OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1944 to June 30, 1945
LETTER OF TRANSMITTAL

July 9, 1945.

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**

<table>
<thead>
<tr>
<th>Name</th>
<th>County</th>
<th>Official Title</th>
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<tr>
<td>Abram P. Staples</td>
<td>Roanoke city</td>
<td>Attorney General</td>
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<tr>
<td>W. W. Martin</td>
<td>Henrico</td>
<td>Assistant</td>
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<tr>
<td><em>D. Gardiner Tyler, Jr.</em></td>
<td>Charles City</td>
<td>Assistant</td>
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<tr>
<td>G. Stanley Clarke</td>
<td>Henrico</td>
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<tr>
<td>Kenneth C. Patty</td>
<td>Tazewell</td>
<td>Assistant</td>
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<tr>
<td>†Joseph L. Kelly, Jr.</td>
<td>Bristol City</td>
<td>Assistant</td>
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<tr>
<td>‡Walter E. Rogers</td>
<td>Richmond city</td>
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<td>Edwin B. Jones</td>
<td>Highland</td>
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<td>M. Ray Doubles</td>
<td>Henrico</td>
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<td>V. P. Randolph, Jr.</td>
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<td>William C. King</td>
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<tr>
<td>‡Carrington Thompson</td>
<td>Pittsylvania</td>
<td>Senior Attorney</td>
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<tr>
<td>Nerhea S. Evans</td>
<td>Charlotte</td>
<td>Secretary</td>
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<td>Louise W. Poore</td>
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<td>Marie Low</td>
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<tr>
<td>Eleanor L. White</td>
<td>Smyth</td>
<td>Secretary</td>
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<tr>
<td>Mary Elizabeth Withrow</td>
<td>Roanoke City</td>
<td>Receptionist</td>
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### Attorneys General of Virginia

From 1776 to 1936

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<tr>
<td>Robert Brooke</td>
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<td>Philip Norborne Nicholas</td>
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<td>James Robertson</td>
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<td>Sidney S. Baxter</td>
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<td>Willia P. Booc</td>
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<td>John Randolph Tucker</td>
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<td>Thomas Russell Bowden</td>
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<td>Charles Whittlesey (military appointee)</td>
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<td>James C. Taylor</td>
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<td>Raleigh T. Daniel</td>
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<td>James G. Field</td>
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<td>Frank S. Blair</td>
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<td>Rufus A. Ayres</td>
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<td>R. Taylor Scott</td>
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<td>R. Carter Scott</td>
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<tr>
<td>A. J. Montague</td>
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<tr>
<td>William A. Anderson</td>
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<td>Samuel W. Williams</td>
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<tr>
<td>John Garland Pollard</td>
<td>1914-1918</td>
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<td>§J. D. Hank, Jr.</td>
<td>1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918-1934</td>
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<tr>
<td>‡Abram P. Staples</td>
<td>1934-1936</td>
</tr>
<tr>
<td>Abram P. Staples</td>
<td>1936</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


2. Coleman, John, Jr. v. Commonwealth. From Circuit Court of Buchanan County. Murder.


8. LaMarr, Lawozier v. Commonwealth. From Hustings Court City of Portsmouth. Involuntary manslaughter.


Cases Decided in the Supreme Court of Appeals of Virginia


Cases Pending in the Supreme Court of the United States


Cases Decided in the United States District Court


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


4. **Commonwealth v. Mrs. Laurena M. Griffith.** Circuit Court City of Richmond. Tax on intangible personal property.

5. **Commonwealth v. Meister Tailoring Company.** Circuit Court City of Richmond. Merchant's license tax.


8. **Cooper, David M. and Rose v. Commonwealth.** Circuit Court of Warwick County. Income tax.


15. **McSweeney Meat Market v. Commonwealth.** Hustings Court City of Richmond. License tax.

16. **Milk Commission v. Virginia Rountree, trading as Rountree Dairy.** Hustings Court of City of Richmond. Injunction to prohibit Dairy from selling milk without license from the State Milk Commission in the Suffolk Milk Market area.


19. **Powell, Blanche P. v. Commonwealth.** Hustings Court City of Richmond. Tax on intangible personal property.

20. **Price, Mrs. Effie G. v. Commonwealth.** Circuit Court City of Richmond. Tax on intangible personal property.


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.

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.

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.

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

The work of the Division of War Veterans Claims (a Division of the Department of Law) which is charged with the responsibility of assisting veterans and their dependents to secure benefits to which they are entitled under existing laws, has greatly increased, and, as many more veterans are discharged, this important work will further increase. In addition to the offices now in operation, the General Assembly has provided a sufficient fund to make possible the opening of area offices in Norfolk, Newport News, Danville, Bristol, Roanoke and Alexandria, as soon as the personnel is available.

Following is a concise resume of the principal work of the Division for the fiscal year 1944-1945, under the supervision of Nelson F. Richards, Director, located at the Roanoke office:
Contacts (Personal office interviews) ........................................ 1497
Board Appearances (Appeals, presentation and reviews) ........ 1111
Letters received ............................................................. 7582
Letters written .............................................................. 9340
Claims filed ................................................................. 1983
Claims completed .......................................................... 1232
Appeals filed ............................................................... 192
Appeals completed ......................................................... 147
Visits outside office ....................................................... 43

Conducted Rehabilitation Conferences in service office schools in each Congressional District in State. These conferences and schools were attended by more than 400 Rehabilitation and Service Officers.

Compiled—Handbook for Post Service Officer—Distributed to American Legion Post Service Officers. (Cost of Printing and Distribution borne by American Legion).
My dear Mr. Boatwright:

This is in reply to your letter of September 30, 1944, in which you ask my opinion as to certain aspects of Chapter 160 of the Acts of 1944 (Michie's Code, §580(1), et seq.), referred to as the "Administrative Agencies Act," which regulates the rule-making power of fourteen (14) named administrative agencies in Virginia.

Chapter 160 of the Acts of 1944 provides in section 5 thereof that the present rules promulgated by the named agencies shall expire on December 31, 1944, and that all rules proposed for effect thereafter must be first approved by the "Commission on Administrative Agencies" created in section 3 of the Act.

Section 6-a of the Act reads as follows:

"No rule proposed for effect after the thirty-first day of December, nineteen hundred forty-four, by any agency, shall be submitted to nor approved by the Commission unless a copy of the proposed rule has been delivered to the Director of the Division of Statutory Research and Drafting, who shall cause a copy of the proposed rule, or a fair and adequate synopsis, together with notice of the date and place of public hearing, to be published at the expense of the agency in the 'Virginia State Register,' or if there be no such publication then in a newspaper of general circulation published in the City of Richmond, not less than fifteen nor more than thirty days prior to a session of the agency at which the public hearing on the proposal is to be had."

It is clear from this section that each of the fourteen agencies, i.e., the boards, shall submit to the Director of the Division of Statutory Research and Drafting a copy of the set of rules to be proposed for effect after December 31, 1944. The Director then, on behalf of each agency, shall cause copies of these rules to be printed in the "Virginia State Register" (a publication created by Chapter 218 of the Acts of 1944; Michie's Code, §580(b), (1) et seq.) or a synopsis of such rules may be published in a Richmond newspaper. I notice from your letter and the enclosure that the former procedure was followed. The section then contemplates and provides for a meeting of the agency to be called at which the rules so published shall be the subject of a public hearing by those affected thereby. The Section provides that the Director of the Division of Statutory Research and Drafting shall cause a "notice of the date and place of public meeting, to be published *** in the 'Virginia State Register,' or *** in a newspaper ***"

In view of the fact that the publication of the "Virginia State Register" carried no dates for meetings of the respective agencies, the other alternative is for each of the fourteen (14) agencies to notify the Director of the Division of Statutory Research and Drafting of the date and place at which the agency will hold its public meeting. The Director will then cause a suitable notice of such called meeting to be published in a newspaper as provided by the Act above quoted.
It is apparent from House Document No. 5 of the General Assembly of 1944, which is a report of the Virginia Advisory Legislative Council which sponsored this legislation, that the intent of this legislation is to make a fresh start in the rule-making power of the fourteen (14) named agencies and that the first step is for the agencies themselves to hold a public meeting of the members of their own profession to determine the desirability of the rules to be proposed. It is entirely possible that at such public meeting the members of the profession affected by such proposed rules will have constructive amendments, deletions or additions to suggest to the board which regulates the particular profession.

Thereafter the board or agency will submit its final proposed set of rules as amended to the Commission on Administrative Agencies for approval. Here again, as provided in section 6-b of the Act, reasonable opportunity for anyone appearing to be interested to be heard is provided. It is apparent again from House Document No. 5, that the function of this Commission, which is composed of members of the General Assembly, will be to scrutinize the proposed rules to ascertain whether they are in excess of the rule-making power delegated to the respective agencies by the General Assembly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

AGRICULTURE AND IMMIGRATION—What Commodities Are Subject Inspection. Under "Feeding Stuffs Law."

Honorable S. S. Smith, Director,
Division of Dairy and Foods,
Department of Agriculture and Immigration,
Richmond 19, Virginia.

My dear Mr. Smith:

This is in reply to your letter of October 20, which I quote in full as follows:

"May I refer you to a letter I wrote you on July 9, 1940, requesting you to advise me as to the construction of the revenue provisions in the State Feeding Stuffs Law, Section 1239 of the Code of Virginia. Reference is made also to your opinion on this matter dated July 16, 1940. Since that time I have been enforcing this section of the Code according to my understanding of your opinion of July 16, 1940.

"Recently exception has been taken by some feed manufacturers to my enforcement of the said law pursuant to the first sentence in the last paragraph of your opinion which is found on page 2 of the opinion as follows: 'I find nothing in the law which would exempt from either the inspection or the tax a given quantity of "concentrated commercial feeding stuff" simply because it was actually or allegedly intended to be mixed thereafter with some other material either before or after sale to the consumer.'

"Because of the difference of opinion concerning my enforcement of the law, I was asked to arrange an appointment with you in order that you might be made familiar with the viewpoint of the feed manufacturers as well as our own. You will recall that at the meeting in your office on Monday, October 6, 1944, the point at issue was whether or not the requirement of a state inspection tax on feed to be used for mixing purposes only and the requirement of a tax on the feed after it has been mixed with other ingredients constitutes a double taxation, and if storing of such ingredients for mixing purposes only is tantamount to offering or exposing them for sale?

"Will you please give me your opinion with respect to these questions."
The former opinion of this office under date of July 16, 1940, (Opinions of Attorney General, 1940-1941, p. 179) was intended to apply to feedstuffs suitable for consumption in the form in which it was possessed, and which was held in possession and dealt with by the possessor in such manner as to indicate that it was a part of a stock of merchandise being offered for sale. The question there decided was whether such merchandise was subject to the inspection tax laid by section 1239 of the Code of Virginia.

It developed at the conference to which you refer that there are a number of manufacturing establishments in the State which constantly have on hand feedstuffs which are concentrated in a form suitable for consumption, but which are never offered for sale in such form. These feedstuffs are being held solely for purposes of further mixing so as to produce an entirely different type of concentrated feedstuff. They are merely ingredients intended solely for use in the manufacture of a different finished product.

It is my opinion that ingredients so possessed and held solely for further processing, and which are not offered for sale and are segregated from and not intermingled with others of like kind which are being exposed or offered for sale, are not subject to the said inspection tax. The statute, by its terms, is applicable only to merchandise which is exposed or offered for sale. The ingredients you refer to are not within that classification, as they are held only for manufacturing purposes.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ALIENS—Amenable To State Criminal Laws.

July 27, 1944.

MAJOR J. R. NUNN, Acting Superintendent,
Department of State Police,
Richmond, Virginia.

My dear Major Nunn:

This is in reply to your letter of July 21, from which I quote as follows:

"There are located in this State several labor camps of Bahamans. These camps of Bahamans are moved about the State for the purpose of harvesting agriculture crops and were recruited by the Federal Government for this purpose.

"Recently, on the Eastern Shore of Virginia, there was some disturbance in one of the camps and the local enforcement officers were not definitely clear as to their authority to make an arrest of a Bahaman within the confines of one of the camps.

"It is respectfully requested that you furnish this Department with an opinion as to the rights of the local and State Police to make an arrest of a Bahaman within the bounds of one of these labor camps in case of a violation of State or local statute."

While you do not give all of the facts with reference to the Bahamans who you state are engaged in agricultural work in Virginia, unless there is some treaty provision which may affect the question you ask, I know of no reason why these persons are not amenable to the criminal laws of the State and, therefore, subject to arrest by State and local police officers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
BAIL AND RECOGNIZANCES—Physical Examination Required Of Certain Persons As Prerequisite.

November 13, 1944.

HONORABLE J. HUME TAYLOR,
Commonwealth's Attorney,
Norfolk 10, Virginia.

My dear Mr. Taylor:

This is in reply to your letter of November 8, 1944, in which you wish to know whether Section 380 of the Norfolk City Code comes within the purview of Section 4548f of the Code of Virginia.

Section 4548f of the Code provides that the following persons shall not be released on bail until a physical examination has been made:

"Any person arrested in this State upon a charge of prostitution or of being a keeper or inmate of a house of ill fame, prostitution, or assignation, or of soliciting for immoral purposes. * * *"

Section 580 of the Norfolk City Code provides in part as follows:

"It shall be unlawful for any person in the City of Norfolk to frequent or visit for immoral purposes any house of ill fame, brothel or bawdy-house, apartment, room or other place, within or without any building or structure which is used or is to be used for lewdness, assignation, prostitution or illicit sexual intercourse. * * *"

An examination of Section 580 of the Norfolk City Code would indicate that prostitution, as such, is not condemned in it, being broader and embracing a larger group than Section 4548f of the Virginia Code, such as visitors, frequenters, or customers in houses of ill-fame who are not included in the Virginia Code section. For this reason, it is my opinion that persons charged with a violation of Section 580 of the Norfolk City Code do not come within the purview of Section 4548f of the Virginia Code requiring a physical examination before being admitted to bail.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

BAIL AND RECOGNIZANCES—Appearance In Another County Or City.

July 11, 1944.

HONORABLE S. J. THOMPSON,
Attorney for the Commonwealth,
Rustburg, Virginia:

My dear Mr. Thompson:

This is in reply to your letter of July 6, in which you pointed out that by virtue of the authority conferred by law [Acts of the General Assembly 1942, Chapter 217, Section 13; Code Section 4992(13)], the county of Campbell has made an arrangement with the City of Lynchburg for the housing of prisoners in the Lynchburg City jail and for that reason it would be more practical for some authority located in the City of Lynchburg, such as the police justice or his assistant, to bail the prisoners held in the jail there, if this could be effected.

It has been my consistent opinion that Sections 4828 and 4829 of the Code do not allow a justice or other bailing authority under those two sections to bail prisoners for appearance in other than their own counties or cities (1942-43 Report of the Attorney General, pages 11 and 135), and the same reasoning and conclusions would apply to any bonds executed by virtue of Section 4829a.

Section 4837 of the Code provides in part that
"A person charged with a misdemeanor, and to be carried to another county or corporation, shall, if he request it in the county or corporation wherein he is arrested, be brought before a court, judge, or justice thereof. In such case, if he desire it, such court, judge, or justice before whom he is brought may, without trial or examination, let him to bail. * * *"

This section by its very terms applies only to those charged with a misdemeanor. Even for them, I do not think that it applies to your ordinary situation where persons are arrested in Campbell County and then taken to the Lynchburg jail, because the court, judge, or justice given bailing powers in the above quoted section is only such of the county or city in which the prisoners are actually arrested. Its language does not include cities and counties to which prisoners are later taken after arrest and for that reason I do not feel this section would give power to the Lynchburg authorities to bail such prisoners.

The only other provisions of the law which might be of help to you that I know of would be to utilize the services of a bail commissioner or clerk of the Lynchburg court. (See Code sections 4830, 4831 and 6188).

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BAIL AND RECOGNIZANCES—Authority of Deputy Clerk of Court To Grant Bail.

HONORABLE H. M. WALKER, Clerk,
Circuit Court of Northumberland County,
Heathsville, Virginia.

My dear Mr. Walker:

I am in receipt of your letter of October 21 in which you ask for my opinion on the following question:

"Section 4830 of the Code of Virginia, as amended, authorizes Clerks of Circuit Courts to admit to bail all persons charged with crime in their respective cities or counties. Do the deputies of such Clerks have the same authority granted their principals under this Section to admit to bail, or does the Statute limit such power to said Clerks only?"

Section 2701 of the Code provides for the appointment of Deputy Clerks "who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law." Section 4830 of the Code provides that clerks of courts having criminal jurisdiction "** shall have the power and jurisdiction to admit to bail ** all persons charged with crime in their respective cities and counties **" Nothing in the section nor in any other statute that has come to my attention forbids deputy clerks to admit persons to bail. Reading the two sections together, therefore, I am of opinion that deputy clerks may admit persons to bail in accordance with the provisions of section 4830.

I call your attention to the fact that while clerks have the power to admit persons to bail, they are not required by section 4830 to exercise this power, but "** may refuse to hear such application." If, therefore, a clerk in the exercise of his discretion decides not to act in any case of application for bail, he may instruct any one or all of his deputies not to act. Indeed the clerk may validly instruct any one or more of his deputies not to act in any case of application for bail.

Very sincerely yours,

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

BANKS AND BANKING—When Information Concerning State Banks May Be Revealed to Certain Federal Agencies.

HONORABLE L. McCARTHY DOWNS, Commissioner,
State Corporation Commission,
Richmond, Virginia.

My dear Judge Downs:

I am in receipt of your letter of January 29, in which you ask if the State Corporation Commission may disclose to the Federal Bureau of Investigation or the Federal Reserve Bank or the Federal Deposit Insurance Corporation information in its files concerning a State bank.

As to the Federal Reserve Board, section 4149(7) of the Code provides in part that:

"The chief examiner of banks may disclose to the Federal Reserve Board, or to examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become a member of said system."

Under the authority of this section, I am of opinion that the Commission, through its chief examiner of banks, may disclose to the Federal Reserve Board all information in its files concerning State banks which are members of the Federal Reserve System.

As to the Federal Deposit Insurance Corporation, section 4149(7a) of the Code provides in part as follows:

"All records, reports, reports of examinations and information relating to insured banks shall be open to the inspection of and made available to the officers and duly accredited agents of Federal Deposit Insurance Corporation so long as like records, reports and information in the possession or under the control of Federal Deposit Insurance Corporation are, by Federal statute, made available and subject to the inspection of the governmental authority of this Commonwealth, having supervisory authority over such banks."

12 U.S.C.A., section 264(k), dealing with the Federal Deposit Insurance Corporation, provides:

"The Corporation shall have access to reports of examinations made by, and reports of condition made to, the Comptroller of the Currency or any Federal Reserve Bank, may accept any report made by or to any commission, board, or authority having supervision of a State non-member bank (except a District bank), and may furnish to the Comptroller of the Currency, to any Federal Reserve bank, and to any such commission, board, or authority, reports of examinations made on behalf of, and reports of condition made to, the Corporation."

Reading the above quoted Federal and State laws together, I am of opinion that, if the Federal Deposit Insurance Corporation will state in writing to the Commission that it will furnish to it reports made to the Corporation by member banks in Virginia, then the Commission may furnish to such Corporation records and reports made to it by such banks.

As to the Federal Bureau of Investigation, section 4149(54) of the Code provides as follows:

"All records, reports and information concerning any bank other than those required by law to be public, shall be open only to such officers and employees of the State as may have occasion and authority to inspect them in the performance of their duties, and to any officer or duly authorized agent of such bank, and the imparting of such information by any employee or officer of the State may be sufficient cause for his removal from the position he occupies under the State government."
In view of the above quoted section, I know of no authority which the Commission has to furnish information concerning State banks to the Federal Bureau of Investigation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Chairman Is A Voting Member.

December 6, 1944.

HONORABLE CHARLES G. STONE,
Attorney for the Commonwealth,
Warrenton, Virginia

My dear Mr. Stone:

I am in receipt of your letter of December 5.

While I do not recall at the moment that I have ever had occasion to express an opinion on whether or not the Chairman of the Board of Supervisors has a vote just as any other member of the Board, I do not think there can be any doubt about the fact that he has such a vote.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—When Appropriation May Be Made To Treat Person Bitten By A Dog.

March 28, 1945.

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

My dear Mr. Johnson:

I am in receipt of your letter of March 27, in which you direct my attention to sections 3305(75) and 1553 of the Code (Michie, 1942).

Section 1553 authorizes, but is not mandatory, the board of supervisors of a county to appropriate a sum sufficient for the care, treatment and transportation of any person of such county who has been bitten by or exposed to an animal (of any type) suspected of having rabies or hydrophobia.

Section 3305(75) and 3305(81) require that any person bitten by a rabid dog shall, out of the dog fund of a county, be paid the cost of necessary treatment not to exceed $100, provided that in a county having a health officer nothing shall be paid for treatment unless the person treated first applied to the health officer and by that officer refused treatment.

You desire my opinion “as to the authority of the board of supervisors to make the payments . . . under the provisions of these two sections.”

Under section 3305(75) it seems to me plain from its terms that the county may not make any payment for treatment of a person bitten by a rabid dog unless such person has first applied to the health officer for treatment, where the county has a health officer, and such officer has refused or failed to treat the case.

Under section 1553 the board of supervisors may in its discretion appropriate money for the treatment of persons bitten by a dog or other animal sus-
pected of having rabies, but the board is not required to make such an appropriation.

It is my opinion that the two sections are entirely independent of each other and, even though a person may not be paid the cost of treatment under section 3305(75), the board of supervisors may, nevertheless, pay such cost from an appropriation made under the authority of section 1553, from the general fund of this county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—When Appropriation May Be Made To Maintenance Of A Library.

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

My dear Mr. Harrison:

This is in further reference to your inquiry concerning the authority of the Board of Supervisors of Loudoun County to make an appropriation for the Purcellville Library.

Section 364 and 365 of the Code authorize, among other things, the making of contracts for library service between boards of supervisors of counties and free public libraries operated by towns. When the board of supervisors of a county makes such a contract, it unquestionably may make an appropriation for the support of the library with which it is contracting. These sections contain the only authority that I can find for an appropriation by a board of supervisors to a town library. Therefore, unless the proposed appropriation is to be made pursuant to these sections and unless the library is organized and managed as provided in the sections, I am of the opinion that the board does not have the authority to make the appropriation.

For your information, I enclose copy of a letter I wrote to Honorable Edward H. Richardson, Commonwealth Attorney for Roanoke County, under date of April 2, 1935, on a similar question.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Authority To Supply Trial Justice With An Office.

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

My dear Mr. Burnett:

This will acknowledge receipt of your letter of August 17, in which you raise the following question:

"The Trial Justice of this County does not have an office in the courthouse at Independence, but maintains his office here in Galax. The Board
of Supervisors has been supplementing his salary by paying $10 per month on the rental of his offices. Some question has arisen as to the legality of these payments and I will appreciate your giving me an opinion on this."

