of March 6, 1944, in which you enclosed two applications of the Continental Can Company, Inc., New York, N. Y., which seeks to register under the Virginia Trade-Mark statutes certain marks used by the applicant.

The first of these marks is the word "Dixie" used by the applicant on a metal container manufactured by it adapted to pressure cooking. In my opinion this mark may be properly registered under the Virginia statute.
The second of these marks is the combination of words "Dixie Canner Co." in plain block type with no peculiar design, and used by the applicant on the same type of product. In my opinion this mark may not be registered.

Section 1458a of (Michie's) Code of Virginia 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 * * *.

Section 1455 defines "person" as follows:

"'Person' shall mean and include an individual, firm, association, corporation or union of workingmen."

These sections are merely declaratory of the general law of trade-marks, and it is well settled that such phrases as "Dixie Canner Co." are trade names and not trade-marks, i.e., they relate chiefly to the individuality of the manufacturer and not to the article itself. I notice the applicant argues that the applicant is not the "Dixie Canner Co.," and it may be that there is no such company in existence, but the phrase certainly would lead the public to believe that there was such a company, and that it was the manufacturer of the articles. But even if there be no such company, it is well settled that a corporation may distribute its products under a fictitious trade name, and thus build up a good will thereunder which will be protected by the courts—however, the protection comes in the form of protecting the trade name, and the applicant cannot avoid the nature of this protection and seek it in the form of registering it as a trade-mark, unless the phrase is otherwise adapted to registration, which, in my opinion, the present one is not.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS, BRANDS, ETC.—Registration of: "Three Sisters."

COMMONWEALTH OF VIRGINIA.
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., March 8, 1944.

HONORABLE R. E. WILKINS,
Secretary of the Commonwealth,
RICHMOND 12, RICHMOND.

MY DEAR MR. WILKINS:

This is in reply to your communication of March 6, 1944, in which you enclosed three applications of the Miller-Wohl Company, Inc., New York, N. Y., which seeks to register under the Virginia Trade-Marks statutes certain marks used by the applicant as follows:

1. The term "Three Sisters" in combination with a design of three sisters' heads;
2. The term "Three Sisters";
3. The design of three sisters' heads.

The applicant has filed under oath three statements certifying that each of these designs or marks, respectively, are used by the applicant in marking
clothing apparel manufactured by it. Each of the three marks and designs, and the combination thereof, are proper subjects for registration, and unless there is some reason to believe that any one or more of them has not been in use, it is my opinion that three separate registrations are proper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRADE-MARKS, BRANDS, ETC.—Identification Brand for Animals Not Within Virginia Registration Statute.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
RICHMOND, VA., August 17, 1943.

MRS. THELMA G. GORDON,
Acting Secretary of the Commonwealth,
Richmond, Virginia.

MY DEAR MRS. GORDON:

Your letter of the sixteenth instant, enclosing letter dated the fourteenth, addressed to the Secretary of the Commonwealth from Mr. E. Almer Ames, Jr., is received.

Mr. Ames writes that he has a client who owns a number of Chincoteague wild ponies and raises the ponies for sale; that “each year the ponies are branded so as to distinguish them from ponies owned by other people. The brand is put on the young ponies with a hot branding iron. This particular individual has his own brand and desires to have it registered so no one else can use his brand.”

In your letter you ask if the brands used on these ponies can be properly registered under the provisions of the trade mark-law of Virginia.

Section 1454(2) provides:

“In order to promote, protect, further and develop the agricultural interests of this State, the director, with the approval of the commissioner, is hereby authorized and empowered, after investigation, to establish and promulgate grades, trade-marks, brands, and/or other markings which when used on or in connection with agricultural products will indicate grade, classification, quality, condition, size, variety, quantity, and/or other characteristics of such products and/or marks identifying the party responsible for the grading and marking of such products, and/or any or all of them; and to prescribe and promulgate rules and regulations governing the voluntary use of such grades, trade-marks, brands and other markings for such agricultural products produced and/or packed and/or marked in this State.”

The brand proposed to be registered by Mr. Ames’ client is solely for the purpose of identification. It has no reference whatever to a standard of quality, etc., as set out in the above section. There is no difference in the quality of the ponies in the Chincoteague herd noted by any brand that is used and certainly the Commissioner of Agriculture has not established any grade or classification as to which a pony brand would be registered.

The branding of animals for the purpose of identification is an entirely different matter from that which is treated under the section quoted and Virginia has no statute on this subject. In the statutes which have been adopted by some of the States, which permit the registry of brands for the purpose of identifying livestock, there is usually a provision as to how the proof of
the brand may be received as evidence of ownership. The statutes are not uniform in this respect. That is a very material part of the law for proof of ownership is the main purpose of having brands registered. Statutes usually require also that the record of such brands shall be kept in the county where the livestock is grown. I mention these facts to show the difference in the purpose and procedure with reference to livestock brands from those contemplated by our statute providing for marks to show quality and condition of agricultural products according to standards established by the Commissioner of Agriculture.