I do not think that the Board of Supervisors has the authority to supplement the salary of the trial justice, this salary being paid by the State and fixed in accordance with the provisions of section 4987-e of the Code. However, section 4987-i of the Code provides that the Board of Supervisors of each county "shall provide suitable quarters for the court of such trial justice * * *" In compliance with this duty, I am of opinion that the Board of Supervisors may make an allowance to the trial justice of $10 per month for the use of his offices as the place where the court is held.

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

BOARDS OF SUPERVISORS—Authority To Appropriate Funds For War Veterans' Information Office.

Honorable Ryland Craft,
Member of House of Delegates,
Gate City, Virginia.

My dear Mr. Craft:

I am in receipt of your letter of May 1, in which you ask for my opinion on the following question:

"The American Legion is planning to ask the Board of Supervisors of Scott County to make an appropriation for an office and office help to handle veterans' affairs. A question has been raised as to the legality of such an appropriation and I should like to have your opinion on the matter."

I assume that the function of the office you mention would be to advise with and give information to veterans and to co-operate with State and Federal agencies of a similar character. In my opinion, under the broad general powers given to Boards of Supervisors by section 2743 of the Code, your Board would have the authority to make an appropriation for the establishment of such an office.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority To Appropriate Funds For Erection Of Veterans' Memorial.

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

My dear Mr. Parsons:

I am in receipt of your letter of October 10, in which you ask if the Board of Supervisors of Wythe County has the authority to make an appropriation to assist in the purchase of a building in Wythe County which is to be a
memorial to veterans of all wars and is to be used as a place of recreation, entertainment, meeting place, to take care of transient veterans, and to render other services to the veterans. The title to the property is to be taken either in the name of American Legion Post or a veterans corporation to be chartered.

Of course, an enterprise of this character has great sympathetic appeal and I should be happy if I could find any statute authorizing the Board of Supervisors to make such an appropriation, but I have been unable to do so.

I also call your attention to the following from 1 McQuillin, Municipal Corporations, 2nd Edition, at page 1046:

"Unless expressly authorized by charter or statute, a municipal corporation cannot appropriate or give away the public moneys as pure donations to any person, corporation or private institution, not under the control of the city and having no connection with it. Appropriations for national guards, vote of money to purchase uniforms for an artillery company, or for sports and games, or a donation fund for the erection of a building for the use of the G.A.R. are examples."

While the above deals with municipal corporations, it seems to me the principle is equally applicable to a county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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BOARDS OF SUPERVISORS—Authority To Abate Nuisances: Cesspools.

HONORABLE W. H. CARTER,
Attorney for the Commonwealth,
Amherst, Virginia.

My dear Mr. Carter:

This is in reply to your letter of December 29, which I quote below:

"At the request of the Board of Supervisors of Amherst County, I am writing to ask you to advise us whether or not, in your opinion, the Board of Supervisors has the authority to enact an ordinance prohibiting persons within the Sanitary District from using abandoned wells as cesspools.

"The Sanitary District of Amherst County is known as Madison Heights Sanitary District and was created and is operated under section 1560m of the Code of Virginia. Section 1560o prescribes the powers and duties of the Board. (See also section 2743 of the Cole.)

"The Sanitary District purchases water from the City of Lynchburg, which is distributed to persons in the Sanitary District who purchase the same, but all the citizens within the District do not purchase water, and some of them continue to use wells. There is some sewage lines within the District, but they only cover a small part of the Sanitary District, and some of the people who do not use the sewage systems, but are in close enough to take the water, have converted their wells into cesspools, and other citizens of the Sanitary District who use wells for their supply of water are afraid that the wells being used as cesspools will contaminate their wells." Section 1560-o, subsection (1) of the Code (Michie, 1942) provides that:

"The board of supervisors shall have the same power and authority for the abatement of nuisances in such sanitary district as is vested by law in councils of cities and towns for the abatement of nuisances therein, and it shall be the duty of the board to exercise such power when any such nuisance shall be shown to exist."

Very truly yours,

HONORABLE W. H. CARTER,
Attorney for the Commonwealth,
Amherst, Virginia.
Section 30 of the Code gives to municipal corporations, among other things, the power "to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and cause any nuisance to be abated." Construing the above two provisions together, I am of opinion that the Board of Supervisors has the power to adopt the ordinance you describe if the Board is satisfied that the use of these abandoned wells as cesspools is contaminating other wells in the District now in use or will probably contaminate such wells in the future.

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

BOARDS OF SUPERVISORS—No General Authority To Levy License Taxes; Taxicabs.

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

My dear Mr. Whitehead:

I have your letter of June 19, with reference to the authority of the Board of Supervisors of Pittsylvania County to adopt an ordinance to license the operation of taxicabs in the county. I presume that you are referring to a license for revenue purposes only.

I direct your attention to chapter 45 of the Acts of the Extra Session of 1945, which gives to certain counties the power to impose a license tax on the operation of a taxicab. I doubt whether this Act is applicable to Pittsylvania county, but you will be better able to pass on this than I. In the absence of specific statutory authority, I do not think that a county may impose a license tax on taxicabs or on any other subject of license taxation, since I know of no law giving to the boards of supervisors of counties general powers of license taxation.

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

BONDS—Issuance Of New Bond To Replace Lost One.

HONORABLE W. T. TAYLOE MURPHY,
Treasurer of Virginia,
State Finance Building,
Richmond, Virginia.

My dear Mr. Murphy:

I am in receipt of your letter of February 12, enclosing a communication from a representative of the owner of a Virginia bond which has been lost or stolen. The bond appears to be a "Bearer" coupon bond. The owner desires to learn the procedure necessary to obtain a new bond.

In my opinion, if the provisions of section 2639 of the Code are followed, you would be justified in issuing a new bond. It does not seem to me that this section is confined to bonds registered in the names of the owners thereof. See sections 2631 and 2632 of the Code.

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

CHILD LABOR LAWS—Apply To State Employees. May 2, 1945.

HONORABLE J. H. BRADFORD,
Director of the Budget,
Governor's Office,
Richmond, Virginia.

My dear Mr. Bradford:

On behalf of the Virginia Polytechnic Institute you have asked for my opinion concerning "the minimum age requirements for employees to work in the laundry" at the Institute.

Section 1808-m of the Code (Michie, 1942) provides that "no boy under sixteen and no girl under eighteen years of age shall be employed, permitted or suffered to work in any * * steam laundry * * *" I have heretofore expressed the opinion that the child labor laws are applicable to the various State Departments and institutions, and I enclose for your information a copy of that opinion. Therefore, if the laundry at the Virginia Polytechnic Institute is a steam laundry, I am of opinion that the quoted provision of section 1808-m of the Code is applicable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWN AND COUNTIES—City Of Richmond May Close A Street Or Alley; Land Reverts To Abutting Owner. April 26, 1945.

MAJOR R. M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Major Youell:

This is in response to your inquiry of April 25, 1945, concerning certain real estate located near the penitentiary grounds. It appears that this real estate consists of two plots divided by an alleyway which is proposed to be closed by the Council of the City of Richmond so that a building or buildings can be erected on these plots.

You inquire whether the Council of the City of Richmond had authority to close this alley. Section 19g of the Charter of the City of Richmond (1926 Acts of Assembly, page 552) expressly authorizes the Council of the City of Richmond to "close * * * streets and public alleys in the city." Such authority in a charter has been expressly upheld in City of Lynchburg v. Peters, 145 Va. 1, 133 S. E. 674, where it was also held that the property reverts to the owners of the abutting land upon the abandonment of the easement of a public way. See also Marbury v. Jones, 112 Va. 389, 71 S. E. 1124.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HONORABLE JOHN ROBERTS,
Attorney for the Commonwealth,
Wise, Virginia.

My dear Mr. Roberts:

I have carefully considered your letter of December 19, and am of the opinion that the ordinance adopted by the Board of Supervisors of Wise County under the authority of section 4675(83-b) of the Code (Michie, 1942) prohibiting the sale of wine and beer on Sunday is not effective in Bondtown if that town has a municipal charter. Although the town may not have functioned as such for a number of years, it is well settled that a municipal corporation does not go out of existence for non-user of its charter. Beale v. Pankey, 107 Va. 215.

The Alcoholic Beverage Control Board, however, does have certain authority over the hours of sale by its licensees, and I suggest, therefore, that the situation you describe be brought to the attention of the Board by representative citizens, with a full statement of conditions existing.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—County May Assume Bonded Indebtedness Of a District Thereof Only Pursuant To A General Law.

HONORABLE WILLIAM O. FIFE,
Commonwealth's Attorney,
Court Square,
Charlottesville, Virginia.

My dear Mr. Fife:

This is in reply to your letter of February 28, in which you ask for my views with reference to a procedure which might be appropriately followed in order to have the entire county become obligated for the payment of bonds issued by a district of the county.

There have been quite a number of district road bond issues and also school bond issues which are outstanding, and, as you point out in your letter, Chapter 205 of the Acts of 1944 provides that Orange County may assume a certain debt of $30,000 owed by a magisterial district for the construction of certain roads, provided the voters in the county vote in favor of the assumption of said debt. The Act to which you refer is admirably drawn, but I entertain some doubt as to whether or not it does not violate section 115a of the Constitution, in that it is a special Act and not a general law.

The section referred to provides that no debt shall be contracted by any county “except in pursuance of authority conferred by the General Assembly by general law * * *. Said section also contains a provision prohibiting the General Assembly from authorizing any county to contract any debt with certain exceptions not here material, “unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote * * *”.

In our discussion of this question when you were at Richmond the other day, I believe we both agreed that a statute patterned after the Orange County Act, but which by its terms would be applicable to all counties having an executive form of county government, would be a general law within the meaning of
section 115a. Of course, such a law could not undertake to deal with a specific debt, as was done in the Orange County Act, but would have to apply to all district road indebtedness or all district school indebtedness, or both, as might be desired.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Closing Of Office On Thanksgiving Day Authorized.

November 14, 1944.

Honorable John M. Whalen, Clerk,
Circuit Court of Fairfax County,
Fairfax, Virginia.

My dear Mr. Whalen:

I am in receipt of your letter of November 13, in which you call my attention to section 3388 of the Code, which provides in effect that court clerks' offices may be closed on Thanksgiving Day. You desire my opinion as to the date on which your office may be closed this year pursuant to the above provision.

The Governor of Virginia has declared Thanksgiving Day this year to be on November 30 and has declared it a legal holiday, and so it is my opinion that the said date is the day on which your office may be closed pursuant to section 3388.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees For Recording Option.

October 26, 1944.

Honorable F. E. Snidow, Clerk,
Circuit Court of Giles County,
Pearisburg, Virginia.

My dear Mr. Snidow:

Replying to your letter of October 25, I beg to advise that in my opinion the recordation tax on the option which you enclosed should be based on the consideration for the option, namely, $100. I do not think that the tax upon the recordation of the option should be based upon the consideration which will be paid for the land if the option is exercised, for the reason that the option is all that is being recorded at this time and the privilege granted by the option may never be exercised.

Very sincerely yours,

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

CLERKS OF COURT—No Fee To Be Charged For Transferring On Books Of Commissioner Of Revenue Land Of A Decedent.

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 30, in which you ask the following question:

"When a person dies, intestate, seized and possessed of real estate and leaves surviving him heirs at law who become the owner or owners of such real estate by the law of inheritance, should the commissioner of the revenue, upon request, transfer such real estate on his books, to such heirs, without the payment of the regular transfer fee or should the person request the transfer from the clerk and pay to him the regular transfer fee; who would then report to the commissioner of the revenue as in cases of deeds and wills?"

I can find no provision for a fee for the commissioner of the revenue in such a case as you present. Section 264 of the Code, as amended by chapter 76 of the Acts of the Extra Session of 1945 provides that, when the owner of real estate dies intestate, the commissioner may ascertain who are the heirs of the intestate and charge the land to said heirs, but neither section 264 nor section 276 provides for a transfer fee. I also call your attention to the fact that section 264 of the Code, as now amended, authorizes the commissioner of the revenue to charge the land to the decedent's estate until a transfer thereof.

Your second question is:

"Should real estate conveyed by deed or will to a life tenant and then to a remainderman be assessed in the name of the life tenant while he is living. I can find no provision for a transfer fee to be charged for transferring the real estate on the commissioner's books to the remainderman at the death of the life tenant.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Duties In Connection With Preparation Of "Induction and Discharge Record, World War II."

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

My dear Mr. Huffman:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has referred to this office for reply your letter of August 21 addressed to him. I quote from your letter as follows:

"Chapter 31, page 33, of the Acts of 1944 provides for the recordation of clerks of courts of certain information with respect to members of the armed
forces, which information shall be requested of and obtained from the chairman of the local draft boards, the cost of recording same to be paid by the respective counties.

"I have requested the necessary information from the chairman of our local draft board, but he has refused to supply same. I am advised by him, however, that the necessary information will be made available to me in the draft board offices.

"Am I, as clerk of court, required to go out of my office and seek out information for the purpose of recording? If so, would I be allowed to charge the county for this service in addition to the regular fee of 50 cents each, which has been agreed upon by the clerks of the State, I am informed, for recording the information furnished by the draft boards?"

Chapter 31 of the Acts of 1944 provides that the clerk of every circuit court "shall request and obtain from the chairman of each draft board in his county a list" containing certain information as to persons inducted into the armed forces of the United States, and shall record this information in "a record book kept for the purpose, and known as 'Induction and Discharge Record, World War II.'"

While I can appreciate the fact that it might be easier for the clerk to perform the duty required of him by this statute if the list containing the information was furnished to him by the local draft board, yet, in view of the language of the Act that the clerk shall "obtain" this information, it is my opinion that it is the duty of the clerk to secure the information from the records of the local board where such records are made available to him and where the board refuses to furnish the clerk with a list prepared by the board. It is my opinion that the General Assembly intended to make sure that the information described by the statute is recorded in the clerk's office and that the duties imposed upon the clerk of obtaining this information and recording it are mandatory.

The local selective service boards being Federal agencies, you will understand, of course, that the General Assembly has no power to impose any duty upon such boards. Therefore, if any particular board refuses to supply a clerk with a list containing the desired information, there is no State law under which it could be compelled to supply such a list.

As a practical method of making up the record specified by the Act, where a local board does not furnish the clerk with a list of the information, but simply makes it available to him in the office of the board, I suggest for your consideration that you could send your deputy to the board with the original book required by the Act and record the information in the book at the office of the board. This would obviate the necessity of your preparing a list of the information in the office of the board.

In reply to your second question, I call your attention to the fact that section 5 of the Act provides for the payment to the clerk by his county of certain fees for performing the duties imposed upon him, and that only these fees may be charged. I find no fee provided by the statute to pay the clerk for going out of his office to secure the information from the records of the draft board where the board declines to furnish him a list.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CLERKS OF COURT—Who To Be Recorded Into “Induction And Discharge Record, World War II.”

January 23, 1945.

My dear Mr. Richards:

I am in receipt of your letter of January 19, in which you refer to chapter 31 of the Acts of 1944, providing for the recordation by clerks of courts of counties and cities of certain information relating to residents thereof who are serving or have served in the armed forces of the United States in World War II. You ask if the clerk of the circuit court of a county is required under the Act to record discharge certificates of residents of his county who may have been inducted while in another county.

Section 4 of the Act provides as follows:

“When the honorable or dishonorable discharge of any person who served in the armed forces of the United States, or its associates, during World War II and who was a resident of the county or city at the time of his induction, is presented, it shall be the duty of the clerk to record the information contained therein in the proper spaces provided for such purpose in the book known as ‘Induction and Discharge Record World War II.’ If the induction record of the veteran presenting a discharge for recordation is not already recorded, it shall be the duty of the clerk to ascertain this information and record it along with the discharge.”

You will observe that the clerk of the circuit court of a county is required to record the discharge of a person “who was a resident of the county *** at the time of his induction ***” Whether or not a person was a resident of a particular county at the time of his induction is a question to be determined by the facts in each particular case, but where such facts show that a person presenting his discharge for recordation to the clerk was a resident of the county at the time of his induction, I am of opinion that the discharge under the Act should be recorded by the clerk as provided therein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees For Copying Records Into “Induction And Discharge Record, World War II.”

Honorable H. M. Walker,
Clerk of Northumberland County,
Heathsville, Virginia.

My dear Mr. Walker:

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

“Section 5 of an Act of the 1944 General Assembly of Virginia reads as follows:

“The clerk shall be entitled to and paid from the funds of his county or city the fees allowed by law in similar cases, for copying in the Induction and Discharge Record, World War II, the information obtained from the draft boards, but in no case shall any charge be made
the resident who has served in the armed forces for recording his discharge papers."

"As I do not find in the law a similar case, kindly give me your opinion as to the proper fee to collect from the county for the services required under this Act. (Acts of 1944, page 33.)"

A similar statute passed in 1918, codified in Michie's Code of 1942 as section 5214-a, providing for the recordation of men who were drafted or who volunteered during World War One, provided that court clerks "shall be entitled to the fees allowed by law for copying in similar cases." Section 3484 of the Code provides for a fee to a clerk for copying of three cents for every twenty words.

It is my opinion, therefore, that when chapter 31 of the Acts of 1944 provides that the clerk shall be entitled to "the fees allowed by law in similar cases" the Legislature probably intended that the fee should be three cents for each twenty words. I must say that I do not think the statute with respect to the clerk's fee is as clear as it might have been, but I feel that the fee which I have mentioned is probably what the Legislature had in mind.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Act Of General Assembly Consolidating Two Colleges Is Constitutional.

December 22, 1944.

DR. W. C. CAUDILL, 
Member of State Senate, 
Pearsburg, Virginia.

My dear Senator Caudill:

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

"The General Assembly, at its regular session of 1944, passed a bill, Chapter 240, Acts of Assembly of 1944, page 341, consolidating the State Teachers College at Radford with V.P.I. at Blacksburg, Va.

"Will you be kind enough to give your opinion on the constitutionality of this act?"

There is no constitutional provision dealing specifically with the institutions consolidated by Chapter 240 of the Acts of Assembly of 1944. The two institutions were established by the General Assembly and are entirely controlled by that body. It is my opinion that the Act in question does not violate any constitutional provision.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
COLLEGES AND UNIVERSITIES—Powers Of Executive Committee Of Board Of Visitors Of Medical College Of Virginia.

July 17, 1944.

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

My dear Dr. Sanger:

This will acknowledge receipt of your letter of July 17, from which I quote as follows:

"The Federal Works Agency has made a grant to the Medical College of Virginia in the amount of $34,500 to be matched by a like amount by the college for reconditioning and reconstructing, in part, several floors of the Saint Philip Hospital, including equipment, modernization of elevators, etc. This grant stipulates that it must be accepted within ten days by this institution.

"The by-laws of our Board of Visitors provide that its executive committee may perform in the interim between board meetings all duties devolving on the board except four, which have no relation whatever to accepting such a grant as the Federal government has made. I have just talked with Mr. McDowell of the legal department of the Federal Works Agency in Richmond, asking whether under Federal regulations it would be possible for our executive committee to accept this grant rather than the full board. I read him from the by-laws of the board the powers of the executive committee which seemed to satisfy him that this committee has power to act in the matter. He stated, however, that a letter from you furnishing an opinion that the executive committee has the legal authority to act in accepting this grant would end the matter in Washington and would be greatly appreciated. * * *"

You further advise me that the matching State funds have been made available by the Appropriation Act of 1944 (Chapter 407 of the Acts of 1944, at p. 695) and that the expenditure has been approved by the Governor.

Chapter 508 of the Acts of 1916 provides that the Board of Visitors of the Medical College of Virginia shall appoint an executive committee “to perform all such duties as may be required of them by the board and as could be performed by the board during the interim between its meetings.” The by-laws of the Board of Visitors adopted pursuant to the above quoted provision confer upon the executive committee ample authority to accept such a grant as the one to which you refer. It is my opinion, therefore, that the executive committee of the Board of Visitors of the Medical College of Virginia clearly has authority to accept a grant which may be made by the Federal Works Agency such as is described in your letter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Applicant For Reduced Tuition Must Have Been Citizen Of Virginia For One Year.

September 11, 1944.

Mr. Edgar E. Woodward, Treasurer,
Mary Washington College,
Fredericksburg, Virginia.

My dear Mr. Woodward:

I am in receipt of your letter of September 8, with regard to Mrs. Louise Tyler Rixey, who you state married a resident of Virginia on August 19. You
desire my opinion on the question of whether or not, having so married a resident of Virginia, this young lady is entitled to the reduced tuition charges provided for Virginia students at Mary Washington College.

Assuming that Mrs. Rixey's legal domicile follows that of her husband, so that such domicile was established in Virginia as of the date of her marriage, she would still not be entitled to these reduced charges for the reason that section 1003-1-(a) of the Code (Michie, 1942) provides that no person shall be entitled to these reduced charges "unless such person has been a bona fide citizen or resident of Virginia for a period of at least one year prior to admissions * * *

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—State Aid To Matriculate At Howard University; Basis Of Calculation.

Dr. L. H. Foster, President,
Virginia State College,
Petersburg, Virginia.

My dear Dr. Foster:

This is in reply to your letter of November 22, 1944, supplemented by your letter of December 5, 1944, giving additional information necessary for an opinion.

You state that Howard University at Washington, D. C., had written you concerning two cases of veterans who were discharged from the Dental School ASTP who have benefits under Public Law 346, asking the following questions:

"The question has arisen, if the men who are receiving aid from the Veterans Bureau under Public Law 346 should get the out-of-state aid checks which you send to the University.

"If it is the policy of the State of Virginia not to provide out-of-state aid for such men, please advise."

The out-of-state aid sections mentioned are the Acts of 1940, page 60 [Michie's Code §1003-1(b)] where it is provided that the State Board of Education is authorized to pay certain differentials between the costs of local institutions of learning and out-of-state institutions under certain circumstances to either the beneficiary or to the institution itself. Various factors are to be taken into consideration and by the second section of that Act an alternative method of payment is allowed based on the pro rata appropriation per student by the State.

Public Law 346 mentioned above was recently passed by this Congress and is known as the "Service Men's Readjustment Act of 1944" and provides that the administrator of veterans' affairs shall pay to the educational institutions the cost of tuition and certain other fees and the veteran is further entitled to other monetary benefits for board, lodging, etc., provided the annual benefits do not exceed $500 for the school year.

You will note that the payments under the Federal Act for tuition go straight to the educational institution while payments under the Virginia Act may be either to the beneficiary or the educational institution. Howard University should not receive two payments for tuition and should, therefore, return any check from our State Board of Education which duplicates a payment already made or payable by the Federal government.

The single fact that the veteran is a beneficiary under the "Service Men's Readjustment Act of 1944" (Public Law 346) should not necessarily preclude
him from out-of-state aid under the Virginia Law. Under such circumstances the amounts to be given is an administrative matter to be determined by the State Board of Education as applied to the varying facts and factors of each individual case.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Interest Of Member Of Board Of Visitors In Contract Of Institution Leasing Premises Of Members.

Dr. M. L. COMBS, President,
Mary Washington College,
Fredericksburg, Virginia.

My dear Dr. Combs:

I am in receipt of your letter of July 14, in which you state that a recently appointed member of the Board of Visitors of the University of Virginia, which Board is now the governing body of Mary Washington College (Chapter 54 of the Acts of 1944), has a half interest in a building which the College rents. It seems that the original lease was made several years ago, before the appointment of the member in question, and that it is the desire of the Board to continue to rent this building for the use of the College. You inquire whether this member of the Board would be amenable to the provisions of section 4706 of the Code should this lease be continued.

Section 4706 provides in part that, if a member of the board of visitors of any State institution "be interested in any contract of such institution * * * for furnishing supplies or performing any work of said institution, * * * he shall be fined not exceeding five hundred dollars."

In my opinion, the leasing of a building to be used for dormitory space is not a contract "for furnishing supplies or performing any work." It is, therefore, my opinion that the lease to which you refer does not come within the scope of section 4706 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONERS OF REVENUE—Dates For Keeping Office Open.

HONORABLE A. S. HADEN, Clerk,
Circuit Court of Fluvanna County,
Palmyra, Virginia:

My dear Mr. Haden:

I am in receipt of your letter of October 26, in which you ask if the board of supervisors of a county "has the right to require the commissioner of the revenue of that county to keep his office open during certain days in the week."

The only statute that I have been able to locate dealing with the office of the commissioner of the revenue is section 301 of the Tax Code. This section makes it the duty of the board of supervisors to provide an office for the com-
missioner of the revenue, and further provides that the commissioner of the
revenue or one of his deputies shall attend the first and second days of each
regular term of the circuit court and all regular meetings of the board of
supervisors. I know of no statute giving to the board of supervisors the authority
to fix the times at which the commissioner of the revenue shall keep his office
open.

Very sincerely yours,

ABRAM P. STAPLES,

Attorney General.

CONCEALED WEAPONS—Court May Grant State-wide Permit To Carry.

HONORABLE CHAS. R. PURDY, Clerk,
Hustings Court Part II,
Richmond, Virginia.

My dear Mr. Purdy:

This is in reply to your letter of July 28, in which you request my opinion
upon the question whether or not a permit to carry concealed weapons granted
by an order of the Hustings Court of the City of Richmond extends only within
the boundaries of the City, or whether it 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.

CONSTITUTIONAL CONVENTIONS—Eligibility Of Members.

HONORABLE GEORGE W. LAYMAN,
Attorney for the Commonwealth,
New Castle, Virginia.

My dear Senator Layman:

I am in receipt of your letter of March 25, in which you inquire if as
Commonwealth Attorney you would be eligible to serve in the Constitutional
Convention without resigning your office as Commonwealth Attorney.

Of course, the Convention will be the judge of the qualifications of its
members, but, on account of the effect that your election as a member of the
Constitutional Convention may have on your office as Commonwealth Attorney, I
direct your attention to section 2702 of the Code, providing among other things
that no person holding the office of Attorney for the Commonwealth "shall hold any other office, elective or appointive, at the same time," with certain exceptions not pertinent here. The section goes on to provide that, if a person holding the office of Commonwealth Attorney shall be elected or appointed to any other office, his qualification in such office shall thereby vacate his office as Commonwealth Attorney.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONSTITUTIONAL CONVENTIONS—Notices Of Candidacy; Ballots.

March 30, 1945.

MR. JOHN D. CROWLE, JR., Chairman,
Electoral Board City of Staunton,
Masonic Temple,
Staunton, Virginia.

My dear Mr. Crowle:

Replying to your letter of March 30, I beg to advise that the names of those who have filed their notices of candidacy for the office of a member of the Constitutional Convention, pursuant to section 154 of the Code, should be certified to the electoral boards by the clerks of the circuit and corporation courts with whom such notices are filed. The ballots should be caused to be printed by the electoral boards, pursuant to section 155 of the Code, which section also prescribes the form of the ballot. I suggest that the following will comply with the section:

FOR DELEGATE TO THE CONSTITUTIONAL CONVENTION

☐ John Doe
☐ Richard Roe

Where there is more than one candidate, there should be printed in small type immediately below the titles of the office the number of candidates to be voted for; for example, "vote for one."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONTRACTS—Recission And Release By Commonwealth In Cases Based Upon Mistake.

October 4, 1944.

HONORABLE MORTON G. GOODE, Chairman,
State Hospital Board,
309 North 12th Street,
Richmond, 19, Virginia.

My dear Senator Goode:

This is in reply to your letter of September 28, 1944, from which it appears that the Roanoke Painters and Decorators entered into a contract with the Western State Hospital to do certain painting work at the Western State
Hospital for the sum of $36,600.00, in connection with which the contractors gave
a performance bond with adequate surety. The Board finds that the price bid
is inadequate to complete the work and is willing to rescind the contract pro-
vided the contractors lose the amount already expended on the work, estimated
by the Board to be at least $1,000.00 and by the contractors to be about $2500.00.
You request my opinion upon the question of the authority of the Board to
take this action. The Commissioner and the Superintendent of the Hospital, as
well as Mr. Salmons, representing the contractors, have talked with me about
the case. The contractor made the claim that his bid was based on a gross mis-
conception of the full extent of the work involved in painting a large number
of windows due to the necessity of removing some grill work covering the
windows; that he relied on statements made to him in good faith by an agent of
the Hospital which had a material bearing upon the cost of the work but which
turned out to be erroneous with the result that his bid was grossly inadequate. It
seems that there was only one bid on the job.

Whether the contract was entered into under such a misconception by the
parties as the contractor claims is, of course, a question of fact. If it is true, a
court of equity would have jurisdiction to grant him such relief as might be
appropriate. See 19 Am. Jur. p. 74. If the Board agrees that there was such a
mistake, in my opinion, the controversy may be compromised and settled by
the concurrent action of the Chairman of the Hospital Board, the Governor and the

If such a settlement is deemed proper by the Board, the facts as found by
the Board or its representatives showing the mistake to have occurred should be
stated in writing, together with the terms of the proposed settlement.

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

Sincerely,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Taxing of Commonwealth Attorney's Fee For Crimi-
nal and Domestic Relations Cases.

HONORABLE M. A. COGBILL,
Attorney for the Commonwealth,
Chesterfield Courthouse, Virginia,

My dear Mr. Cogbill:

This is in reply to your letter of June 26, from which I quote:

"For information for the Trial Justice and his Clerk, and the under-
signed, I would like your opinion as to the scope of Chapter 327 of the Acts
of the Assembly 1944, wherein it purports, in Section 5, to suggest a fee of
$2.50 for the Attorney for the Commonwealth. The title to the Act seems to
indicate that the Section amended was amended 'so as to provide for taxing
Commonwealth's Attorneys' fees in criminal and juvenile and domestic
relation cases.'"

The amendment to which you refer provides for a fee of two dollars and
fifty cents for the Attorney for the Commonwealth for appearing in criminal
cases before the trial justice or a juvenile and domestic relations court where
he is required by law to appear. However, section 3505 of the Code, which is
the general law on the subject of fees to Attorneys for the Commonwealth,
provides for a fee of five dollars to that officer "for each person prosecuted by
him before any *** justice of his county or city for a misdemeanor which he is
required by law to prosecute ***" The substantial effect, therefore, it seems
to me, of providing for a fee to the Attorney for the Commonwealth in the Act to which you refer, which is amendatory of section 4987-n of the Code, is to reduce the fee of this officer for prosecuting a case before a justice, which he is required by law to prosecute, from five dollars to two dollars and fifty cents.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Political Sub-divisions Of The Commonwealth Not Liable For Writ Taxes.

HONORABLE ROBERT G. BASS, Clerk,
Hustings and Circuit Courts,
Petersburg, Virginia.

My dear Mr. Bass:

Your letter of June 11 addressed to Honorable J. Gordon Bennett, Auditor of Public Accounts, has been referred to this office for reply.

You state that the City of Petersburg institutes a number of suits in your courts and you desire to know whether the writ tax imposed by section 126 of the Tax Code should be assessed and collected in such suits.

This office has expressed the opinion on a number of occasions over a considerable period that section 126 of the Tax Code should not be construed to impose a writ tax in the case of suits instituted by political subdivisions of the State. Furthermore, our Court of Appeals in the very recent case of Pelouze v. City of Richmond, 183 Va. 805 (Advance Sheets) has reached the same conclusion.

It is my opinion, therefore, that you should not collect the writ tax in suits instituted by the City of Petersburg.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


HONORABLE C. STUART WHEATLEY, Clerk,
Corporation Court City of Danville,
Danville, Virginia.

My dear Mr. Wheatley:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has requested me to reply to your letter of July 13 addressed to him. You desire an interpretation of the last sentence of section 6007 of the Code, reading as follows:

"In cities, when the jurors are summoned to attend courts held in such cities, jurors shall only receive one dollar for each day of attendance upon the court without serving upon a jury."

as applied to the following types of cases:

"1. The case in which a juror comes to court a few minutes before it
convenes and is excused from jury duty by the Judge. In such cases it has been our practice to allow the juror no compensation.

"2. Another illustration: the case in which all the jurors summoned attend court, wait around for a while, maybe a few minutes, maybe an hour when it is finally decided that no case will be tried that day, and are then excused for the day. In your opinion is this an instance of 'attendance upon the court without serving upon a jury' and are the jurors in such cases therefore entitled to only $1 fee? In many cases of this sort should the jurors be employed in the cotton mills or on the railroad they lose a day's work by their having gone to court ready to serve on the jury, regardless of the fact that they were not indeed required so to serve.

"3. Another illustration: the case of jurors struck from a panel by peremptory challenge or for cause and then excused for the day due to the fact that there were no further cases to be tried on that day. Are such jurors entitled to $3.50 or $1?

"4. Then a further illustration which simply carries the last one above further in degree: supposing a juror came to court at ten o'clock in the morning, when it convened with a full day of business ahead of it, and such juror gets into the jury box as a member of the panel in each case but is struck from said panel each time by peremptory challenge or for cause and does not, in fact, sit on any of the juries that actually try the cases, but spends the entire day in the courtroom nevertheless. Is this juror entitled to $3.50 or $1?"

In the first case, where a juror is excused from jury duty by the judge before the court convenes, I do not think it can be said that such a juror has been in "attendance upon the court" and I, therefore, am of opinion that the practice you have been following of allowing no compensation in such a case is correct.

In the second case, however, the juror is actually in "attendance upon the court" although he does not serve upon a jury. This it seems to me is the very type of case that the Legislature had in mind in inserting the provision in question in section 6007. In my opinion, therefore, in this class of case the juror is only entitled to $1, although I can see how in some cases it would result in a hardship.

In the third and fourth cases I am likewise of the opinion that the jurors who have been struck from the panel by peremptory challenges have not served "upon a jury," although they have unquestionably been in "attendance upon the court." A jury for the trial of the case has not been formed until all challenges, peremptory and otherwise, have been made. It seems clear to me, therefore, that the jurors who have been struck from the panel by peremptory challenges are only entitled under the quoted provision to a fee of $1 per day.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Disposition Of Collection Of Old Accounts.

September 27, 1944.

HONORABLE JENNINGS L. LOONEY, Clerk,
Circuit Court of Buchanan County,
Grundy, Virginia.

My dear Mr. Looney:

Honorable L. McCarthy Downs, Auditor of Public Accounts, has referred to this office for reply your letter of September 23, in which you state:
"I recently collected a fine and cost tax against a certain person in the year 1921, and also another fine and cost taxed against the same person during the year 1930, and this collection included the Clerk's cost, Commonwealth Attorney's fee, Sheriff's fee, witness cost, as well as the fine, and both fines and costs were assessed against the party for violation of the prohibition law.

"If it is not asking too much, I would appreciate your advice, if you are able to give it to me without much trouble, as to the proper distribution of the clerk's fee, Commonwealth Attorney's fee, and Sheriff's fee collected in these cases."

As I understand the law as it existed during the years to which you refer, if the defendant or prosecutor did not pay the fees of the Clerk, Commonwealth Attorney and Sheriff, they were paid upon proper certification out of the State treasury. I assume, therefore, that the fees to which you refer were paid to the officers involved out of the State treasury. Upon this assumption it is my opinion that the fees which you have now collected should be paid into the State treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Arrests Without A Warrant; Segregation Laws.

April 20, 1945.

ROBERT A. HUTCHISON, Esq.,
Attorney for the Town of Manassas,
Manassas, Virginia.

My dear Mr. Hutchison:

This is in reply to your letter of April 18, in which you state:

"As attorney for the Town of Manassas, I have advised the town police that unless a misdemeanor is committed in the presence of an officer, a lawful arrest may be made only on a warrant; Muscoe's Case, 86 Va. 443; Bourne v. Richardson, 133 Va. 441; Crosswhite v. Barnes, 139 Va. 471.

"The statute regulating the separation of white from colored passengers on steam cars, (differing somewhat from that relative to electric cars, steamboats and busses), provides that the conductor may put off his train any passenger who fails to comply. I find no other penalty attaches to the passenger (on steam cars). The duty of enforcing the statute is on the company, manager or conductor."

You then ask:

"Will you please advise me if any town policeman or sheriff has any right to board a train and eject a passenger who is not disorderly, or violating any law other than failure to occupy the designated place assigned him. And whether such passenger on a steam car can be punished, other than by ejection."

Let me say first that I concur in your advice to the town police that they should not make an arrest for misdemeanors without a warrant unless the offense is committed in the officer's presence.

In reply to your specific question, I call your attention to section 3983 of the Code, a part of a chapter 155 dealing with railroads and railroad companies, which makes a passenger who refuses to move after certain conditions have been complied with guilty of a misdemeanor whether the carrier be propelled by "steam or electricity, or other motive power."
Under these circumstances, if a town policeman were invited on the train and if thereafter, in his presence, the rule of the carrier were explained to the passenger who nevertheless refused to move, the policeman would have the right to arrest the offender without a warrant. It would then be the duty of the officer to take the offender immediately before a justice or magistrate and swear out a warrant charging him with a violation of section 3983 of the Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Offenses Mala Prohibita Do Not Require Knowledge Or Intent.

February 21, 1945.

MR. R. D. THOMPSON, Supervisor,
Division of Markets,
1030 State Office Building,
Richmond, Virginia.

My dear Mr. Thompson:

This is in reply to your letter of February 19, in which you ask my opinion on the following question: "In the enforcement of Chapter 62 of Michie's Code of Virginia, is it necessary to prove that an operator who sells commodities short weight knew of such short weight or intended to defraud?"

Section 1485(23) of this chapter provides punishment for any person "*** who, by himself or by his servant or agent, or as a servant or agent of another, *** shall sell or offer or expose for sale less than the quantity he represents, ***"

It is customary to divide crimes into two classes according to the nature of the act—offenses mala in se and mala prohibita. An offense malum in se is one which is naturally evil, while an offense malum prohibitum is wrong because made so by statute. In enacting statutes making acts criminal which were not previously punishable, the legislature may require that the act be done knowingly or it may make the act punishable without respect to knowledge or intent. In the latter case, the offense is purely malum prohibitum, and ignorance, mistake, or good faith become immaterial so far as guilt is concerned, although they are proper factors to be considered in determining the amount of punishment to be fixed.

The above distinction has been frequently recognized in Virginia. See for example Bracy v. Commonwealth, 119 Va. 867, 89 S. E. 144.

The Virginia statute above cited does not require knowledge or intent to defraud.

It is my opinion, therefore, that where an operator sells commodities short weight, he is guilty of a violation of the statute, and that mistake and ignorance are not defenses.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CRIMINAL LAW—Grade Of Offense; Felony Or Misdemeanor.

July 24, 1944.

Mr. Allen S. Yeatman,
Templeton Cross Roads,
Virginia.

My dear Mr. Yeatman:

This is in reply to your letter of July 19, 1944, in which you enclosed a copy of a judgment of the Circuit Court of your county whereby Aaron Dickerson was convicted of "unlawful maiming." The verdict of the jury reads as follows:

"We, the Jury, upon the issue joined find the accused guilty of unlawful maiming as charged in the within indictment and with the intent as charged and fix his punishment at six months in jail and a fine of $100."

You have asked me whether this is a conviction for felony or misdemeanor. The answer will depend upon a reading of the indictment. If the indictment charged that the wound or bodily injury inflicted was done with intent to maim, disfigure, disable or kill, then an offense under §4402 of the Code was described. The section reads as follows:

"If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars."

The first sentence in the section punishes such acts, if done "maliciously," and the second sentence, if done "unlawfully." Both constitute felonies, the definition of a felony being

"*** Such offenses as are punishable with death or confinement in the penitentiary are felonies; *** (Code §4758.)

The cases annotated under this section show that the offense is not measured by what punishment was inflicted in the particular case, but rather by what punishment could have been inflicted for the offense of which the accused was found guilty.

An unlawful maiming, if done with any of the intents set out in §4402, would constitute a felony because it is punishable by confinement in the penitentiary. The fact that the jury in the particular case specified a jail sentence is immaterial.

If upon a reading of the indictment, you find that an offense was adequately charged under §4402 of the Code, then the judgment in the case of Aaron Dickerson is for a felony conviction.

Very sincerely yours,

Abram P. Staples,
Attorney General.
CRIMINAL LAW—Contributing To Disruption Of Marital Relations.

HONORABLE E. E. JOHNSON,
Acting Trial Justice,
Culpeper, Virginia.

My dear Mr. Johnson:

I acknowledge receipt of your letter of August 15, 1944, in which you make reference to section 1950, sub-section 5 of the Code, and then ask my opinion on whether a person may be convicted for knowingly contributing to the disruption of marital relations.

I have expressed the opinion on a former occasion in answer to a similar request that sub-sections 5 or sections 1950 and 1953e of the Code 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 bill (House Bill No. 170) was introduced at the 1944 Session of the General Assembly, making such acts a misdemeanor, but it was not enacted.

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—Gambling: Operation Of Pool Room Who Permits Gambling.

HONORABLE JOHN W. RICE,
Trial Justice,
Winchester, Virginia.

My dear Mr. Rice:

This is in reply to your letter of May 22, in which you make the following inquiry:

"I would like very much to have a ruling from you as to whether or not the owner and operator of a pool room who permits gambling on a game of pool in his place of business can be prosecuted."

I concur in your opinion that section 4676 of Michie's Code has no application to such a situation. Whether or not the establishment referred to is a "house of entertainment," so that section 4688 of the Code applies, is, of course, a matter to be determined under the facts of the particular case. In this connection I refer you to Linkous v. Commonwealth, 9 Leigh 608, and Talbott v. Southern Seminary, 131 Va. 576, 109 S. E. 44.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Sale Of Iodine And Lysol By Grocery Stores Illegal.

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

My dear Mr. Butler:

I am in receipt of your letter of March 29, in which you ask "whether or not it is legal for grocery or food stores to sell iodine or lysol."

I am informed by the Secretary of the State Board of Pharmacy that both iodine and lysol are poisons. Upon this assumption, I am of opinion that, in view of the provisions of section 1682 of the Code, these products may not be sold by regular merchants such as grocery and food stores unless such merchants operate registered pharmacies. Section 1681 of the Code permits merchants and retail dealers to sell certain drug products, but iodine and lysol are not included.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Larceny: Destruction Of Growing Tobacco Plants.

HONORABLE W. R. BROADDUS, Jr.,
Commonwealth's Attorney,
Martinsville, Virginia.

My dear Mr. Broaddus:

This is in reply to your letter of June 27, in which you ask my opinion as
to whether a person may be prosecuted for a felony who unlawfully goes on another man's lands and unlawfully pulls up and destroys tobacco plants whose actual current market value as such, without regard to their prospective speculative value as a crop, exceeds fifty dollars.

The only theory upon which such a prosecution might be had is that the accused had committed grand larceny. In my opinion such a prosecution might be sustained on the following reasoning. Young tobacco plants, being raised for the purposes of transplanting, could be treated as personality. 15 Am. Jur. 195, section 3, and 25 C. J. S. 3, section 1b, particularly the case in footnote 6 on nursery stock. Also the requirement of a taking lucrè causa has been repudiated in Virginia; Jordan v. Commonwealth, 25 Gratt. (66 Va.) 943; Butts v. Commonwealth, 145 Va. 800; therefore, the destruction of the plants with intent to deprive the owner of them would satisfy the requirement of animus furandi.

Section 4482a of the Code makes it a misdemeanor for a person to unlawfully pull up any plant, etc., and the accused may be prosecuted, of course, under that statute, but, in my opinion, it does not afford adequate protection against wholesale vandalism of property worth hundreds and possibly thousands of dollars. Certainly an accused who destroys property over the value of fifty dollars should be prosecuted for grand larceny if possible irrespective of the technical characteristics of the property. The situation in the case you mention is particularly aggravated because not only has the owner's property been destroyed in its present value, but also his prospective crop to be derived therefrom which would be worth many times more.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Indictment For Larceny: Election.

HONORABLE JULIUS GOODMAN,
Attorney for the Commonwealth,
Christiansburg, Virginia.

My dear Mr. Goodman:

This is in reply to your letter of September 20, 1944, in which you enclosed a copy of an indictment returned against an employee of the Commonwealth who is accused under section 4451 of the Code of converting to his own use the proceeds of a $2,000 check given to him by a purchaser of a certain chattel owned by the Commonwealth, which chattel the employee was authorized to sell on behalf of the Commonwealth.

You have called my attention to the last sentence of the Code section which provides:

"** On the trial of every indictment for larceny, however, the defendant, if he demands it, shall be entitled to a statement in writing from the attorney for the Commonwealth of what statute he intends to rely upon to ask for conviction."

and then you then ask my opinion as to what section you should rely on if the question is raised.

Section 4431 provides:

"If any person wrongfully and fraudulently use, dispose of, conceal, or embezzle any money, *** check, *** which he shall have received for *** his employer, *** he shall be deemed guilty of larceny thereof, and may be indicted as for simple larceny thereof, ***"

September 21, 1944.
In *Vaughan* vs. *Lytton*, 126 Va. 671, 101 S. E. 865, the following definition of simple larceny is given:

"Simple larceny, as defined by Mr. Minor in his Synopsis of Criminal Law, page 98, is: 'the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.'"

Simple larceny is made punishable in Virginia under section 4440 of the Code, the appropriate portion of which in the present case reading as follows:

"** If any person commit simple larceny not from the person of another of goods and chattels he shall if they are of the value of fifty dollars or more be deemed guilty of grand larceny and be confined in the penitentiary not less than one nor more than ten years; **"

In light of the foregoing, it is my opinion that the indictment charges an offense under section 4440 of the Code, and that, therefore, the election should be made to proceed under that section.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Lotteries: Pari-Mutual Betting.

HONORABLE WILLIAM MCL. FERGUSON,
Member House of Delegates,
Newport News, Virginia.

My dear Mr. Ferguson:

This is in reply to your inquiry of June 23, 1945, in which you state the following:

"I would greatly appreciate your opinion whether it would be legally objectionable to have a general law, local in application to Warwick County, permitting pari-mutual betting at horse races, said proposed act to provide that the tax or revenue derived therefrom by the county to be applied to the general fund of the county."