It is my opinion that a brand for identifying Chincoteague ponies cannot be registered as a trade-mark or brand under the law.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Holding Accused for Grand Jury.

COMMONWEALTH OF VIRGINIA.
Office of the Attorney General,
Richmond, Va., August 14, 1943.

Honorable L. Brooks Smith,
Trial Justice,
Accomac, Virginia.

My dear Judge Smith:

I have before me your letter of August 10, in which you request my views with respect to the sufficiency of evidence necessary to justify the Trial Justice in committing for trial before the Circuit Court of the county a person charged with the commission of a felony. As you point out, the Trial Justice Act (Michie's Code, section 4987fl-b) vests in the Trial Justice the same power to conduct preliminary hearings of such persons as were formerly exercised by the Justice of the Peace under the provisions of chapter 192 of the Code, sections 4823-4850, inclusive. Section 4845 provides that if the Justice "consider that there is just and sufficient cause for charging the accused with a felony, then he shall commit him to jail or let him to bail under section forty-eight hundred and twenty-eight." Section 4846 provides that any such commitment shall be for trial, and the recognizance be for appearance in the court having jurisdiction of the offense.

Your request for my opinion is addressed to the question whether the accused should be committed for trial in a felony case where the evidence, in the opinion of the Justice, is insufficient to convict beyond a reasonable doubt, yet is sufficient to create a strong probability of guilt. It is my view that in such a case the accused should be committed. The chief purpose of the preliminary hearing in a felony case is to prevent the escape of the accused. A grand jury may indict, even though the Trial Justice refuses to commit, but the indictment might be fruitless if the accused has made his escape. A preliminary hearing usually follows a short time after the commission of the offense when there has been no opportunity for a complete investigation of the case or the marshaling of evidence. In my opinion, therefore, the Trial Justice should commit the accused if the evidence at the preliminary hearing is such as to make it appear that there is sufficient probability of guilt as, in the exercise of a sound discretion, would justify the precaution of commitment to prevent a possible escape.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TRIAL JUSTICES—Clerk Has Authority to Sign Abstract of Judgment, But Not the Judgment Itself.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., JULY 13, 1943.

HONORABLE WILLIAM D. PRINCE,
Trial Justice of Sussex County, Stony Creek, Virginia.

MY DEAR MR. PRINCE:

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

"The question has arisen whether or not the duly appointed clerk of the Trial Justice Court has the legal right to sign abstracts of judgment and judgments. It seems clear from section 4987-g that the clerk has this legal right, but the Substitute Trial Justice, who is an attorney at law, says that the clerks have no such jurisdiction. I will thank you for your legal opinion in this matter."

Section 4987-g of the Code provides that the clerk of a Trial Justice Court may, among other things, "* * * issue abstracts of judgments * * *.

In my opinion, this is authority for the clerk to sign an abstract of a judgment entered by the Trial Justice. After all, an abstract of judgment is nothing more than a certification of a record which is in the office of the Trial Justice, and it would seem logical that the clerk, who has charge of such records, should have the authority to certify as to them.

I know of no authority, however, for the clerk of a Trial Justice Court to sign a judgment of the Trial Justice. This would clearly appear to be something which the Trial Justice should do for himself inasmuch as he enters the judgment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Costs of Office to Be Paid by County; Check Books.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., AUGUST 31, 1943.

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

MY DEAR MR. HADEN:

Replying to your letter of August 26, I beg to advise that, if a charge is made for check books used by the trial justice, I am of opinion that it should be paid by the county. See sections 4987-e and 4987-i of the Code (Michie, 1942).

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
TRIAL JUSTICES—No Record Required of Arrest Made on Warrant Issued in and Returnable to Another County.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., February 28, 1944.

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

MY DEAR MR. SMITH:

I acknowledge receipt of your recent letter, from which I quote the following:

"In an arrest made by the local officers of this County for an offense committed elsewhere and where the accused is placed in our jail waiting to be sent to the Court of Jurisdiction, is it, in your opinion, necessary for the Trial Justice to make a record of this transaction on his docket?"

I assume that the warrant, under which the accused is being held by the local jailor, was issued by the trial justice of the demanding county, and in such case I see no reason for your records to show the transaction at all. As you have pointed out, the sheriff and the jailor have made the necessary record of the transaction.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

HONORABLE R. H. MARRIOTT,
Trial Justice for Fauquier County,
Warrenton, Virginia.