As you know, Section 60 of the Constitution of Virginia provides as follows:

"No lottery shall hereafter be authorized by law; and the buying, selling, or transferring of tickets or chances in any lottery shall be prohibited."

It does not appear that our Supreme Court of Appeals has construed whether pari-mutual betting at horse races is a lottery or not. The majority of the decisions in other states do not consider such betting to constitute a lottery. *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S. E. (2d) 987, 994; *Panas v. Texas Ass'n*, 80 S. W., (2d) 1020, 1024 (Tex. Civ. App.); *Multnomah County Fair Ass'n*. v. *Langley*, 140 Or. 172, 13 P. (2d) 354, 358; *People v. Monroe*, 349 Ill. 270, 182 N. E. 439, 411; *Engle v. State*, 53 Ariz. 458, 90 P. (2d) 988, 992-3.

There is, however, a minority holding such to be a lottery. *State v. Ak-Sar-Ben Exposition Co.*, 121 Neb. 248, 236 N. W. 736, 738; *Streeper v. Auditorium Kennel Club*, 13 N. J. Misc. 584, 180 A. 212.
REPORT OF THE ATTORNEY GENERAL

Our Court of Appeals has given a very broad definition of a lottery, stating that any form of reward in which the element of chance enters is a lottery. Maughs v. Commonwealth, 157 Va. 415, 161 S. E. 242; Abdella v. Commonwealth, 174 Va. 450, 5 S. E. (2d) 495; Motley v. Commonwealth, 177 Va. 306, 14 S. E. (2d) 28.

In view of the conflict of authority in the decisions in other states and of the extremely broad interpretation of what constitutes a lottery by our Court of Appeals in the mentioned cases, I am unable to reach a conclusion that the validity of such an act would not be subject to grave doubt.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Lotteries: War Bond Drawings.

April 10, 1945.

HONORABLE G. EDMOND MASSIE,
Member of House of Delegates,
Richmond, Virginia.

My dear Mr. Massie:

This is in reply to your letter of April 6, in which you ask for my opinion on the following question:

"I have been requested by certain retailers who are interested in pushing the coming drive for War Bonds to ascertain from you if it will be legal and permissible for them in the sale of War Bonds to issue tickets numbered in duplicate, one end of which will be retained by the bond buyer and the other deposited in a receptacle from which a number will be drawn and a prize of a War Bond be awarded the holder of the duplicate number."

Section 60 of the Constitution of Virginia provides that "the buying, selling, or transferring of tickets or chances in any lottery shall be prohibited." In obedience to this mandate, the General Assembly in section 4693 of the Code has said that:

"If any person set up or promote, or be concerned in managing or drawing a lottery or raffle, for money or other thing of value, or knowingly permit such lottery in any house under his control, or knowingly permit the sale in such house of any chance or ticket in a lottery, or any writing, certificate, bill, token, or other device purporting or intended to guarantee or assure to any person, or entitle him to a prize or share of, or interest in a prize to be drawn in a lottery, he shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars."

Richmond, Virginia.

In view of the quoted constitutional and statutory provisions, the question presented by your inquiry is whether or not the proposed plan constitutes a lottery.

Our Supreme Court of Appeals in Maughs v. Porter, 157 Va. 415, dealt with the question somewhat at length. In that case it was advertised that a free automobile would be given to one of the persons attending an auction sale, the winner to be determined by chance. The purpose of this scheme was to attract bidders to the auction sale and as an inducement to attend the sale each white person over sixteen years of age who did attend, whether he bought or not, was given a chance to win the automobile. The Court held that this scheme was a lottery.
In discussing a lottery the Court said that the essential elements thereof are the distribution of money or property, chance, and a valuable consideration paid, or agreed to be paid, for the chance. All of these elements appear to be present in the plan you describe.

In the course of the opinion in Maughs v. Porter, supra, former Chief Justice Prentis cited with approval Rountree v. Ingle, 94 S. C. 231, 77 S. E. 931, a case in which these facts were shown:

"A merchant gave cards to his customers, bearing numbers, for goods purchased, placing a number corresponding to each card in a box, drawing out one and giving to the holder of the corresponding numbered card a range worth $65 as a prize."

This state of facts was held to constitute a lottery, and you will observe that, insofar as the plan is concerned, there is practically no difference between that presented by your letter and the one followed by the South Carolina merchant.

On account of the high purpose which it is desired to accomplish, it is with much reluctance that I am constrained to advise you that our Supreme Court of Appeals has held that such a plan as the one proposed by the retailers for whom you are writing is illegal.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Slot Machine Law; Interpretation Of.

HONORABLE COLGATE W. DARDEN, JR.,
Governor of Virginia,
State Capitol,
Richmond, Virginia:

My dear Governor Darden:

This is in reply to your recent letter, in which you enclosed a letter from Mr. T. Nelson Parker, and in which you request my opinion on several matters set out in Mr. Parker’s letter pertaining to Section 4694-a of the Code of Virginia (Slot Machine Law). I will answer the questions in order.

1. In my opinion a pin-ball machine that gives free plays, or extra balls to be used in free plays, is within the class of machines prohibited in Section 4694-a of the Code. Subsection 2-b of the Act in question in defining an illegal machine says in part:

"Any machine, apparatus, or device is a slot machine or device within the provisions of this section if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that * * * the user may receive * * * or the user may secure additional chances or rights to use such machine * * *"

It is clear, in my opinion, that a machine which, under certain conditions, gives the player an extra ball for free play is within the prohibitions of the language above quoted.

2. Your second inquiry raises the question of upon whom is the burden of proof to show legality or illegality of possession of slot machines where the possessor is a dealer duly licensed to store such machine for sale outside the State. The statute, Section 4694a of the Code begins as follows:

"It is unlawful for any person, firm, or corporation, other than a duly licensed dealer in slot machines bona fide storing such machines in bulk for
sale outside the State only and in jurisdictions where the operation of such machines is not forbidden by law ** *

The statute then goes on to define the type of machine made unlawful in Virginia and declares them to be a public nuisance and subject to confiscation.

As a general principle "one who relies on an exception to a general rule has the burden of proving that the case falls within the exception, unless the non-existence of the exception is made a condition of the application of the rule." 31 C. J. S., p. 712, "Evidence" §104.

In view of the fact that the phraseology of Section 4694a of the Code does not in terms make such licensed dealers an exception to the rule, it is arguable that the statute has no application to such duly licensed dealers and that the burden would be on the Commonwealth from the outset to prove that the defendant, even though he be licensed, was not in fact storing the machines bona fide for sale outside the State.

On the other hand, if it be assumed that the statute merely makes such persons an exception, and that therefore the burden is upon them to prove that they are within the exception, it is my opinion that they would make out a prima facie defense by simply exhibiting their license. The fifth paragraph of Section 198 of the Tax Code provides a tax of $1,000 for persons engaged in the selling and leasing of slot machines. This so-called "Operator's Tax" covers many activities, all of which would, of course, have to be lawful, and one of the privileges to be enjoyed thereunder would be to store in bulk for bona fide sale outside of Virginia machines which would be illegal if used in Virginia. Therefore, in my opinion, if the defendant produced such a license he would have established a prima facie case of lawful storage and the burden of going forward with the evidence would shift to the Commonwealth to show that the machines seized were not held in fact pursuant to the license under which the claim is being asserted.

3. Your third question is whether the failure of a machine to carry a State tax stamp would make it subject to confiscation.

Section 4694-a makes subject to confiscation only those machines which are illegal per se as described and defined therein. If the machine falls within the type there prohibited, it would be subject to confiscation whether it carried a State tax stamp or not.

On the other hand, if the machine is not of a type declared to be illegal per se under Section 4694a, but is of a lawful variety, it is subject to the use tax specified in the first paragraph of Section 198 of the Tax Code. If the necessary use tax stamp has not been purchased for such machine, paragraph six of Section 198 of the Tax Code provides that, in addition to a fine, "such machine or other device shall become forfeited to the Commonwealth."

This tax is a "use tax" and a machine held in storage, by a licensed operator for bona fide sale outside the State, would not be subject to such tax and, therefore, in my opinion, would not be subject to confiscation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Slot Machines: Admissibility Of Evidence Obtained By "Under Cover Detectives."

Honorable T. Nelson Parker,
Attorney-at-law,
Mutual Building,
Richmond, Virginia.

My dear Mr. Parker:

This is in reply to your letter of February 19, in which you ask my opinion
on two questions involving the enforcement of the Slot Machine Law in Virginia.
For convenience I quote from your letter as follows:

"I would like to know first: If an investigator plays machines that are
open for play to the general public for the purpose of obtaining evidence of
illegal operations whether he is guilty of a violation of any law against
gambling or the slot machine law itself; second: If the machines are being
openly played by the general public and the investigator plays them in order
to obtain evidence would this be a case of entrapment and the evidence be
inadmissible in a trial of the operator."

It is my opinion that the investigator is not guilty of any offense, provided
that his motive in playing the slot machine is solely to uncover evidence to be
used in prosecution of the operator of the machine; and it is my further
opinion that the evidence thus obtained is admissible at the trial of the operator.
The investigator is what is termed "a feigned accomplice," i.e., one whose
intent is not to conceal and cover but to disclose the violation of the law, and
who, because of this laudable intent, is not a punishable accomplice.
The Supreme Court of Appeals of Virginia, in line with the overwhelming
weight of authority in this country, has so held in the cases involving the pur-
chase of illegal whiskey by so-called "under-cover men," detectives employed for
683; Harris v. Commonwealth, 174 Va. 486, 6 S. E. (2d) 678, which draw a sharp
distinction between an investigator inducing an otherwise innocent person to
commit a crime and one who merely invites the exposure of that which already
exists. The doctrine is of general application throughout the country in numer-
ous types of crime, e.g., liquor laws, theft, bribery, extortion, narcotic laws, sex
crimes, gambling, etc.—a slot machine case being found in Clement v. Belanger,
105 N. Y. S. 537.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

DIVISION OF MARKETS—Regulation of Coal Weights.

Mr. M. A. HUBBARD, Supervisor,
Division of Markets,
1030 State Office Building,
Richmond, 19, Virginia.

My dear Mr. Hubbard:

This is in reply to your inquiry of July 5, concerning your authority over the
weights of coal shipments.

Under section 1485(16 and 17) of the Code, specific regulations for the retail
delivery of coal from dealers to consumer have been set up. In addition to those
provisions, section 1485(7) gives broad general powers to county and city
scalers:

"When not otherwise provided by law the county or city scaler shall
have the power and it shall be his duty within his county or city to inspect,
test, try and ascertain if they are correct, all weights, measures and weigh-
ing or measuring devices kept, offered, or exposed for sale, sold, or used or
employed within the county or city by any proprietor, agent, lessee, or em-
ployee in proving the size, quantity, area, or measurement of quantities, things,
produce or articles for distribution or consumption purchased or offered or
submitted by such person or persons for sale, hire, or award or in computing
any charge for services rendered on the basis of weight or measure, or in determinining weight or measure when a charge is made for such determination; and he shall have the power to and shall from time to time weigh or measure and inspect packages or amounts of commodities of whatsoever kind, kept for the purpose of sale, offered or exposed for sale, or sold in the process of delivery, in order to determine whether the same contain the amounts represented, and whether they be kept, offered, or exposed for sale or sold in a manner in accordance with law; he shall at least twice a year and as much oftener as he may deem necessary, see that all weights, measures and weighing or measuring devices used in the county or city are correct. He may for the purpose above mentioned, and in the general performance of his official duties, enter and go into or upon, and without formal warrant, any stand, place, building, or premises, or stop any vendor, peddler, junk dealer, coal wagon, ice wagon, delivery wagon, or any person whomsoever, and require him, if necessary, to proceed to some place which the sealer may specify, for the purpose of making the proper tests. Whenever the county or city sealer finds a violation of the statutes, specifications, tolerances or regulations relating to weights and measures, he shall cause the violator to be prosecuted."

The criminal enforcement of the above is found in section 1485(23).

I note that your letter states that there are railroad track scales in most of our principal cities which would make the testing permitted under section 1485(7) above practical.

It is my opinion that reasonable checkweighing may be required on cars delivered to points within the State.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voting: Type Of Return Envelope To Be Used.

HONORABLE CHARLES H. FUNK,
Commonwealth's Attorney,
Graybeal Building,
Marion, Virginia.

My dear Mr. Funk:

You inquire whether or not, in my opinion, it would be lawful to have a flap of the type enclosed with your letter pasted on the back of an absentee ballot being returned to the registrar, the flap having printed on it the same printed matter as that contained on the back of the envelope. The reason given for the use of such a flap is that the official envelopes furnished by the election officials for the return of the ballot "contain a totally insufficient amount of mucilage to the extent that they can be easily opened. For that reason many absentee voters have absolutely refused to vote by mail although they are legitimately out of the precinct on election day."

Section 205 of the Code provides that the registrar shall furnish the applicant for an absentee ballot with "An envelope for rescaling the marked ballot, on which is printed the 'voucher,' form of which is hereinafter provided." The voucher form appears in section 206.

In view of this specific provision of section 205, I do not feel that I would be justified in stating that a flap could be used to cover same, even though the same printed matter might be contained on it. It is possible that this might open up some other avenue of fraud or uncertainty in connection with the
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ballot. It seems to me that the objection you raise could be overcome by the voter himself applying additional mucilage to the envelope so as to render it more secure and free from being tampered with. I believe that this would be a much more regular and orderly method of meeting the situation. As requested, I am returning herewith the flap which you sent me with your letter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots: Number To Be Printed.

HONORABLE JULIUS GOODMAN,
Attorney for the Commonwealth,
Christiansburg, Virginia.

My dear Mr. Goodman:

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

"The County Electoral Board of Montgomery County has asked me to ascertain whether or not they would be required to have printed 12,000 voting ballots for the coming Constitutional Convention election, to be held April 24, since the statute states that there should be twice the amount of ballots printed as there are regular qualified voters; however, there will not be more than 3,000 ballots cast, as indicated by the last election, and it would seem that certainly 6,000 ballots would be sufficient, as the other would be merely a waste and expense.

"I trust that you will let me have your opinion as to this at once, so that I may advise the County Electoral Board."

Section 155 of the Code provides that the electoral board shall "cause to be printed a number of ballots equal to twice the entire registered vote of the said county or city." In view of this mandatory provision of the statute, I cannot advise you that the electoral board may cause to be printed a number of ballots less than the number specified by such statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots: Two Ballot Boxes For Independent But Simultaneous Elections Not Necessary.

HONORABLE J. HAMILTON HENING,
Clerk of the Circuit Court,
Hopewell, Virginia.

My dear Mr. Hening:

I am in receipt of your letter of October 30, in which you ask the following questions:

"Please advise at your earliest convenience whether it will be necessary to have two ballot boxes in each polling place at the election November 7, 1944, to take care of the regular election and the referendum on Constitution Amendments."
Insofar as I know there is no statute which requires the use of a separate ballot box for use in the referendum on the proposed amendments to the Constitution. However, I think that a separate ballot box may be used if it seems in the opinion of the electoral board to be desirable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballots: Effect Of Partial Mutilation Of Ballot.

HONORABLE LEONARD G. MUSE
306 Boxley Building,
Roanoke 4, Virginia.

February 26, 1945.

My dear Senator Muse:

This is in reply to your letter of February 21, in which you ask this question:

"Some of my constituents have asked as to the effect of their striking out the informative statement on the Constitutional Convention ballot. As I am unable to answer this, I would appreciate your giving me an opinion."

I presume that by "striking out" you mean drawing a line or lines through the "Informatory Statement" which is contained on the ballot as provided by the Act (Chapter 1 of the Acts of the Extra Session of 1944).

Section 3 of the Act prescribing the contents of the ballot provides that the question to be voted on is—

"'Shall there be a convention to revise the Constitution and amend the same?"

"[ ] For the convention.

"[ ] Against the convention.'"

Section 4 of the Act reads as follows:

"A ballot deposited with a cross mark, a line or check mark placed in the square preceding the words 'For the convention' shall be a vote for the convention, and a ballot deposited with a cross mark, line or check mark preceding the words 'Against the convention' shall be a vote against the convention."

It is my opinion that where a voter marks his ballot as prescribed in section 4 and in addition strikes out the "Informatory Statement," such action with regard to the "Informatory Statement" is mere surplusage and would have no effect on the validity of the ballot which should be counted as for or against the convention depending on the square in which the voter's mark is placed. The sole purpose of the "Informatory Statement" is to furnish information to the voter as to the effect of his vote and if the voter chooses to mark out this statement I can think of no good reason why such action should affect the validity of the ballot or cause his vote to be interpreted in any manner other than that set out in section 4.

Unquestionably, if the voter should place such distinguishing marks on his ballot as would have the effect of destroying the secrecy thereof, the ballot should not be counted at all, but this is true of any election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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ELECTIONS—Ballots: Destruction Of Unused Ballots.

October 3, 1944.

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

My dear Governor Darden:

I am in receipt of your letter of October 2, in which you enclose a communication from C. H. Luebbert, Executive Secretary for Virginia of the General Salvage Branch of the Salvage Division, War Production Board, in which Mr. Luebbert states:

"It has been brought to our attention that a State law prescribes the burning of all unused election ballots before any count is made. It is our thought that over the State the quantity of unused ballots must run into a large volume. If such is the case, would it not be possible to have these ballots turned into salvage committees for their waste paper collection instead of burning them? The need of waste paper continues critical and we know that in many states ballots both used and unused are being put in the paper collection. They could, of course, be torn or destroyed to the extent whereby they would have no further value nor could they be used as a ballot.

"If, in your opinion, the amount of paper that could be collected from this source over the State would run into a large poundage, we would appreciate your suggestion as to the possibility of salvaging such ballots."

As to unused ballots at each voting place, section 159 of the Code provides that “all ballots remaining unused at the close of the polls shall be carefully destroyed before the (ballot) box is opened.” As to ballots which are voted, they are, as you know, returned to the offices of the clerks of the circuit and corporation courts and required to be safely kept by the respective clerks for twelve months, at the end of which time the clerks may “destroy such . . . ballots upon an order of their respective courts to such effect.” See sections 180 and 181 of the Code of Virginia.

In my opinion the word “destroy” as it appears in the section of the Code from which I have quoted does not necessarily mean “burn.” It would accomplish the object of the statutes, in my opinion, if those in charge of the unused and used ballots would so mutilate them by tearing or otherwise that they could not be used as ballots or for any other improper purpose. If this is done, I see no reason why the “destroyed” ballots may not be turned over to the salvage committees which are collecting waste paper to assist in the war effort. Of course, the provisions of the sections to which I have referred must be carried out, that is to say, the unused ballots must be destroyed before the ballot box is opened and the used ballots must be kept for at least a year by the clerks of the courts before they are destroyed.

I need not remind you that the officers having charge of both the used and the unused ballots should be carefully and specifically instructed with reference to their effective destruction before such ballots are turned over to the salvage committees.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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ELECTIONS—Candidates: When Notice Of Candidacy To Be Filed In Special Election.

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

My dear Mr. Whitehead:

I am just in receipt of your letter of January 29, inquiring when notice of candidacy for the House of Delegates in a special election to be held in Pittsylvania county on March 6 should be filed.

The answer to your inquiry is to be found in section 154 of the Code, as amended by chapter 395 of the Acts of 1944. It is therein provided that a notice of candidacy shall be filed “at least thirty days before the election if it be a special election, or within five days after the issuance of any writ of election or order calling the special election to be held less than thirty-five days after the issuance of the writ or order ***” The writ of election in this case was issued on January 29 and it would, therefore, appear that the notice of candidacy should be filed with the clerk of the Circuit Court of Pittsylvania county within five days after that date. You are, of course, familiar with the other provisions of the section to the effect that the notice of candidacy should be accompanied by a petition signed by fifty qualified voters of the county.

Since the time is so short, I do not presume it would be practicable to have a convention for the nomination of a candidate, but, if a convention is held, the name of the candidate nominated is to be certified to the clerk of the Circuit Court by the chairman of the Party and no petition is necessary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: No Such Office As Member Of House Of Representatives At Large.

HONORABLE RALPH E. WILKINS,
Secretary of the Commonwealth,
State Capitol,
Richmond 12, Virginia.

My dear Mr. Wilkins:

After giving careful thought and study to the request of Henry L. Saunders that his name be certified by the Secretary of the Commonwealth to the various electoral boards as a candidate for member of the House of Representatives from the State of Virginia at large, I beg to advise that under the laws of this State there is no such office provided for, and no election is being held for that position. For this reason, I am of the opinion that you should notify Mr. Saunders that you are without authority to so certify his name as such a candidate.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Electoral Board: Compensation; How Calculated.

Mr. W. T. Hicks, Secretary,
Carroll County Electoral Board,
Hillsville, Virginia.

My dear Mr. Hicks:

I am in receipt of your letter of January 29, from which I quote as follows:

"I would appreciate your giving me your interpretation as to section 89 of the Code of Virginia, relative to the mileage of the members of the electoral board.

"The part of the section that I would like your opinion on is where it states the members of the board shall receive the same mileage as is now paid to jurors. The jurors are limited to 40 miles per day, but when I am delivering ballots or other official papers to the judges and registrars throughout the county I will travel perhaps 100 miles or more per day. Should I be allowed pay for the entire mileage or for the limit of 40 miles?"

In my opinion, the provision of section 89 of the Code to the effect that members of a county electoral board shall receive "the same mileage as is now paid to jurors" relates only to the rate per mile which is allowed, and that the limitation as to the total amount allowed in any one day is not applicable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Poll Tax; In General: Only Those Taxes Assessable For Three Years Prior To Election Must Be Paid.

Mr. T. K. Lusby,
Judge of Election,
Lee Hall, Virginia.

My dear Mr. Lusby:

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

"Some individuals have moved into Warwick County from states where the requirement that capitation tax for three previous years be paid does not parallel the Virginia law. I understand that some individuals have moved into the county from states where a law of this nature is not effective. Under Virginia law can an individual who moves into Virginia from a state where capitation tax was assessable against him, and after establishing residence in Virginia for one year, qualify to vote? If this individual is qualified to vote, will it be mandatory that a receipt be demonstrated by this individual as indicative of the fact that he had paid his capitation tax in the state of previous residence, or may we accept his word as a matter of fact? I assume that there is no question relative to the eligibility of a person to vote who moves into Warwick County, establishes proper residence, from a state where the capitation tax was not assessed or assessable against him."

The Constitution and laws of the former state of residence of a person who is now a resident of Virginia have no bearing whatsoever on the right
of such person to vote in Virginia, this right being determined by the Constitution and laws of this State. Therefore, when a person moves into Virginia it is immaterial whether or not he has paid a capitation tax in the State from which he moved. Insofar as his right to vote in Virginia is affected by the payment of a capitation tax, he is only required to pay such taxes as were assessed or assessable against him under the laws of Virginia for the three years next preceding the year in which he offers to register and vote. For example, if a person has only been a resident of Virginia for the years 1942, 1943 and 1944, it is only necessary, in order to be enabled to vote, that he pay his capitation tax for 1942 and 1943, these being the only capitation taxes assessed or assessable against him for the three years next preceding that in which he offers to register and vote.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Poll Taxes: Last Day For Payment; Computation Of.

HONORABLE WILLIAM A. ADAIR,
Treasurer of Rockbridge County,
Lexington, Virginia.

My dear Mr. Adair:

I have your letter with reference to determining what day is the last day upon which capitation taxes can be paid six months prior to June 12.

This office has for many years ruled that the day on which the tax is paid is counted as one day of the six months. As an illustration, a tax paid on the 1st day of January would be paid one month prior to the 1st day of February. Upon this same principle, if the election falls on the 10th day of June, a tax paid on the 10th day of December is regarded as being paid six months prior thereto. This year the election falls on June 12, and, therefore, the 12th day of December is, in my opinion, the last day on which the tax can be paid six months prior to election.

This same rule has been uniformly followed in determining the last day on which a notice can be filed which is required to be filed sixty or ninety days before an election. The election day is not counted, but the day on which the notice may be filed is included as one of the sixty or ninety days.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Poll Tax: Evidence Of Payment By Exhibiting Tax Receipts Or Treasurer's Certificate.

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

My dear Mr. Kellam:

I am in receipt of your letter of January 13.

Since you do not have to prepare the list which otherwise would be required for a June election by section 109 of the Code, I am of opinion that any person
who produces before the judges of election at the special election to be called by the Governor tax receipts or certificates of the treasurer with respect to the payment of his taxes, where the receipts or certificates taken in conjunction with and in addition to the list which was used at the last November election show the payment of taxes for the years 1942, 1943 and 1944 prior to the 12th day of December, 1944, will be entitled to vote in said special election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Poll Tax; New Resident: Must Be Paid For The First Year In Which Person Was A Resident.

Mr. Harry K. Green,
Commissioner of the Revenue,
Arlington, Virginia:

My dear Mr. Green:

I am in receipt of your letter of July 25, from which I quote as follows:

"A person moved into Virginia the latter part of 1941 and was exempt from the payment of capitation tax under the six months provision in our tax laws. Consequently he failed to pay his 1942 capitation tax because he was deemed to be a non-resident on January 1, 1942. The question is would such a person be able to register and vote? He has remained in Virginia, paid his 1943 capitation tax and has been assessed for 1944.

"The question seems to be that, if Virginia did not deem the taxpayer referred to as being a resident on January, 1942, and did not assess him with a capitation tax for said year, would he be legally required, under the 1942 Act, to pay a capitation tax as he was not deemed a resident of the State?

"I would appreciate it if you would give me a prompt reply, as we are having numerous cases presented to us of this kind."

If the individual in question had established his legal residence in Virginia on or before January 1, 1942, regardless of the length of time he had been in the State, he was subject to the 1942 capitation tax. Furthermore, under the provisions of the last sentence of section 22 of the Tax Code, if the individual in question did not become a legal resident of Virginia until after January 1, 1942, he was also subject to the 1942 capitation tax, inasmuch as 1942 is the year "in which he first becomes a resident."

I am of opinion, therefore, that the individual in question, in order to now register and vote, must have paid within the statutory period the 1942 State capitation tax.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Poll Tax; New Resident: Liability For Tax Depends Upon Age.

MRS. THELMA D. WILLIAMSON,
City Treasurer,
Hampton, Virginia.

My dear Mrs. Williamson:

This is in reply to your letter of May 3, in which you request my opinion upon the question whether or not a person who moved into Virginia November 1, 1944, is required to pay a capitation tax for that year in order to be eligible to vote in the August primary and November general election this year.

The answer to your question would depend upon whether or not the person in question became twenty-one years of age during the year 1944. If so, no tax is assessable under our State laws for such person until the year 1945. However, if the person moving into the State during the year 1944 was twenty-one years of age or more on January 1, 1944, then said person is assessable for the tax for that year and required to pay same on or before May 5, 1945, in order to be eligible to vote in this year's primary and general election.

I call your attention further to the fact, however, that the city treasurer has no authority or jurisdiction to pass upon the question of whether a person may vote without the payment of a capitation tax for any particular year. If a person offers to pay the tax, it is the duty of the treasurer to accept it. If the tax is not paid, then the question becomes one for the election judges to determine whether such person is qualified to vote. Your only obligation as treasurer is to accept payment of the tax if same is tendered to you. You have no authority to advise any person upon the legal effect of their failing to pay same, although you may do so as an unofficial act if you desire.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Persons Just Becoming Of Age.

HONORABLE J. ROBERT SWITZER, Clerk,
Circuit Court of Rockingham County,
Harrisonburg, Virginia.

My dear Mr. Switzer:

I am in receipt of your letter of November 21, in which you state first:

"I understand the rule to have been followed was that a person becoming twenty-one between January 2 and November 7, 1944, could register thirty days before election and vote in November, 1944, without payment of capitation tax.

"Now do these persons have to pay 1945 tax to vote in fall of 1945 and, if so, before what date? The taxes for 1945, of course, are not due until December, 1945."

Your understanding is in accordance with the views expressed by this office. The persons to whom you refer who registered in 1944 may vote in 1945 without the payment of any capitation tax, since no such tax was assessed or assessable against them for any of the three years next preceding the year 1945.

You also ask the following questions:
"When does a person have to pay his capitation tax if he becomes twenty-one on January 1, 1945, to vote in 1945?

A person becoming of age after November 7, 1944—what tax does he have to pay to vote in 1945, and when does it have to be paid?"

A person becoming twenty-one years of age on January 1, 1945, and registering during that year on or subsequent to that date would have to pay his capitation tax for 1945 in order to register. Section 20 of the Constitution provides that a person who becomes of age at such a time that no capitation tax is assessable against him for the year next preceding the year in which he offers to register may register upon the payment of the first-year's capitation tax assessable against him. The first year's capitation tax assessable against a person becoming twenty-one years of age on January 1, 1945, is the tax for the year 1945.

As to a person becoming of age after November 7, 1944, if such a person registers during 1944, he may, as I have indicated, do so without the payment of any capitation tax and may likewise vote in 1945 without the payment of any capitation tax. If, however, a person becoming of age after November 7, 1944, offers to register on or after January 1, 1945, he will have to pay the 1945 capitation tax for the reasons I have already given.

As to the time of payment of capitation taxes of the persons involved in your questions, it is only necessary that they be paid prior to registration.

The situation existing as a result of the facts stated in your inquiries is due to the fact that the requirements for the payment of capitation taxes for the purpose of registration are different in the case of young persons becoming of age from the requirements with reference to the payment of capitation taxes for voting. In the case of registration section 20 of the Constitution requires that the first year's capitation tax assessable against such a young person be paid, while as to voting section 21 of the Constitution requires the payment of capitation taxes assessed or assessable for the three years next preceding the year in which a person offers to vote.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Persons Just Becoming Of Age.

Mr. J. J. Barrow,
Judge of Election,
P. O. Box 237,
Fieldale, Virginia.

My dear Mr. Barrow:

I am in receipt of your letter of October 23, in which you ask a number of questions involving the construction of the election laws.

A person becoming of age after January 1, but on or before November 7, of this year, could have registered at any time this year before the registration books were closed and would have been eligible to vote in the coming election without the payment of any capitation tax. Now that the registration books are closed, no new registrations may be received.

A person, to be eligible to vote in the coming election, must have paid at least six months before the election all capitation taxes assessed or assessable against him for the years 1941, 1942 and 1943. If no capitation taxes were assessable against him for any one of these years, then in order to register he should have paid taxes only for this year if same were assessable against him,
as, for instance, a person who became of age in 1943, after January 1 of that
year, was required to pay the 1944 poll tax before registering this year. It was
not necessary to pay it six months in advance of the election, however.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence: Evidence of Residence; Temporary Change Of.

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

My dear Mr. Marsh:

I am in receipt of your letter of August 12, in which you state that a
certain individual purchased a tract of land in Lee magisterial district in your
county in the fall of 1938 and established his physical residence in a dwelling
house on this place. He lived there continuously until December, 1942, when he
sold the dwelling house, retaining the greater part of the land originally pur-
chased, and moved to the town of Fairfax where he rented a house, and has
lived there up to this time. The question is whether the individual is domiciled
in Lee magisterial district or in the town of Fairfax. You make the following
statement concerning the position of the individual involved:

"Mr. A. contends that his domicile is at Burke, in Lee district, because
he acquired the same in 1938, and that he has never formulated any in-
tention to acquire another domicile, and further, his domicile is at Burke
because he owns approximately 113 acres of unimproved land upon which
is located no dwelling house nor other buildings that are habitable, situated
in Lee magisterial district, in Burke precinct; that the reason he did not
build a home in which to live on the 113 acre tract in Lee district in 1942
was because he could not get the material and labor to do so, and that when
he moved from Burke to Fairfax, in 1942, and rented a house in which to
live, he intended, and now intends to build a dwelling house on the said
real estate now owned by him, in Lee district, at Burke, and that he intends
to make the same his permanent home; he has since he moved from Burke
laid out and maintained a garden for the two summers since he left, on the
real estate at Burke, and has cleared around the site where he intends to
build his permanent dwelling house and home, and he further states
that he has caused to be excavated and filled a new driveway from the
State road to the site where his house is to be built, and that the State
Highway Engineer, at his request, has constructed a drain under the drive-
way where the driveway from the place where he intends to build his
dwelling house enters into the State highway.

"Mr. A's contention is that his domicile and voting residence is at
Burke, in Lee district, because he intends, after the war and when building
material is available, to build his dwelling house and home at Burke, and
that under those circumstances, section 82 of Michie's 1942 Code of Virginia
is not applicable to his case, because his domicile is at Burke, in Lee district,
and that his voting residence necessarily must also be there."

From the facts stated as to the individual's intention and acts, I am of
opinion that he has not abandoned his original domicile in Lee district and that
he may, therefore, continue to vote there. This individual, it seems to me,
clearly makes out a case of temporary absence from his original domicile, and it
is well settled that the mere change of dwelling place, however long continued, does not of itself constitute change of domicile. The individual in question apparently insists that he has never had the intention to abandon his original domicile and that it has always been his intention to resume his physical residence there, his plans in this respect having been affected by his inability to secure material and labor to construct a new residence.

For an excellent opinion on the question of domicile I refer you to the case of Cooper's Administrator v. Commonwealth, 121 Va. 338. It seems to me that the principles stated in the opinion clearly establish the fact that the individual about whom you write has not abandoned his original domicile in your county.

I do not mean to suggest that any individual may actually abandon his domicile in one magisterial district and arbitrarily elect to continue to vote in such district. As has been so often stated, the determination of the place of domicile is frequently difficult and always depends upon the facts existing in each particular case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Form Of Application For Transfer.

February 23, 1945.

HONORABLE W. L. SHUMATE,
General Registrar,
17 City Hall,
Newport News, Virginia.

My dear Mr. Shumate:

I am in receipt of your letter of recent date, and am of opinion that a registrar may require an applicant for a transfer under the provisions of section 100 to apply for such transfer in writing or in person. However, if the applicant can give the registrar sufficient information over the telephone to enable him to prepare the transfer, I see no reason why the matter might not be handled in this way.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Transfer From One Precinct To Another; Registration To Vote In Special Elections; Public Inspection Of Registrar's Books.

August 10, 1944.

HONORABLE WILLIAM MCL. FERGUSON,
Member of House of Delegates,
First National Bank Building,
Newport News, Virginia.

My dear Mr. Ferguson:

I am in receipt of your letter of August 8, in which you ask a number of questions relating to a special election to be held in Warwick county on September 19, of this year.

I shall state your questions and my opinions thereon in the order in which they appear in your letter.
"1. Within what period of time prior to the special election may voters transfer to their proper precinct?"

Assuming that the voter is transferring from one precinct in his county to another precinct therein, he may effect such transfer at any time up to and including the day of the election. See section 100 of the Code.

"2. Is it necessary for a voter to effect his own transfer or can he rely upon the registrar in the new precinct to do this?"

This question results from the fact, as you state, that the electoral board has within the past several months created six voting precincts in one magisterial district out of two former precincts. Pursuant to section 102 of the Code, it is the duty of the registrar of the old district to make out, certify and deliver to the registrar of the new district a list of the registered voters who have been placed in the new district by the change made in the voting precincts. It is then the duty of the registrar of the new district to enter the names of the person so certified to him on the books of the new district. I should think, however, that a cautious voter would check it to see that his name appears on the books of the new precinct.

"3. Within what period of time prior to the special election may a citizen who is otherwise qualified register in order to vote in said election?"

Since the registration books will not be closed until thirty days prior to the November election, and your special election is being held on September 19, the registration books are now open and will be open through the time set for the special election. A citizen who is otherwise qualified, therefore, may register in order to vote in the special election up to and including the day of the election itself.

"4. Are the registrar's records containing a list of the voters public records in the sense that they are subject to inspection by any interested citizen at reasonable times?"

In view of section 104 of the Code, providing that the "registration books shall at all times be open to public inspection," the above question must be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
This office has previously expressed the opinion that, where a person who has abandoned his residence in Virginia and subsequently returns and reestablishes his residence here, he should be treated as a new resident and may re-register here upon the payment of the required capitation taxes that are assessable against a new resident.

Your next question is:

"Can a person such as above referred to register without first securing a letter from the registrar of the precinct in which he originally registered to the effect that his name has been purged from the registration books of that precinct?"

I know of no authority for requiring such a person to secure a letter from the registrar of his former precinct to the effect that his name has been purged from the registration books of that precinct. If the registrar of the new precinct is concerned that the voter's name may appear on the registration books of two precincts at the same time, it might be well for him to advise the registrar of the former precinct concerning the new registration. However, I know of no statute which places upon the voter the burden of seeing that his name is stricken from the books of the former precinct.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Judges Of Election; Compensation.

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

My dear Mr. Friend:

This is in reply to your letter of October 13, in which you ask if a judge of election "carrying the returns and tickets to and from his voting place and to the county clerk's office" is entitled, under section 200 of the Code as amended by chapter 122 of the Acts of 1944, to compensation in the amount of five dollars for such service.

Section 200 provides that the judges of election shall receive "as compensation for their services the sum of five dollars each for each day's service rendered." Section 180 of the Code provides that one of the judges of election "on the day following the election" shall convey the poll books and ballots (which are evidently "the returns and tickets" referred to in section 200) to the county clerk.

I think it is plain, therefore, that the judge of election rendering this service on the day following the election has rendered another day's service and is entitled to the compensation of five dollars provided by section 200 in addition to his mileage.

If the judge of election renders the service referred to in the preceding paragraph on the day of the election, instead of the day following the election, then I am of opinion that he is not entitled to an additional day's compensation, for he has rendered only one day's service. Of course, in this case the judge would be entitled to his mileage traveled in rendering the service.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Judges Of Election; Who To Give Oath.

HONORABLE BERNARD MAHON,
Attorney for the Commonwealth,
Bowling Green, Virginia.

My dear Mr. Mahon:

I am in receipt of your letter of November 9, in which you ask the following question:

"Please advise me whether a registrar has any authority to swear a judge of election. I take it that a clerk of election has no authority whatsoever to swear a judge."

I know of no statute authorizing either a registrar or a clerk of election to administer the oath of office to a judge of election. You are, of course, familiar with section 149 of the Code, which provides in part that "if there is no one present authorized to administer oaths, the judges of election may administer to each other and to the clerks the oaths above provided." As to who may administer oaths generally, I refer you to section 274 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Polls; Abolition Of Precinct.

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

My dear Mr. Moore:

This is in reply to your letter of August 15, requesting my opinion upon the question whether or not a precinct voting place can be discontinued and combined with some other precinct without proceeding upon a petition as provided in section 144 of the Code.

The only exception to this is contained in an amendment of this section, which appears at pages 622-3 of the Acts of 1944. This exception is that, in any district or voting place where there are not more than thirty qualified voters as shown by the books of the registrar, the court or judge may abolish the district or voting place upon petition of the governing body of the county. You no doubt have a copy of the 1944 Acts available for your study of this section.

Cordially yours,

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

ELECTIONS—Polls: Occupancy By Two Or More Districts Of Same Building For Keeping Of Polls.

HONORABLE R. PAGE MORTON,
Attorney for the Commonwealth,
Charlotte Court House, Virginia.

My dear Mr. Morton:

I am in receipt of your letter of March 22, from which I quote as follows:

"Three magisterial districts in Charlotte County come together at Charlotte Court House, Virginia, and each district has a voting place at Charlotte Court House, making three voting places in this small town. Each of the three said magisterial districts have one or more other voting places within said district.

"The electoral board has asked me whether or not they can have one voting place in Charlotte Court House for the three election districts. It is their desire, if permissible, to use the courthouse building, and have the three sets of election officials all in this building. The three election districts could be accommodated easily by the courthouse building, and each have their own private voting place. The courthouse building is situated on the edge of Walton District, and less than one hundred yards from the other two districts, but it would require the voters to come out of their own district into another district.

"This change would not increase or diminish, abandon, or abolish any election district, or alter any boundaries of any election district, but it is an economy measure. Please advise me if you consider that this is legal."

While I have been able to find no statute prohibiting the arrangement you suggest, it is my opinion that when the sections of the Code dealing with voting places are read together they contemplate that the voting places for each election district shall be located in such district. However, in view of the rather unusual situation described by you as existing at Charlotte Court House, I am inclined to be of the opinion that under the doctrine of *de minimis* the proposed change would be justified. From the facts stated by you I do not see how any voter could be inconvenienced.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Polls: To Be Closed Promptly At Official Closing Time.

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

My dear Mr. Colasanto:

This is in reply to your letter of November 1, from which I quote as follows:

"At the coming election on November 7, 1944, the Electoral Board is anticipating a large vote and an overflow capacity about closing time.

"According to the statute, polls are to be open from sun-up to sun-down, which happens to be from 7:42 A. M. to 6:01 P. M. on the day of the election."
“We are wondering whether or not we should permit those persons who are in line at closing time, to cast their ballot, or close the polls promptly at 6:01 and refuse those who are still in line.”

Section 152 of the Code contains the mandatory provision that “at all election by the people the polls shall be opened *** at sunrise *** and closed at sunset of the same day.” I can find no authority for holding that because there may be a number of voters in line at the time prescribed by statute for closing the polls, the election officials would be justified in keeping the polls open after such time.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Poll Books; Number To Be Used In Joint Elections.

September 6, 1944.

HONORABLE RALPH E. WILKINS,
Secretary of the Commonwealth,
Richmond 12, Virginia.

My dear Mr. Wilkins:

I am in receipt of your letter of August 23, from which I quote as follows:

“I have been requested to obtain from you an official opinion as to whether or not separate poll books should be used in the general election on November 7, 1944, to record the names of the individuals who cast their votes for and against the two proposed constitutional amendments and for the individuals who cast their votes for candidates for office.

“As the required number of poll books must go forward to the various localities within the next few days, I would thank you to give this matter your usual prompt attention.”

From a consideration of the applicable statutes, I am of opinion that they do not require that separate poll books be used in the situation you describe.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Poll Books; Inspection Of By Citizen After Sealing Thereof.

November 16, 1944.

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

My dear Mr. Eastman:

I am in receipt of your letter of November 9, from which I quote as follows:

“After the election commissioners have met at the clerk’s office and canvassed the votes and made their returns as provided in section 182 of the election law, and adjourned and gone home, then a citizen requests the clerk of the court to allow him to inspect the poll books of said election. The question is should the clerk allow this citizen to inspect the poll books of such election.
"The custom of this office has always been to have the commissioners before they adjourn seal the poll books, leave them deposited in the clerk's office, where they remain unopened until they are destroyed under section 181."

Section 132 of the Code of 1887 (section 180 of the Code of 1919) provided that the poll books should be sealed by the judges of election and delivered to the clerk of the circuit court, "there to remain for the use of the persons who may choose to inspect the same." This language, as you will observe, was quite broad and was construed in Keller v. Stone, 96 Va. 667. This section was amended at the Extra Session of 1902-3-4 (Acts 1902-3-4, at page 132) and with reference to the right of inspection of the poll books the language used was "there to remain for the use of the persons who may be lawfully entitled to inspect the same," and this is the language now used in section 180. I think it reasonable to assume that the General Assembly of 1902-3-4 intended to make some change concerning those who were entitled to inspect the poll books, but the amended section does not define the phrase "lawfully entitled." Nor do I find that this phrase as it appears in the section has been defined by our Court of Appeals. I do not think, therefore, that I should attempt to give you a categorical answer to your inquiry, for the reason that the facts upon which a person may base his request to inspect the books will naturally vary in each particular case. My suggestion is, therefore, that a person desiring to inspect the poll books first have his right to such inspection determined by the court pursuant to a petition or motion or other appropriate proceeding.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Poll Tax Lists; Duties Of Preparation And Publication.

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

My dear Mr. Cole:

I am in receipt of your letter of July 29, from which I quote as follows:

"I have always in the past handled the printing of the list of persons who have paid their capitation taxes as provided in section 109 of the Code of Virginia. Recently the Clerk of the Court has taken the position that the printing of what is known as the poll tax list comes under his supervision. As I understand the situation, all I have to do is to turn over one certified list to the Clerk of the Court and it becomes the function of the Clerk of the Court to read the proofs and handle the matter from that point on.

"I also take it to be the law that the Clerk of the Court has the power to determine whether the printing of the list shall be by public bid or he may select his own printer to do the work, and I assume that I am to honor the warrant whether or not it is put out by public bid. I might say that this matter has been discussed with the Auditor of Public Accounts who is somewhat familiar with the situation."

Section 109 of the Code provides that the treasurer of a county shall file with the clerk of the circuit court of his county a certified list of those persons in his county who have paid the capitation taxes mentioned in the section. It then goes on to provide that the clerk "shall make and certify a sufficient
number of copies” of the list for the posting required by this section. Section 112 of the Code provides that “for making and certifying such list the treasurer shall be allowed three cents for each ten words, counting initials as words, and the clerk for copying and certifying the same shall be allowed two cents for each ten words, counting initials as words, for the first copy, and the actual reasonable cost of printing or otherwise making, in the cheapest way obtainable, the other copies he is required to make.” That part of the language just quoted providing for the reimbursement of the clerk for the cost of printing or otherwise making the list “he is required to make” plainly indicates, I think, that it is the duty of the clerk and not the treasurer to have a sufficient number of the list printed or otherwise made.

As to whether the clerk should have the printing of the list submitted to public bid, I can find no State law requiring that this be done. In my opinion, when a properly executed warrant of the Board of Supervisors to cover the cost of this printing is presented to the treasurer, he is authorized to honor the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

My dear Mr. Bryan:

This is in reply to your letter of July 26, from which I quote as follows:

“At your convenience I would like to have your construction of section 109 of Virginia Code pertaining to the compilation by the city treasurer of a list of the persons who have paid their capitation taxes.