MY DEAR MR. MARRIOTT:

This will acknowledge receipt of your letter of November 27, from which I quote as follows:

"As trial justice for this county, I have set up as regular court days Monday and Friday of each week, and this procedure is being followed and has been followed in the past. Only under special circumstances are cases tried on the other days of the week. Section 4987(b) of the Code provides for the appointment and compensation of the substitute trial justice."
“Due to illness it has several times been necessary for me to be absent from my office and the court for as much as two weeks at a time. The substitute trial justice claims that, although cases are heard only on Mondays and Fridays, he is entitled to compensation for each day that I am away from the office. I would appreciate your advice as to the proper method of interpreting this section in view of the court procedure here.”

Section 4987-b of the Code provides in part that where the trial justice for the reasons specified, including sickness, is unable to perform the duties of his office the substitute trial justice shall perform such duties and shall receive “a per diem compensation equivalent to one-twenty-fifth of the monthly instalment of the salary of the trial justice, which, in the discretion of the committee hereinafter provided for, may be deducted from the salary of the trial justice * * *.” The section also provides that, while the substitute trial justice is acting as trial justice he shall perform the same duties, have the same jurisdiction, and exercise the same powers and authority as the trial justice. As you know, a trial justice has many official duties other than the actual trial of cases. I think it entirely clear that, when a substitute trial justice is acting during the sickness of the trial justice, such substitute trial justice is entitled to the per diem compensation provided by the section. I call your attention, however, to the fact that the section also provides that this per diem compensation that the substitute trial justice receives may be deducted from the salary of the trial justice “in the discretion of the committee.” In view of this latter quoted provision, I suggest that you consider taking the question up with the committee of circuit court judges provided for by section 4987-e of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VETERINARY EXAMINERS, BOARD OF—Validity of Rules of.

COMMONWEALTH OF VIRGINIA,
Office of the Attorney General,
Richmond, Va., September 10, 1943.

Dr. I. D. Wilson,
President Virginia State Board of Veterinary Examiners,
Blacksburg, Virginia.

My dear Dr. Wilson:

I am in receipt of your letter of September 8, in which you request the opinion of this office as to the validity of a by-law of the Virginia State Board of Veterinary Examiners requiring an applicant to take the examination given by the Board to “furnish proof that he is a graduate of a veterinary college recognized by the Board.”

Section 1275 of the Code provides that the State Board of Veterinary Examiners “may prescribe rules and regulations and by-laws for its own proceedings and government, and for the examination by its members of candidates for the practice of veterinary medicine and surgery.” In my opinion, even if this language stood alone, it is exceedingly doubtful that it would confer on the Board the power to prescribe educational qualifications or standards which must be met by applicants to take the examination. Where the General Assembly has considered it wise to fix educational qualifications or standards for those desiring to take examinations to practice professions in this State, such qualifications or standards, as a general rule, have been prescribed by
statute. This is true in the case of doctors, dentists, pharmacists, nurses, lawyers, and numerous other professions, but the General Assembly has prescribed no such qualifications or standards for practitioners of veterinary medicine. I think it reasonable to say, therefore, that, if the General Assembly had desired to prescribe educational qualifications or standards for those desiring to practice veterinary medicine in this State, it would have done so by statute.

Any doubt, however, concerning the construction of the quoted language relating to the powers of the Board to adopt regulations on this subject is removed by the first sentence of section 1276 of the Code, which provides that:

"It shall be the duty of said Board * * * to examine all persons making application to them who shall desire to commence the practice of veterinary medicine or surgery in this State and who shall not by the provisions of this chapter be exempt from such examination, and when an applicant shall have passed an examination satisfactory as to efficiency before the Board in session the President thereof shall grant to such applicant a certificate to that effect."

In my opinion, this language makes it the mandatory duty of the Board to allow an applicant to take the examination, whatever his academic or professional education may have been.

It follows from what I have written that, in my opinion, the by-law of the Board concerning which you write is not authorized by statute and is, therefore, invalid.

Very Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WAR—Prisoners of War Are Within Exclusive Jurisdiction of Military Authorities.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL,
RICHMOND, VA., MAY 17, 1944.

MAJOR J. R. NUNN,
Acting Superintendent of State Police,
Richmond, Virginia.

MY DEAR MAJOR NUNN:

Your letter of May 3 addressed to Major E. H. Gibson, with regard to the authority of State police to arrest and hold a prisoner of war who may commit a misdemeanor or a felony, and which prisoner of war you state is "actually in charge of and under control of a military guard," has been referred to this office for reply.

While a prisoner of war is actually in charge of and under control of the armed forces, I am of opinion that their jurisdiction is exclusive and that the members of your force should not attempt to arrest and hold such prisoners of war, even though a crime may have been committed by him.

Very Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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