“The specific question is whether in a city having wards, and electing its councilmen by wards, the city treasurer may in making this list compile a single list arranged alphabetically for the entire city.

“My opinion is that under the amendment of 1934, the city treasurer is no longer required to make a separate list for each ward, nor is my opinion changed by the fact that we sometimes have elections only in one or two wards, for the reason that a city-wide list could as well be used in a ward election as in an election from the whole city.”

I have examined section 109 of the Code, and agree with your conclusion that the list of persons who have paid their capitation taxes is not required to be made out by wards, but may be made in the form of a single list arranged alphabetically for the entire city, the white and colored persons being stated separately.

Very sincerely yours,

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

ELECTIONS—Registrars: Fees In Connection With Absent Voters, Civil And Military.

Mr. E. T. Howard, Secretary, Pulaski County Electoral Board, Pulaski, Virginia.

My dear Mr. Howard:

I am in receipt of your letter of October 4, from which I quote as follows:

"Section 98 of the Code provides* for the pay of registrars. Previous to 1944 registrars received a per diem plus ten cents for each person registered or transferred other than on the regular registration days. This section was amended by the last legislature—Chapter 391—and increases the pay of registrars to twenty-five cents in counties with a population of less than 30,000.

"Under the Absent Voters' Law—Section 216 provides that each registrar shall receive the same pay for their services in connection with registering persons.

"Am I correct that the amendment to Section 98 is in effect also on Section 216? In other words, the registrars shall receive 25 cents for their services in connection with each absent voter this fall."

I agree with the conclusion reached by you, namely, that registrars for their services under the Absent Voters' Law are entitled to receive 25 cents for each person who votes by mail.

You also ask the following question:

"Section 7 of Chapter 286 under the War Voters' legislation provides that the Secretary of the Electoral Board shall deliver the ballots sent to him by the Secretary of the Commonwealth to the registrars of the several precincts, and that the registrars shall deliver them to the Judges of Election in the same manner, along with other absent voters' ballots. Will you please advise me if it shall be the duty of the registrar to prepare a list of ballots delivered to him under the War Voters' Law and what compensation he should receive in connection with the preparation of such lists, and delivery of them to the Judges of Election * * * "

Chapter 286 of the Acts of 1944 provides that the Secretary of the Commonwealth shall send to the Secretary of every Electoral Board the envelopes containing the voted ballots which have been returned to him under the provisions of the Act. The Secretary of the Electoral Board in turn delivers the envelopes to the registrars of the respective precincts of the county and the registrars retain these ballots until election day and deliver them to the Judges of Election "in the same manner and along with other absent ballot envelopes."

The registrar being a fee officer, I do not think it should be presumed that he is to perform the new duties required of him without compensation. Section 216 of the Code, which is a part of the Absent Voters' Law, provides that the registrar shall receive for each voter voting under such law "the same fee that he receives for registering a voter." This fee by virtue of Chapter 391 of the Acts of 1944 is now 25 cents per person in counties with a population of less than 30,000 and 10 cents per person in cities and in counties of 30,000 population or more. It is my opinion, therefore, that the registrar in a county is entitled to the fees stated above for the services he renders under Chapter 286 of the Acts of 1944 providing for absentee ballots for members of the armed services.

I do not think it is contemplated by said Chapter 286 of the Acts of 1944 that the registrar should make out a list of the persons voting under said Act, such as is prescribed by sections 205 and 211 of the Code. It is contemplated, you will observe, that on the list prescribed by these sections the registrar shall place the names of those applying to him for ballots and shall likewise designate

* * *
on said list those whose ballots he receives. Since under the War Voters' legisla-
tion no applications for ballots are made to the registrar, I do not think the
making of a list of those voting under such legislation is required.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars: Compensation For Certifying Lists.

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

My dear Mr. Kohen:

I am in receipt of your letter of May 19, in which you state that a registrar
in your county in certifying to the clerk a list of the names of persons admitted
to registration, as required by section 98 of the Code, includes the date of
registration of each person on the list and his or her address. You inquire if
the registrar is entitled to compensation for the words and figures included in
the date of registration and the address.

In my opinion, your question must be answered in the negative. The
section provides that the registrar shall certify a list of the "names" and that
he shall be allowed three cents for each ten hords, counting initials as
words. If the statute had intended that the registrar should receive compen-
sation for certifying the date of registration and the address, it would have so
provided.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars: Procedure For Preparing Lists.

MR. ROBERT J. LILLARD, Registrar,
Luray, Virginia.

My dear Mr. Lillard:

I am in receipt of your letter of February 5.

Section 2995 of the Code provides for a town registrar who 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 * * * " The object of this section is, of course, to provide for a list of
residents of a town who are qualified to vote in town elections.

It is my opinion that as to those persons whom the town registrar knows to
be residents of the town he may place the names of such persons upon the list
without requiring them to make formal application for registration. As to those
persons whose residence is not sufficiently well known to the registrar to enable
him to place them on the list, I am of the opinion that, where such persons
satisfy the registrar that they are residents of the town, he may place them on
the town list without requiring them to submit formal written applications.
should think, however, that the registrar would be authorized to require such evidence of residence as may be reasonable under the circumstances.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration; Blind Persons.

Mr. J. L. Clarkson, Registrar,
Millboro, Virginia.

My dear Mr. Clarkson:

This is in reply to your letter of October 2 addressed to the Secretary of the Commonwealth, from which I quote as follows:

"As Registrar for the Millboro Springs Precinct of Bath County, I do not find an answer to the following question in the Virginia Election Laws: "A citizen of this community, almost totally blind, and eligible to register in every respect except that he cannot make application in his own handwriting because of his eyesight. I understand that he can sign his name, though this latter is not definite information. "I trust that I may have a ruling on this question in my hands before October 7, 1944."

Section 20 of the Constitution of Virginia and Section 98 of the Code of Virginia provide that "unless physically unable" a person shall make application to register in his own handwriting "in the presence of the registration officer . . .". A person "almost totally blind" certainly may be said to be "physically unable" to make application in his own handwriting. The exception, therefore, contained both in the Constitution and the Code for the benefit of a person physically unable to apply for registration is certainly applicable to a person almost totally blind, and I am, therefore, of the opinion that such a person may apply for registration by dictating to the registrar or to some other person in the presence of the registrar his application to be transcribed by the registrar or by such other person in the presence of the registrar.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration; Person May Vote If by Election Date He Will Have Been Resident One Year.

Honorable Julius Goodman,
Attorney for the Commonwealth,
Christiansburg, Virginia.

My dear Mr. Goodman:

I am in receipt of your letter of April 28, in which you ask the following question:

"I would like to be advised if a person who has paid his poll tax as required by law, can apply to the registrar to be registered if he has not
been a resident of the State for one year at the time he applies to be registered, but will have been a resident of the State for one year prior to the day the election is held."

Section 98 of the Code provides when voters may be registered, and contains this language:

"The registrar shall, at any time previous to the regular days of registration, register any voter entitled to vote at the next succeeding election who may apply to him to be registered; * * *"

In view of the above, I am of opinion that your question should be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Closing Of Registration Books; Transfers.

October 27, 1944.

Miss HELEN D. CLEVenger, Clerk,
Circuit Court of Henrico County,
22nd and Main Streets,
Richmond, Virginia.

My dear Miss Clevenger:

I am in receipt of your letter of October 25, from which I quote as follows:

"There seems to be some confusion in the minds of the registrars of the different precincts in Henrico county as to the entering of transfers on the registration books, and of issuing transfers to voters during the thirty day period directly preceding the general election.

"In accordance with sections 98 and 100 of the Virginia Election Laws, it appears that no such transfers should be made after registration day—that is, thirty days prior to the general election."

Section 100 of the Code reads in part as follows:

"Whenever a registered voter changes his place of residence from one election district to another, in the same county or city, it shall be lawful for him to apply for, in person or in writing, and it shall be the duty of the registrar of his former election district, at any time, to furnish a certificate that he was duly registered, and that his name has, since his removal, been erased from the registration books of said election district, which shall be sufficient evidence to entitle him to be registered in the election district to which he has removed, on its appearing to the satisfaction of the registrar that he has resided, prior to the next election, in such district for thirty days; * * *"

Pursuant to the quoted language, this office has uniformly ruled that when a registered voter changes his place of residence from one election district to another in the same county he may transfer his registration at any time up to and including the day of election. However, where a person changes his place of residence from one county or city to another county or city and desires his place of registration to be transferred, this may be done only when the registration books are open for the regular registration of voters.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Registration: Closing Of Registration Books; Transfers.

HONORABLE EDWARD McC. WILLIAMS,
Attorney for the Commonwealth,
Berryville, Virginia.

My dear Mr. Williams:

Replying to your letter of October 16, it is entirely true that the registration books are closed thirty days previous to the November election, but this in my opinion relates primarily to the registration of new voters and it is not intended that they should be closed for the purpose of transferring voters as provided in that portion of section 100 of the Code which you quote. To hold otherwise would render meaningless the authority given registrars by said section 100 to transfer voters at any time where they move from one election district to another in the same county or city.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Persons Just Becoming Of Age.

Mr. J. D. Crowle, Jr.,
Chairman of Electoral Board,
Staunton, Virginia.

My dear Mr. Crowle:

I am in receipt of your letter of October 16, with regard to the registration of the persons becoming of age on or before the day of the election to be held in November.

I beg to advise that pursuant to section 20 of the Constitution and section 93 of the Code this office has uniformly expressed the opinion that a person who will be twenty-one years of age at the next election may register and be eligible to vote at such election, although he or she may not be twenty-one at the time of registration. This means that those who will be twenty-one years of age on or before November 7, of this year, could have registered at any time during the year when the registration books were open. However, since the registration books are now closed and will be closed for the purpose of new registration until after November 7, there may be no new registrations before that time.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration; Eligibility: Unnaturalized Alien Wife Of Naturalized Husband.

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

My dear Mr. Sheild:

This is to acknowledge receipt of your letter of July 24, in which you
requested my opinion in behalf of the electoral board of Warwick County upon the following facts:

"It appears that one Mr. Guida was naturalized in New York State some fifteen or twenty years ago and registered and voted in that State. His wife, Italian born, married him in this Country and as a result of his naturalization she was allowed to qualify as a voter of New York State. Does she have the right to register in Virginia, since her husband has become naturalized, without being naturalized in her own right?"

One of the qualifications of voting in Virginia is citizenship of the United States (Constitution of Virginia, Section 18; Virginia Code of 1942, Section 82). Unless Mrs. Guida, a native of Italy, acquired United States citizenship by marriage or naturalization she is not qualified to register or vote in Virginia. In this connection it may be well to point out that since September 21, 1922, marriage to an American citizen by a woman who was a citizen of a foreign country does not by the marriage itself confer citizenship upon the woman and she must become naturalized in her own right (see, 8 USCA 710).

The qualifications for voting are different in each of the states, some, I understand, not even requiring a person to be a citizen of the United States, so the fact that Mrs. Guida did vote in New York would not have any particular bearing upon her qualifications in Virginia.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

Elections—Secretary Of Electoral Board; Compensation; By Whom Defrayed.

HONORABLE G. W. LAYMAN,
Attorney for the Commonwealth,
New Castle, Virginia.

My dear Senator Layman:

I am in receipt of your letter of November 14, in which you inquire concerning the responsibility for the compensation and expenses of the Secretary of the Electoral Board of your county in delivering the war voters' ballots to the several registrars of the county, pursuant to section 7 of chapter 286 of the Acts of 1944.

The compensation and allowance for expenses of the members of the Electoral Board, including the Secretary, is fixed by section 89 of the Code. Section 170 of the Code places upon the counties and cities, respectively, the cost of conducting elections. I am of opinion, therefore, that the county should pay the compensation and expenses of the Secretary of the Electoral Board in performing the duty to which you refer.

You direct my attention to section 9 of chapter 286 of the Acts of 1944, making an appropriation for the expenses of administering that Act. However, I think it is plain that the expenses referred to are limited to those incurred by the Secretary of the Commonwealth under the provisions of section 8 of the Act, and I do not think that the compensation and expenses of the Secretary of the Electoral Board are included in the language of section 8. The only persons whose compensation is included in section 8 are those employed by the Secretary of the Commonwealth, and, as you know, the Secretary of the Commonwealth does not employ the Secretaries of Electoral Boards.

You seem to be in doubt concerning the authority of the Board of Supervisors to pay the item about which you write, since the Board did not authorize the Secretary of the Electoral Board to distribute the ballots. However, I call
your attention to the fact that the Board of Supervisors does not impose upon or authorize the Secretary of the Electoral Board to perform any duties in connection with the conduct of elections, all of such duties being imposed upon him by general law, and the duty of distributing the war voters’ ballots is likewise imposed upon him by general law.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Special Election May Be Set For Same Date As General Election.

September 11, 1944.

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

My dear Governor Darden:

I am in receipt of your letter of September 7, in which you state that Honorable Winder Harris will probably resign as a member of Congress from the Second Congressional District sometime this month, and you ask if a special election to fill the vacancy caused by such resignation may be called to be held on the day of the coming general election in November.

As you know, writs of election to fill vacancies in the representation of this State in the House of Representatives are to be issued by the Governor. Section 73 of the Code. Section 146 of the Code provides how these writs are issued. Section 141 of the Code provides that a special election to supply a vacancy in an office may be held at such time as may be designated by the officer authorized to order the election. I can find no statutory or constitutional provision which has the effect of prohibiting the calling of such a special election as you mention to be held on general election day in November, and I am, therefore, of the opinion that you may order the election to be held on that day.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—War Voters Legislation Of 1944; Discharged Soldier.

August 22, 1944.

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

My dear Mr. Anderson:

This is in reply to your letter of August 16, from which I quote as follows:

“On June 9, 1944, at my request, you rendered an opinion to the effect that any soldier discharged since May 6, 1944, would be eligible to vote in the November election without payment of poll tax and without registering, as though he were still in the armed forces. Since these discharged soldiers have a right to vote, the question then arises as to the method they shall follow in voting.

“Would they be required to vote by mail the same as any other member
of the armed forces or would the presentation of an honorable discharge
dated May 6, 1944, or later at the polling place entitle the discharged soldier
to vote? Kindly advise me as to this matter and it would be deeply ap-
preciated."

I see no reason why the members of the armed services to whom you refer
may not vote in person if they are at the voting places on election day, and I
should think the presentation of their honorable discharge dated May 6, 1944, or
later could be accepted by the election officials as evidence of their right to
vote without payment of the capitation taxes which would otherwise be re-
quired. However, the question of whether or not such persons were members
of the armed services on May 6, 1944, and later is a question of fact to be
passed on by those officials.

In order that there may be no misunderstanding, I call your attention to
the fact that, although members of the armed services discharged on and after
May 6, 1944, and prior to the November election of this year may vote in that
election without the payment of capitation taxes, they are not exempted from
the provisions of law requiring registration, and such members who have not
registered should take the necessary steps to have themselves registered,
including the payment of the poll taxes required by section 20 of the
constitution as a registration requirement, although such poll taxes would
not have to be paid six months in advance of the November election.

The Act of Congress discussed in my letter to you of May 9, does not relieve
members of the armed services of liability to State poll taxes but merely pro-
vides that the payment of such taxes shall not be required of such members as
a prerequisite to the right to vote for certain Federal officers. Therefore, when
a member of the armed services discharged as aforesaid applies for registration,
which registration is effective not only for the coming November election but
for future elections, he must pay the required capitation taxes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation Of 1944; Not Applicable To Red
Cross Personnel.

August 23, 1944.

Mr. W. E. Baker:
Registrar,
King George, Virginia.

My dear Mr. Baker:

This is in reply to your letter of July 21, in which you request my opinion
upon whether or not ballots provided for by the armed forces voting law for
the next November election are available for use by persons connected with the
Red Cross in active service in association with the activities of the Army.

The Virginia Act carries into effect and parallels the Act of Congress which
was intended to protect voting rights of persons in the armed services, but was
not broadened to cover members of the Red Cross. The party in question,
therefore, could not be supplied with a ballot by the Secretary of the Common-
wealth.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—War Voters Legislation Of 1944; As Applied To Local Special Election.—Notice Of Candidacy In Special Election.

August 25, 1944.

Mr. J. C. Curtis, Secretary,
Warwick County Electoral Board,
Denbigh, Virginia.

My dear Mr. Curtis:

I am in receipt of your letter of August 23, in which you ask a number of questions relative to the special election to be held in Warwick county on September 19 on the question of a proposed change in the county government.

Some of your questions relative to voting by members of the armed services in this election and in the election to be held in November for members of the Board of Supervisors if a new form of government is adopted may be answered by the statement that chapter 286 of the Acts of 1944, relative to voting by members of the armed services, is confined to voting for candidates for President and Vice-President of the United States and for Congress, and has no application to your special election nor to the election for members of the Board of Supervisors to be held in November.

You also ask the following question:

"If a soldier whose legal residence is in Warwick county has requested a ballot for the special election of September 19, 1944, to vote on the proposed change in county government, is there any requirement under the Virginia law that this ballot should be furnished to such soldier and, if not furnished, what will be the legal effect?"

If the soldier's request for the ballot complies with the provisions of sections 202 and 203 of the Code, relating to applications for ballots, and such soldier is a duly qualified voter in Warwick county, the ballot should be sent to him. I do not think that I should attempt to pass upon the legal effect of the failure or refusal to furnish a soldier with a ballot where his application is properly filed. This is a matter which can only be determined by the court in case there should be a contest of the election.

You finally ask:

"Please tell me how long before election day will a prospective candidate for supervisor of Warwick county have the right to file his declaration of candidacy, and with whom must he file it?"

Inasmuch as the regular election for members of the Board of Supervisors does not take place this November and such an election will be held in your county only in the event that a change in the form of government is adopted at the special election to be held in September, in my opinion, the election for members of the Board of Supervisors is in the nature of a special election. Therefore, notices of candidacy for membership on the Board should be filed with the clerk of the Circuit Court of the County thirty days before the November election. See section 154 of the Code.

Very sincerely yours,

Abram P. Staples,
Attorney General.
ELECTIONS—Members Of Armed Services; Voting In Person.

September 28, 1944.

Mr. W. Barton Mason, Secretary,
Orange County Electoral Board,
Orange, Virginia.

My dear Mr. Mason:

I am in receipt of your letter of September 23, in which you ask the following question:

"If a soldier is home on leave and has not voted through the regular soldier's channel, would he be eligible to vote even though he had not paid his poll tax or registered?"

The soldier in question being unable to register at the required time by reason of being a member of one of the armed services, I am of opinion that, in view of the Act of Congress known as Public Law No. 712, he is entitled to vote in the election for Federal officers to be held on November 7 of this year without registering or paying his capitation tax, assuming that he is twenty-one years of age and has been a resident of the State, county and precinct for the required time.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Members Of The Armed Services; Discharged Members.

October 17, 1944.

Honorable Hugh B. Marsh,
Commonwealth's Attorney,
Fairfax, Virginia:

My dear Mr. Marsh:

This is in reply to your letters of October 11 and October 12, concerning certain questions arising out of State and Federal legislation relating to voting by recently discharged and other members of the armed forces, in the Presidential and Congressional elections in Virginia to be held in November, 1944.

The primary law relating to the right of those in military service to vote in such elections, without paying poll taxes or registering, is an Act of Congress known as Public Law No. 712, same having been implemented by Chapter 286 of the Virginia Acts of 1944.

Your questions will be answered separately.

1. REGISTRATION BY DISCHARGED MEMBERS. With respect to registration, Section one of the Federal statute dispenses with the necessity of registration as a voting prerequisite in said elections by all individuals absent from the place of their residence in service in the land and naval forces of the United States. I have construed this section, along with Section 2, hereinafter quoted, as applying to all persons who were in the service on the last day on which they could register under our State laws, which was October 7, even though subsequent to that day such persons may have been honorably discharged from the service. Such persons are clearly within the class whose franchise is protected by the Federal Act, and cannot be required to register in order to vote. In fact, they cannot register after October 7, 1944.

With reference to persons honorably discharged prior to October 7 who have not registered, I have expressed the opinion that they are not exempt from the State registration requirements as they were not absent from their place of
residence in military service during a time when they could have registered after being discharged. The Federal statute therefore does not include them within its provisions.

2. POLL TAXES OF DISCHARGED MEMBERS. Section 2 of said Act of Congress is as follows:

“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.”

I have construed this section as exempting from payment of the poll tax, as a condition of voting, any registered honorably discharged person who was in military service on May 6, 1944, the last day on which the poll tax could be paid in order to qualify him to vote in November, under Section 21 of the Virginia Constitution. To have required him to pay the tax while in the service would have been contrary to the provisions of the Act above quoted, and it is my view that the right to vote without the payment of the poll tax accrued to a person still in the service on the last day on which it could be paid to qualify a person to vote. Such persons, therefore, as have received honorable discharges on or after May 6, if already registered, may, in my opinion, vote on November 7 without payment of said poll tax.

It will be noted that while Section 21 of the Constitution requires the poll tax payments to be made six months before the election, as a condition of voting, Section 20, relating to registration, provides only that the required poll taxes be paid. They may be paid on the day of registration or any time prior thereto. Of course, this does not permit one to register after the registration books were closed on October 7, 1944, and unregistered persons honorably discharged prior to October 7 must register within the required time, and in order to do so must pay the required poll taxes.

3. VOTING AT POLLS BY PERSONS STILL IN SERVICE. The last question is whether a member of the armed forces, in active service, who is not absent from his place of residence on election day who has not registered is entitled to vote in the November 7 election.

The answer to this question must be in the affirmative, although Section one of the Federal Act dispenses with registration only in case of such absence. However, the requirement to pay the poll tax, as applied to those still in the service in order to register would, in effect, if registration be held necessary to vote in such a case, be a requirement to pay same in order to vote, and this would be in violation of Section 2 of the Federal Act above quoted. Therefore, in my opinion, one in active service on election day, even though he was not absent from his place of residence on October 7, the last day of registration, may nevertheless vote at the polls without registering or paying any poll tax.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation Of 1944; Death Of Voter Prior To Election Day.

Mr. E. T. SPROLES,
Clinchport, Virginia.

My dear Mr. Sproles:

I am in receipt of your letter of October 23, in which you ask if the mailed
ballot of a soldier who has been reported killed prior to election day should be counted by the judges of election.

In reply, I beg to advise, that the question of whether or not the person has been killed is one of fact to be decided by the judges of election on the basis of the evidence presented to them. If the judges are of opinion that the evidence conclusively shows the person whose ballot is before them to have been killed, I am of opinion that they would be justified in not counting the ballot. If they are not satisfied as to the conclusiveness of the evidence before them, I think they would be justified in counting the ballot.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation Of 1944; To What Precinct A Returned Ballot Should Be Forwarded.

October 26, 1944.

HONORABLE J. ROBERT SWITZER, Clerk,
Circuit Court of Rockingham County,
Harrisonburg, Virginia.

My dear Mr. Switzer:

I am in receipt of your letter of October 25, in which you ask:

"Where the electoral board is unable to determine the precincts of certain war ballots, what disposition shall be made of them?"

Of course, the electoral board should make every possible effort to deliver a ballot to the registrar of the precinct within the boundaries of which the voter resides. However, if the correct precinct cannot be determined, then I think the board should make the best estimate it can of the correct precinct and deliver the ballot to the registrar. For example, if from the postoffice shown on the envelope the voter could be a resident of one of several precincts within the rural free delivery range of the postoffice, and the board is not positive as to the correct precinct, then I think that the board would be justified in delivering the ballot to the registrar of any one of the precincts within the geographical range of such postoffice.

You also ask, if the board receives the war ballots "say on Monday before election day or on election day, and that due to the distance possibly all the precincts cannot be reached in time to have these war ballots counted, whether in that case they can deliver said ballots to Court House Precinct in Central District and there be counted—the same ballot will be used all over the county."

In reply to the above question, I must advise that, in my opinion, the board should deliver a ballot to the registrar of the proper precinct of the voter if such precinct is known, but, if such precinct is not known, I think the ballot should be delivered to a precinct as nearly correct as can be determined from the postoffice address shown on the ballot, as I have outlined in the answer to your first inquiry. I do not think that the board may arbitrarily select one precinct and deliver the ballot to the registrar of that precinct.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—War Voters Legislation Of 1945.

May 10, 1945.

Mr. W. E. Eubank, Registrar,
Chase City, Virginia.

My dear Mr. Eubank:

Your letter of May 1 addressed to Honorable Ralph E. Wilkins, Secretary of the Commonwealth, has been referred to this office for reply.

You ask the following question:

"We will hold a town election here on June 12, and I am writing to know if a person in the armed forces who is twenty-one years old and a resident of the town, whether in the States or out of the States, can vote in this election without registering or paying any capitation taxes."

In view of the action of the recent Constitutional Convention adding Article 17 of our Constitution, a member of the armed forces in active service, twenty-one years of age and a resident of the town of Chase City, may vote in the town election to be held in June without registering or paying any State poll tax.

You also ask the following question:

"And also can I send any one of the above mentioned a ballot when their application is signed by some relative or friend?"

In my opinion, where a member of the armed services is duly registered and has paid the required capitation taxes, you may as registrar forward him an absent voter's ballot where the application is made by the voter himself, pursuant to section 203 of the Code. However, where an application is made for an absent voter's ballot for a member of the armed services who has not registered or paid the required capitation taxes, whether the application is made by such member or in his behalf, I am of opinion that the application should be sent to the Secretary of the Commonwealth, in Richmond, as provided by section 5 of the War Voters' Act of 1945, a copy of which I am enclosing. This Act in section 7 thereof provides the machinery whereby the judges of election may determine whether the member is qualified to vote, even though he may not have registered or paid the required capitation taxes. Please note the oath which a voter is required to take by this section 7. The Secretary of the Commonwealth, pursuant to section 4 of the War Voters' Act, may secure from the local electoral boards the necessary ballots to be supplied the applicants.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Voters Legislation: Applications For Ballots.

June 29, 1945.

Honorable W. L. Carleton,
Commonwealth's Attorney,
Newport News, Virginia.

My dear Mr. Carleton:

This is in reply to your letter of June 28, in which you inquire whether the Secretary of the Commonwealth mails applications to all service men, or whether it is necessary that the application be made by the serviceman or one of his friends or relatives.

When the legislation providing for absentee voting by members of the armed
forces was being considered in the legislature, the question arose as to whether
it would be advisable for the Secretary of the Commonwealth to undertake to
send ballots to all such members. It was finally decided that it would be im-
possible to obtain the correct A. P. O. number or other address of all such mem-
bers, or any very large portion thereof, by reason of the fact that these addresses
are constantly changing, particularly with the ending of the war in Europe and
the frequent movements of troops. It was, therefore, decided that the members
themselves, or their relatives or friends, were in a much better position to fur-
nish a correct mailing address, and it would be more effective to rely on this
method of obtaining the information. The Act therefore provides that the
Secretary of the Commonwealth shall mail an absentee ballot to members of the
armed forces eligible to vote upon application being made by the member, or his
relative or personal friend. A separate application is required for each member.

Sincerely Yours,

ABRAM P. STAPLES,
Attorney General.

EMINENT DOMAIN—Power Possessed By The State Board Of Correc-
tions.

December 11, 1944.

MAJOR R. M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Mr. Youell:

I am in receipt of your letter of December 7, from which I quote as follows:

"The General Assembly of 1942 appropriated $175,000 for the purpose of
constructing a water system to supply water for the following institutions:
State Farm
State Farm for Defective Misdemeanants
State Industrial Farm for Women
State Industrial School for Boys

"There will be approximately 1,600 inmates of State wards incarcerated
in the above mentioned institutions.

"To develop the necessary plans and specifications for the execution of
this project, the State Board of Corrections employed by Mr. R. Stuart
Royer, Consulting Engineer, of Richmond, to make the necessary investiga-
tions and report. This report has been received, and we have approved same
and instructed the engineers to proceed with the plans and specifications.

"The engineer has advised us that it will be necessary to secure certain
lands not now owned by the State for the purpose of constructing the water
supply and also for the location of storage tanks.

"The purpose of this letter is to make inquiry as to whether or not the
State has legal authority to condemn the land which will be necessary to
carry out the above project."

In my opinion, section 4385 of the Code gives to the State Board of Cor-
rections, as the governing body of the State Farm, the State Farm for Defective
Misdemeanants, and the State Industrial Farm for Women, the power of eminent
domain, and the Board may acquire the lands needed for the water system
which you mention by this method. You will observe from the section, how-
ever, that the Board should first attempt to acquire the needed lands by negotiation.

I call your attention to the fact that the State Board of Corrections is not the governing body of the State Industrial School for Boys, but, when the water system has been completed, there is no reason why this institution may not use it.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ESCHEATS—Abandoned And Derelict Automobile.

Mr. A. S. White
Sheriff of York County
Odd, Virginia

My dear Mr. White:

This is in reply to your letter of June 26, 1944, in which you seek my opinion and advice as to what you can do with respect to disposing of an automobile which has come into your custody under the following circumstances. You say that the automobile containing over nine hundred pints of whiskey was seized in August, 1943, by the police without a search warrant, the automobile being delivered into your custody by the enforcement agents of the Alcoholic Beverage Control Department; that under the rulings of the Judge of your circuit, seizure of an automobile without a warrant is illegal and the automobile should be returned to its owner; that you have made diligent effort to locate the owner but cannot find him. You then say:

"I am most anxious to dispose of this car in some way. Will you please therefore, at your convenience, give me your opinion as to how this can be done?"

Under the circumstances set out by you it appears that the automobile was abandoned by someone engaged in the unlawful transportation of ardent spirits. That person may or may not have been the owner of the automobile, but in view of the fact that you have not been able to locate the owner and he has not applied for a return of his property for almost a year, the property has become derelict.

The procedure for disposal of derelict property is set out in sections 518, 519, 520, and 521 of the Code of Virginia, which contemplate a proceeding in equity instituted in behalf of the Commonwealth to have the property sold the same as in an escheat, persons in interest to be served by order of publication.

It would be proper therefore for you to give the necessary information to the Commonwealth's Attorney who would be the proper person to cause such a proceeding to be instituted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
FOREST FIRES—Determination Of Compensation Of Fire-Fighters.

MR. GEORGE W. DEAN, State Forester,
Box 1368,
Charlottesville, Virginia.

My dear Mr. Dean:

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

"On June 1, 1945, the provisions of section 541, chapter 104, of the Code as reenacted by the 1944 regular session of the General Assembly become effective.

"The question has arisen whether, under this section, particularly subsection (b), the State Forester is authorized and has the power to determine the rates of compensation for services rendered by fire fighters, forest wardens, fire tower lookout men and other employees, even though the account is submitted for reimbursement to the board of supervisors of the county in which the cost was incurred, provided, of course, that the amount submitted for reimbursement does not exceed the maximum sum for which the county may be obligated."

Section 541 of the Code, as amended by chapter 104 of the Acts of 1944, provides in subsection (b) as follows:

"When any forest warden sees or there is reported to him a forest fire, he shall repair immediately to the scene of the fire and employ such persons and means as in his judgment are expedient and necessary to extinguish the fire, within the limits of the expense he has been authorized to incur in his instructions from the State Forester. He shall keep an itemized account of all expenses thus incurred and immediately send the account verified by affidavit to the State Forester for examination."

Section 541-a of the Code (Michie, 1942) provides that any person summoned by a forest warden to fight a forest fire shall be paid for such service at such rate of pay as provided for in the State forest service wage scale for fire fighting in effect in the county or part thereof in which the fire is fought.

It is my opinion, in view of these provisions, that the State Forester, under the overall supervision of the Virginia Conservation Commission determines the rate of compensation for services rendered by persons employed by forest wardens pursuant to subsection (b) of section 541 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Power Of Governor To Remit.

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

My dear Governor Darden:

This is in reply to your request for my opinion on the following question:
"Does the Governor have power to remit to the owners certain slot-machines seized and subject to confiscation under the laws of Virginia?"

Section 4694a of the Code of Virginia, after defining an illegal slot machine and providing for punishment of any operator or possessor of the same, then provides as follows:

"(d) Any article or apparatus possessed, maintained, kept or used in violation of the provisions of this section is hereby declared to be a public nuisance and may, together with all money and tokens therein, be seized under a search warrant issued in accordance with law. Any money so seized shall be forfeited to the Commonwealth and such article or apparatus shall be destroyed."

It will be observed that illegal slot machines are made a "public nuisance" per se, and may be confiscated entirely independent of and in the absence of a conviction of the operator, possessor, or owner thereof. The confiscation proceeding is a civil proceeding in rem against the object itself.

It is clear, therefore, that under sub-section (d) of the Act, a slot machine so confiscated is deemed a "forfeiture," and the real question is whether the Governor has power to remit forfeitures.

Section 73 of the Constitution, dealing with certain powers of the Governor, provides in part as follows:

"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; * * *.*

Thus it appears that the Governor may, without an enabling act of the General Assembly, "grant reprieves and pardons after conviction," but this clause refers to criminal convictions, and would not be applicable to a civil in rem forfeiture proceeding.

The power to remit fines and penalties is subject to enabling legislation. This legislation is found in Sections 2569-2577 of the Code. Section 2569 reads in part as follows:

"The Governor shall have power, in his discretion, to remit, in whole or in part, fines and penalties, whether heretofore or hereafter imposed, in all cases of felony or misdemeanor, after conviction, * * *." Section 2577, reads as follows:

"Wherever the word 'fine' is used in this chapter, it shall be construed to include pecuniary forfeiture, penalty and amercement."

While the words "fine," "penalty," "amercement," and "forfeiture" have some characteristics in common, they are not synonymous. "Fine" refers to a pecuniary punishment imposed in a criminal prosecution for violation of offenses against the State. "Penalty," which is a broader term and therefore includes fines, refers to pecuniary sums recoverable either in criminal or civil proceedings for failure to comply with some statutory duty. "Amercement" is generally used to denote a statutory penalty imposed upon a public officer for some misconduct or neglect of duty. "Forfeiture" is the most comprehensive of all the terms referred to, and refers to the divesture of specific property (money, chattels, or realty) without compensation, in consequence of some default or act forbidden by law.

It will be observed that the phrase used both in Section 73 of the Constitution and Section 2569 of the Code, limits the Governor's power of remission to "fines and penalties," and Section 2577 defines a fine as a "pecuniary forfeiture, penalty and amercement."

It is my opinion, therefore, that the Governor has no power to remit a for-
fieiture of specific property which has been confiscated under a statute declaring it to be a nuisance, such as slot machines confiscated under Section 4694a of the Code.

As to the money within the machines when seized, the statute provides that it "shall be forfeited to the Commonwealth," but this is obviously a "pecuniary forfeiture" within the definition of Section 2577 of the Code, and in my opinion the power of the Governor extends to a remission of such forfeited money. However, as a condition precedent to any action by the Governor in such cases, the petitioner must have complied with the procedure outlined in Sections 2570-2574 of the Code.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Payment Of Storage Charges On Forfeited Automobile.

May 2, 1945.

HONORABLE JOHN G. SAUNDERS,
City Sergeant,
Richmond, Virginia.

My dear Mr. Saunders:

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

"Mr. T. P. Duggan, Investigator, Virginia ABC Board, has turned over to me, one 1940 Ford Coupe, Va. License 244-852 (1945) Motor No. 18-5629048, to be held pending confiscation proceedings and final disposition according to law.

"This automobile has been stored with the Coleman-Scales Auto Supply Co. Inc., 1301 W. Broad St., Richmond, Va. The storage charge is 35 cents per day.

"Will you please advise me as soon as possible who will pay this storage charge in the event that this automobile is not sold?"

If this automobile is forfeited to the Commonwealth and sold, then, of course, the storage charges should be paid out of the proceeds of the sale. If it is not forfeited and sold under the provisions of the A. B. C. Act, in my opinion, the cost of storage is a proper charge against the fund appropriated to the State Comptroller for criminal charges, since I assume the seizure was made in enforcing the criminal laws of the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
Forfeitures—Automobiles: Owner Unknown.

February 2, 1945.

Honorable C. Carter Lee,
Commonwealth's Attorney,
Rocky Mount, Virginia.

My dear Mr. Lee:

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

"I have an automobile which was seized for the illegal transportation of more than one quart of alcoholic beverages illegally acquired, which automobile had no license tag on it, nor does it have a motor number. I reported the seizure to the Division of Motor Vehicles and they replied that in view of the lack of information on the car that they were unable to check their records or to furnish the usual certificate.

"In this matter I will appreciate it very much if you will advise me how I should proceed against the car or what I should do with it."

The situation you present is an unusual one. However, section 4675 (38a) of the Code (Michie 1942) and subsection (d) provide that if the owner of the seized car and other interested parties are unknown, or cannot with reasonable diligence be found, they shall be deemed sufficiently served by publication of the notice once a week for two successive weeks. I suggest, therefore, that you proceed in this way. The information should, of course, set out the fact with reference to the absence of a license tag and a motor number. Of course, if you have any knowledge concerning the owner, notice should be sent to him by registered mail as provided in the section.

With best wishes, I am

Very sincerely yours,

Abram P. Staples,
Attorney General.

Forfeitures—Concealed Weapons; How Disposed Of.

September 11, 1944.

Mr. P. Holt Lyon,
City Sergeant,
Danville, Virginia.

My dear Mr. Lyon:

This is in reply to your recent letter in which you ask my opinion on the following question:

When a person is found guilty under Section 4534 of the Code for carrying a concealed weapon, to-wit, a pistol, and the same is ordered confiscated, to whom should the pistol be returned for confiscation, the City Sergeant or the Chief of Police?

Section 4534 of the Code provides for confiscation of concealed weapons upon order of a court, justice or police justice,

"** and such as may be needed for police officers and conservators of the peace shall be devoted to that purpose, **"
It would be proper that the confiscated pistol be turned over to either the City Sergeant, the Chief of Police, or any other conservator of the peace, and in cases of doubt the trial justice ordering the confiscation should designate the official.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Disposition of Monies Seized In Gambling Raid.

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

My. Dear Mr. Sexton:

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

"I should like for you to render an opinion on the question of the disposition of monies seized by officers when arrests are made for petty gambling. I have examined the statutes as carefully as I can but find no specific provision for the forfeiture or disposition of such funds. The statute seems to be clear on funds seized by the officers in gaming houses which are operated more or less for any persons who might wish to enter and play at the games, and of course, there is a general forfeiture providing for the disposition of monies, equipment, paraphernalia, etc., used in the operation of a lottery.

"The case I have in mind is where the officers raid an average poker game played along the roadside or in any other public place, and seize the money that is on the table. The officers here insist that they are entitled to one-half of any money so seized, but I have been unable to find any specific statute covering it."

My conclusion is the same as that reached by you. As you suggest, if the game is being conducted in a place operated for the purpose of providing a place where gaming may be indulged in, such as that described in section 4676 of the Code, specific provisions is made for the disposition of the monies being used. However, I have been unable to find any statute providing for the seizure of money which is being used in a poker game, say in a private home or in any other place not kept for the purpose of gaming.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
FORFEITURES—When Person Making Seizure Of Money Entitled To Any Part Thereof.

HONORABLE M. A. COGBILL,
Attorney for the Commonwealth,
Chesterfield C. H., Virginia.

January 23, 1945.

My dear Mr. Cogbill:

I have your letter of January 17, with regard to the disposition of monies seized and confiscated in "numbers" and "crap games, etc."

I have written a number of letters on this question during the past few years to the effect that the disposition of money seized in any particular case depends upon the statute under which it was seized.

For example, money forfeited under section 4676 of the Code goes one-half to the person making the seizure and the other half to the Commonwealth. The "numbers" game, as I understand it, is a lottery and money seized and forfeited under section 4694 of the Code, providing for the seizure of money used in a lottery, goes to the Commonwealth. There is no provision in this section for any portion of the money to go to the officer making the seizure.

Likewise, money seized under section 4694-a of the Code (Michie, 1942), dealing with illegal slot machines, goes to the Commonwealth, there being no provision for the officer making the seizure to have any portion of it.

I trust that this is the information you desire.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—When Person Making Seizure Of Money Entitled To Any Part Thereof.

HONORABLE JOHN R. BOGGESS,
Attorney for the Commonwealth,
Tazewell, Virginia.

June 15, 1945.

My dear Mr. Boggess:

I am in receipt of your letter of June 14, in which you ask if certain officers who participated in the seizure of money which was subsequently forfeited to the Commonwealth by an order of the Circuit Court of Tazewell County are entitled to any part of the money so seized and forfeited.

In my opinion, the answer to your question turns on the order of the court in the forfeiture proceedings. If the order forfeits the money to the Commonwealth, then it would appear that by section 134 of the Constitution and section 632 of the Code the entire sum must be paid into the State treasury to the credit of the literary fund. You will observe that section 134 of the Constitution, setting up the literary fund, provides in part that "all property accruing to the State by forfeiture" shall constitute a part of this fund. It is quite true that one or more sections of the Code dealing with money seized in gambling enterprises provides that a part of the money so seized shall be forfeited to the person making the seizure. This is true, for example, of section 4676 of the Code, but you will notice that the section does not provide that the money shall be forfeited to the Commonwealth and then one-half paid to the person making the seizure, but
it provides that one-half of the money shall be forfeited to the person making the seizure and the other half to the Commonwealth.

My conclusion is that, if the order of the court directs that the entire sum be forfeited to the Commonwealth, then it must be paid into the treasury to the credit of the literary fund, and that the officers making the seizure are not entitled to any part thereof. On the other hand, if the money was seized under the provisions of section 4676 of the Code, I presume that the order of the court directs that one-half of the money be forfeited to the officers making the seizure and, if this is true, they would be entitled to their portion.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Forfeitures Not Authorized of Seizures Made Under Code Section 4682.

JUDGE WM. ERLE EDWARDS,
Trial Justice of Frederick County,
Winchester, Virginia.

My dear Judge Edwards:

This is in reply to your letter of October 27, which I quote as follows:

"I have recently had before me a case involving violation of Section 4682 of the Code of Virginia relating to illegal betting on horse racing. When the premises were raided certain equipment, paraphernalia and money were taken into possession by the Officers. The question has now arisen as to whether or not this equipment and money is subject to forfeiture. The statute relating to this offense does not provide for forfeiture, and I have been of the opinion that forfeiture could not be enforced. On the other hand I am informed that it has been done in other counties. I shall appreciate an opinion from you in this connection."

As you state, section 4682 contains no provision for the forfeiture of the equipment and money seized in connection with the operation of an establishment of the type therein prohibited.

Sections 4676 and 4694 provide for the forfeiture of money or other property incidental to the operation of gaming tables or lotteries prohibited by these sections.

In the absence of statute, it seems to be established by the authorities that the court may not declare any forfeiture in a case of this type. I, therefore, concur in your view that, unless the provisions of these last two mentioned sections were violated, there can be no forfeiture of the money and equipment seized.

Sincerely yours,

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

GAME, INLAND FISH, AND DOG CODE—Executive Director Of Commission; Appointment Of.

HONORABLE T. E. CLARKE, Executive Director,
Commission of Game and Inland Fisheries,
Richmond 13, Virginia.

My dear Mr. Clarke:

This will acknowledge receipt of your letter of July 22, in which you state:

"The 1942 Legislature passed an Act, Chapter 390, making certain changes in the number of Commissioners and setting their term of office for two years.

"The position of Executive Director was also established, who was appointed by the Commissioners, with no term of office specified.

"The new terms of the Commissioners having expired on June 30, 1942, a new Commission was appointed by the Governor.

"The 1944 Legislature passed a clarifying Act, Chapter 362 (page 516), authorizing the appointment of an Executive Director, but makes no reference to the length of the term of office.

"I will be glad if you will give me your opinion whether or not it is necessary for the newly appointed Commission to reappoint the Executive Director."

The Commission of Game and Inland Fisheries is a continuing body and, since neither of the statutes to which you refer provides for any specific term for its Executive Director, I am of opinion that, having been duly appointed as Executive Director, you would continue in this capacity until the Commission took some action to the contrary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Regulations Of Commission Inconsistent With Statute Are Void.

HONORABLE T. E. CLARKE,
Executive Director,
Commission of Game and Inland Fisheries,
Richmond, 13, Virginia.

My dear Mr. Clarke:

I am in receipt of your letter of June 26, which I quote below:

"The last Legislature passed an Act, Chapter 360, fixing the outside dates within which the Game Commission could fix open hunting seasons.

"There are several seasons set by regulations that extend beyond the outside dates fixed by the Legislative Act. For example, the outside limits set for shooting foxes is October 1st to January 31st. A regulation that has been in force since 1941 fixes the open season in Dickenson County as November 1st to February 20th, in Giles County, October 1st to March 31st; Tazewell County, September 15th to January 20th.

"I will be obliged if you will give me your opinion whether or not the seasons set by regulations that are outside of the seasons fixed by Legislative Act are automatically curtailed so as to bring them within the legal limits."
The Act to which you refer, insofar as it relates to the open season for hunting, provides in part as follows:

"OUTSIDE DATES OF OPEN SEASON FOR HUNTING WITHIN WHICH THE COMMISSION OF GAME AND INLAND FISHERIES MAY FIX THE OPEN SEASONS AND BAG LIMITS."

Then follows the "outside dates" specified in detail in the case of each specie of game.

You will observe that the Legislature expressly provides that the specified "outside dates" are those within which the Commission has authority to fix the open seasons. In my opinion, therefore, it follows that any regulations which the Commission may have adopted which are inconsistent with the "outside dates" specified in the Act are ineffective to the extent of such inconsistency. The Act contains no saving clause to preserve any regulations which the Commission may have heretofore adopted which are contrary to the amended law.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—When Duck Blinds May Not Be Erected In Certain Counties.

HONORABLE M. D. HART, Acting Executive Director,
Commission of Game and Inland Fisheries,
Travelers Building,
Richmond 13, Virginia.

My dear Mr. Hart:

This is in reply to your letter of October 27, 1944, which I quote:

"We construe Chapter 334, Acts 1928, applicable to the public waters of the Counties of King George, Stafford, Prince William, and Fairfax, prohibits the erection of duck blinds in the public waters of said Counties to be placed at a greater distance than three hundred yards of any shore line at low water mark.

"Please advise if you concur in this construction."

Sections one and two of the Act referred to are as follows:

"1. Be it enacted by the general assembly of Virginia, That the owners of land adjoining the waters of the counties of King George, Stafford, Prince William and Fairfax, their lessees, licensees or permittees shall have the exclusive right to erect stob or brush blinds in front of their property for the purpose of hunting water fowl, except that it shall be unlawful to place stob or brush blinds in such waters at a greater distance than three hundred yards from the shore at low water mark; provided, however, that such stob or brush blinds may not be set or maintained at a greater distance from the shore than one-half of the width of the tributary where said tributary is less than six hundred yards in width.

"2. It shall be unlawful to shoot water fowl from floating blinds unless the same are anchored. No floating blind shall be set or shot from within four hundred yards of any other person's blind or shore without the written consent of such other person."

The first section expressly prohibits the erecting of stob or brush blinds in the waters of these counties at any place which is distant more than three hundred yards from the shore. The prohibition clearly applies to all persons
whether they be adjoining land owners or not. Section two permits the use of floating blinds in said waters provided they are anchored, and also subject to the above quoted restrictions as to their location.

It seems that it was the intent of the Act to segregate the waters near the shore for the location of stob or brush blinds and the central waters for floating blinds.

Your letter does not specify any particular type of blind as covered by your interpretation of the Act. As applied to stob or brush blinds in my opinion your interpretation is correct, but it obviously should not be held to include floating blinds.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Certain Statutes Respecting Deer Amended But Not Re-enacted In 1944.

July 24, 1944.

HONORABLE T. E. CLARKE, Executive Director,
Commission of Game and Inland Fisheries,
Richmond 13, Virginia.

My dear Mr. Clarke:

This is in reply to your letter of July 22, from which I quote:

"The 1944 Legislature passed an Act, Chapter 360, making certain changes in the game laws.
"Under 'deer' (page 513) it made some changes, but did not repeal any provisions of the former Acts.
"Chapter 389, Acts 1936 (page 641), provides that only deer without horns visible above the hair may be killed.
"Chapter 364, Acts 1938 (page 581), provides that west of the Blue Ridge only deer that have at least two prongs on one horn may be killed.
"The 1944 Act makes no reference to these two provisions.
"There is some demand for opening the season on does in certain counties.
"I will be obligated if you will give your opinion whether or not the provisions of the Acts of 1936 and 1938 are still in effect."

Chapter 360 of the Acts of 1944 amends and re-enacts section 36 among others of the Game, Inland Fish and Dog Code of Virginia. Chapter 389 of the Acts of 1936 also is amendatory of this same section. Therefore, the provision to which you refer, relating to deer, which was formerly contained in section 36 of the Game, Inland Fish and Dog Code, having been omitted from the section as it was amended by Chapter 360 of the Acts of 1944, is no longer in effect.

However, Chapter 364 of the Acts of 1938, dealing with deer west of the Blue Ridge, adds a new section to the Game, Inland Fish and Dog Code of Virginia, designated as section 36-a. Chapter 360 of the Acts of 1944 contains no repealing clause and does not purport to amend section 36-a, which was added in 1938, and it is, therefore, my opinion that the said section 36-a is still in effect.

Very sincerely yours,

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

GAME, INLAND FISH, AND DOG CODE—When Fishing May Be Done Without A License.

HONORABLE JULIUS GOODMAN,
Attorney for the Commonwealth,
Christiansburg, Virginia.

My dear Mr. Goodman:

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

"Section 3305(19), being a section under the Game and Inland Fisheries Laws, states as follows:

"'It shall be unlawful to hunt, trap or fish ... without first obtaining a license, subject to the following exemptions:

* * * * * * * * *

"Fifth. License shall not be required of residents to fish in the county limits of the county of which they are resident, as defined by section 3305(22) of this chapter, or to fish in the city limits of the city of which they are resident, provided such person is not fishing with a rod and reel or other method whereby artificial lures, or minnows are used as bait and provided, further, that such person is not fishing for bass or trout.'

"I would appreciate an opinion as soon as possible as to the following: 'Is a resident required to have a license to fish if he is using a rod and reel, or a pole and tight line, when he only uses worms for bait?'"

It is my opinion that the language which you quote should be construed to allow a resident of a county or city to fish within the limits of his county or city without a license provided (a) that the fishing is not done with a rod and reel and (b) that artificial lures or minnows are not used as bait, even though a rod and reel are not used. In other words, fishing with a rod and reel, irrespective of the character of the bait used, is prohibited without a license, and fishing with artificial lures or minnows as bait is prohibited without a license, no matter what rod or pole or other method is used.

I may say that I have consulted with the Department of Game and Inland Fisheries and am advised that the construction which I have placed upon the statute is the one that has been uniformly followed by that Department.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


HONORABLE CHAS. H. WILSON,
Attorney for the Commonwealth,
Nottoway, Virginia:

My dear Mr. Wilson:

I am in receipt of your letter of May 22, from which I quote as follows:

"AT the regular meeting of the Board of Supervisors of Nottoway County, Virginia, on the 21st instant, a bill was submitted for payment for six pedigreed rabbits killed by a dog. Under section 3305(75) of the Code,
I ruled that such account was not proper and that the Board of Supervisors should not pay same.

"At the request of the Board of Supervisors, I am writing to ask that you approve and confirm this ruling or point out my error therein."

The section of the Code to which you refer provides for compensation for livestock at the assessed value thereof. Section 3305(61) of the Code (Michie, 1942), which is in the same chapter with section 3305 (75), provides that the word "livestock" includes "enclosed domesticated rabbits or hares." I am, therefore, of opinion that the word "livestock" as used in section 3305 (75) includes "enclosed domesticated rabbits or hares."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Dog Code: Fowls Killed By Dog; Recovery Of Value.

HONORABLE JAMES M. SETTLE, Clerk,
Board of Supervisors,
Washington, Virginia.

My dear Mr. Settle:

I am in receipt of your letter of July 31, in which you ask if it is lawful for the Board of Supervisors to pay claims presented to it for fowls killed by dogs.

In my opinion, your question must be answered in the affirmative. Section 3305(75) of the Code (Michie, 1942) expressly provides that:

"Any person taxed by the State who shall have any livestock or poultry killed or injured by any dog shall be entitled to receive compensation therefor at the assessed value of such livestock and fair value of unassessed lambs or poultry * * *"

You will see from the quoted language that in the case of compensating for fowls killed by dogs it is not necessary to show that such fowls have been assessed for taxation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Dog Code: Fowls Killed By Dog; Owner Must Be Tax-payer In Order To Recover.

HONORABLE LEWIS CRAWLEY,
Clerk of Cumberland County,
Cumberland, Virginia.

My dear Mr. Crawley:

This is in reply to your letter of November 10, from which I quote as follows:
"I have been requested by the Board of Supervisors of Cumberland County, in the State of Virginia, to write you as to your opinion on the following:

"The Commission of Game and Inland Fisheries for the State of Virginia have leased certain lands from the United States Government for the purpose of breeding and raising 'wild turkeys' in this county, which said breeding turkeys are and were kept in an enclosed lot of several acres probably. Some unknown dogs have broken into this lot and have killed several (40 or 45) of these turkeys and the Commission of Game and Inland Fisheries have appeared before the Board of Supervisors of this county requesting compensation for same. Should the said Board pay for such damages? Section 3305(75) provides 'ANY PERSON TAXED BY THE STATE' etc., and this is the question before the Board. It has also questioned if wild turkeys should be paid for by the said Board.'

As you point out, section 3305(75) of the Code (Michie, 1942) provides for compensation for certain live stock and poultry killed by dogs, but the compensation is limited to "any person taxed by the State * * *" I do not think that the Commission of Game and Inland Fisheries comes within the scope of the quoted language and it is, therefore, my opinion that the Board of Supervisors of your county is not required under the section to compensate the Commission for the wild turkeys that you describe.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INEBRIATE PERSONS—Disposition of Whiskey Ration Book During Commitment.

Dr. Hugh C. Henry, Commissioner,
Mental Hygiene and Hospitals,
309 North Twelfth Street,
Richmond, 19, Virginia.

My dear Mr. Henry:

I am in receipt of your letter of May 26, in which you state that the Chairman of the Alcoholic Beverage Control Board has requested you to furnish the Board with the names of inebriates who have been committed to the several State hospitals. The Board also desires that, when an inebriate is committed to one of the State hospitals, his whiskey ration book be taken up and turned over to the Board. You desire to know whether it is permissible for you to cooperate with the Alcoholic Beverage Control Board to the extent requested.

Section 4675(42) of the Code (Michie, 1942) contemplates that alcoholic beverages shall not be sold to a person under the supervision or control of any State hospital, whether such person be on furlough or otherwise. Therefore, I think it would be entirely proper for you to furnish the Alcoholic Beverage Control Board with the names of inebriates who are under the supervision or control of a State hospital, as this would be a means of carrying out the provision of law to which I have referred.

I question your authority to turn over to the Alcoholic Beverage Control Board the whiskey ration books of persons committed to the State hospitals as inebriates. I can find no such specific authority in the Alcoholic Beverage Control Act, nor anything from which such authority can reasonably be implied. However, unquestionably, I think the superintendents of the State hospitals may take up the ration books from persons committed to their institutions and may withhold such ration books so long as such persons are under the super-
vision or control of the institutions, whether on furlough or otherwise. It would indeed be an anomalous situation to allow persons committed as inebriates to retain their whiskey ration books and thus provide them with the means of defeating the purpose for which they were committed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE PERSONS—Where Commitment Papers To Be Filed.

June 19, 1945.

DR. H. C. HENRY, Commissioner,
Mental Hygiene and Hospitals,
309 North Twelfth Street,
Richmond 19, Virginia.

My dear Mr. Henry:

This is in reply to your letter of June 16, which I quote in full:

"In proceedings to ascertain insanity, etc., under section 1017 of the Code of Virginia, it is frequently necessary for a person resident of one county or city to be committed in another of which he is not a resident, particularly when a commission has to be held at a State hospital in the case of patients first admitted as voluntary who subsequently require commitment, or Virginia residents transferred directly to our hospitals from other States. Formerly the records of proceedings in such cases were usually filed in the county or city where the commission was held. At the present time no uniformity of practice exists—some justices filing as formerly and others in the county or city of legal residence.

"It now appears desirable that all such records should be filed in the clerk's office of the county or city in which the committed person has legal residence. If this practice should be made uniform, it would greatly facilitate the compilation of accurate statistics in the central office of the State Hospital Board and it would avoid a great deal of present confusion in the auditing and payment of bills of physicians and others acting on such commissions. All the clerks of courts interviewed by our statistician agree that it would be desirable to have the records filed in the county or city from which the costs of the commission are to be paid.

"Therefore, I am desirous of instructing justices who hold commissions in such cases as have been described to file commitment papers in the clerks' offices of the counties or cities in which the committed persons have established legal residences.

"It will be appreciated if you will advise me if this procedure would be inconsistent with section 1019 of the Code of Virginia or other provision of law."

Section 1019 of the Code, to which you refer, is somewhat ambiguous as to the place where the record of commitment proceedings should be filed, the section simply providing that the record shall be "filed in the office of the clerk of the circuit court of the county or the clerk of the corporation court of the city." I quite agree with you that the practice as to the place where the record of these proceedings are kept should be uniform, and also I can appreciate the fact that the more logical place would seem to be the county or city of the residence of the person committed. It is my opinion that the section
is susceptible of the construction which you desire placed upon it, and I think that the Board would be justified in instructing justices who hold commissions to adopt this construction.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Expense: State Not Liable To Reimburse Locality For Expense Of Holding Prisoner For Federal Authorities.

MAJOR R. M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Major Youell:

This is in reply to your letter of September 1, in which you state that it has been the practice of the Police Justice of the City of Richmond to commit to jail persons suspected of violating the Selective Service Act, pending investigation of each case by the Federal Bureau of Investigation. You state that the persons so held in jail have been reported by the City Sergeant of Richmond and the Sheriff of Henrico County as being "Commonwealth Prisoners," and you desire the opinion of this office as to whether or not the Commonwealth shall reimburse the city and county, respectively, for any part of the cost of feeding, clothing and caring for these prisoners under the provisions of section 9 of chapter 386 of the Acts of 1942, as amended by chapter 226 of the Acts of 1944.

Under the provisions of the above mentioned section the Commonwealth is required to reimburse a county or city for the cost of feeding, clothing and caring for the following persons held in jail:

"*** prisoners accused or convicted of violation of the laws of the Commonwealth *** persons held as witnesses in cases to which the Commonwealth is a party *** persons confined in jail for contempt of court, and *** persons suspected of being or adjudged insane under the laws of the Commonwealth ***"

A person held in jail for violation of the Selective Service Act, which is a Federal law, is not included within the quoted language designating the persons for whom the Commonwealth shall reimburse, and I am, therefore, of the opinion that there is no authority for such reimbursement for this class of prisoners so held.

You are, of course, familiar with the provision of subsection (c) of the said section 9 which provides that a sheriff or sergeant shall collect from the United States the cost of feeding, clothing and caring for "prisoners of the United States confined in the jail of his county or city."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
JAILS AND PRISONERS—Expense Of Operation; Laundry Equipment.

Major R. M. Youell, Commissioner of Corrections, Richmond 6, Virginia.

My dear Major Youell:

I am in receipt of your letter of August 31, in which you ask if pursuant to section 9 of chapter 386 of the Acts of 1942, as amended by chapter 226 of the Acts of 1944, it is proper for the Commonwealth to reimburse a city for any part of the cost of "laundry equipment and equipment for sterilizing clothing, bedding, etc." purchased for the jail of such city.

The aforesaid subsection provides that the Commonwealth shall reimburse the city for its proportionate part of the "*** clothing *** bedding *** mops, brooms, brushes, cloths, and other cleaning supplies ***" While you do not state the type of laundry equipment involved, nor the cost thereof, in my opinion, the question you raise is more administrative and factual than a legal one. If in the judgment of the State Board of Corrections the purchase you describe comes within the scope of the language I have quoted from section 9 and is necessary for the care of prisoners confined in jail, I am of opinion that the Board would be justified in reimbursing the locality for the Commonwealth's proportionate part of the purchase price.

Very sincerely yours,

Abram P. Staples, Attorney General.

JAILS AND PRISONERS—Jail Physician: Compensation Where Jail Is Used By Several Counties.

Honorable H. M. Ratcliffe, Commonwealth Attorney for Henrico County, 302 Travelers Building, Richmond, Virginia.

My dear Mr. Ratcliffe:

I am in receipt of your letter of June 15, in which you state that both Chesterfield and Charles City Counties are using the Henrico County jail for the confinement of prisoners from those counties. You further state that on account of this fact the Henrico County jail physician is attending the Chesterfield and Charles City prisoners who are confined in the Henrico jail. You call my attention to the provision in the last Appropriation Act (Chapter 407 of the Acts of 1944, at page 662) that "not more than five hundred dollars per calendar year shall be paid the jail physician or physicians for any county or city the population of which is less than 100,000," and ask if this limitation is necessarily applicable in the case you present.

Under the facts stated the Henrico County jail is in reality also the jail of Chesterfield and Charles City Counties. If each of these counties had its own jail, its jail physician could under the law receive as much as $500. In substance, however, the jail physician of Henrico County is now the jail physician of two other counties, and it would certainly appear to be unreasonable to expect him to act for three counties and yet receive only such compensation as would be payable by one county. It is my opinion, therefore, that the limitation to which you refer is not applicable in this instance.

Very sincerely yours,

Abram P. Staples, Attorney General.
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JAILS AND PRISONERS—Sale Of Jail Equipment And Accounting For Proceeds.

MAJOR R. M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Major Youell:

I am in receipt of your letter of September 1, which reads as follows:

"In several instances the Commonwealth has reimbursed cities and counties for a proportionate part of expenditures for cook stoves and refrigerators purchased for use in their respective jails.

"If any such county or city should see fit to sell any such equipment in which the State has participated in the cost, would the State be entitled to a refund from such county or city for a proportionate part of the amount received from a sale of the equipment?"

In such a case as you present I am of opinion that the proceeds from the sale of the equipment should first be applied to the expense of operating the jail or the purchase of new equipment, as the case may be, and the amount of reimbursement from the Commonwealth to which the locality would be entitled would thus be based upon the net cost of the operation of the jail or the purchase of the new equipment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Re-arrest Of Prisoner Erroneously Discharged Ahead Of Time.

MAJOR R. M. YOUELL,
Commissioner of Corrections,
Richmond, 6, Virginia.

My dear Major Youell:

I acknowledge receipt of your letter of July 12, 1944, together with the enclosures, which show that Addie Jackson was committed to the Penitentiary in September, 1939, to serve a sentence of eleven (11) years' imprisonment; that on April 5, 1944, she gave a blood transfusion for which service she was allowed a credit of four (4) months and fifteen (15) days on her sentence; that due to a clerical error her good behavior discharge date was fixed at July 10, 1944 instead of September 29, 1946; and that as a consequence she was erroneously discharged from the Penitentiary on July 11, 1944.

You then ask:

"I write to inquire what is the proper and legal action to be taken by the Superintendent of the Penitentiary in this case. Can and should this woman be arrested and brought back to the Penitentiary to serve the 3 year sentence?"

I note that the procedure in this case was for the Governor, upon recommendation of the Superintendent of the Penitentiary, to execute an Executive Order commuting the sentence of the prisoner from eleven (11) years to ten (10) years, seven (7) months and fifteen (15) days. I shall not deal with this aspect of the case, as I have recently expressed the opinion that the Governor has no authority to commute sentences except in capital cases. (See my
opinion of December 21, 1943, to Honorable Ralph E. Wilkins.) The procedure in this and in similar types of cases is for the State Board of Corrections "with the consent of the Governor" to allow a credit upon the sentence of the prisoner. Acts of General Assembly, 1944, Chapter 84. Therefore, the Commutation Order of the Governor is of no consequence in this case except insofar as it expresses the consent of the Governor to the proposed action of the Board of Corrections in allowing the credit of four (4) months and fifteen (15) days of the sentence.

Under the principles of the common law, a jailor has no power to discharge a prisoner prior to the expiration of the prisoner's service of the sentence imposed upon him. If he discharges the prisoner ahead of that date, it constitutes a species of escape by the prisoner who may be rearrested and brought back to serve the remainder of his sentence. In the present case the discharge was not authorized under the law and it is my opinion that Addie Jackson may be rearrested upon proper warrant and returned to serve the remainder of her sentence.

You have also asked me "should" she be so returned. That involves an exercise of discretion on the part of the Board of Corrections, and it would be improper for the Attorney General to express an opinion thereon.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

THOMAS H. WILCOX, Esq.,
Commissioner of Accounts,
419 National Bank of Commerce Building,
Norfolk 10, Virginia.

My dear Mr. Wilcox:

This is in reply to your letter of December 22, from which I quote as follows:

"As Commissioner of Accounts I have a problem on which I need your help.

"The late James U. Goode had in his library a number of books which had been furnished him by the State, including Virginia Reports, Acts of Assembly, etc. The Executor has considered them as the property of the State of Virginia and has not included them in the inventory. The representative of the Judge's infant child says they are his property and should be included in the inventory. See section 390 of Michie's Code, 1942. As to the Virginia Reports see section 396 and also section 347, as it existed prior to 1938. The present section, which was adopted in 1938, settles the matter so far as the Virginia Reports furnished after that date are concerned."

As you state, insofar as the Virginia Reports are concerned which were furnished after the amendment in 1938 of section 396 of the Code (Acts 1938 page 230), these reports are not a part of the estate since the section provides that they are furnished to the judges for their use and that of "their successors in office." As to the Virginia Reports furnished to the judges prior to 1938 under the authority of section 347 of the Code as it then existed, I am inclined to be of the opinion that they belong to the judges individually since the section did not contain the clarifying provision which I have above quoted from section 396 of the Code. While it might be argued that the General Assembly did not
intend for these reports to be the personal property of the judges to whom they were furnished, I am of opinion that this intention was not expressed with sufficient clarity to give it effect.

As to the Acts of Assembly which have been furnished under the authority of section 390 of the Code, I think that they occupy the same status as the Virginia Reports which were furnished prior to 1938, for the section simply provides that two copies shall be furnished to every judge, and does not contain any language to indicate that they are furnished for the use of “their successors in office.”

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Commonwealth Judgments Barred After Twenty Years.

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

My dear Mr. Gilmer:

I am in receipt of your letter of March 5, in which you enclose a communication from Mr. Glenn W. Ruebush, of Harrisonburg, with reference to a judgment obtained in the Circuit Court of Rockingham County for a fine of $200 in favor of the Commonwealth, which judgment was docketed on June 20, 1923.

Section 2543 of the Code provides in part as follows:

“No action, suit, or proceedings of any nature, however, shall be brought or had for the recovery of a fine or costs due the Commonwealth or any political subdivision thereof, unless within twenty years from the date of the judgment imposing the fine.”

I have previously expressed the opinion in cases similar to that presented by Mr. Ruebush that the collection of such judgments is barred by the provision quoted above. Therefore, upon the basis of the facts stated by Mr. Ruebush, I am of opinion that the judgment about which he writes, having been obtained more than twenty years ago, is not now collectable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUDGMENTS—Execution On Judgment To Issue Only From Court Where Judgment Was Rendered.

HONORABLE JAMES ASHBY, Clerk.
Stafford Circuit Court,
Stafford, Virginia.

My dear Mr. Ashby:

This is in reply to your letter of April 24, 1945, in which you state the following:
"The question has arisen in this office as to whether a Clerk has the right to issue an execution on a judgment that has been docketed in his office when the original judgment was entered in another court and the judgment entered in his office is entered from an abstract of judgment.

"Please advise me if I have the right to issue an execution on a judgment that has been docketed in this court from an abstract."

Section 6480 of the Code expressly provides that the writ of fieri facias shall issue from the court at which a judgment was rendered and section 6055 of the Code, as construed in Johnston v. Pearson, 121 Va. 453, 93 S. E. 40, allows such process to be directed to the proper officer of any county or city. It is my opinion, therefore, that an execution has to be issued only by the clerk in the county or city where the original judgment was entered.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

JURISDICTION—Crimes Committed On Potomac River.

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

My dear Governor Darden:

This is in reply to your request for my opinion on the following question:

"Does the jurisdiction of the State of Virginia to enforce its criminal laws respecting slot machines extend to offenses alleged to have occurred on the Potomac River?"

In my opinion, the State of Virginia has no such jurisdiction.

By the compact of 1785 between Virginia and Maryland, the territorial bounds of Virginia extend only to the low water mark of the Potomac River on its southern or Virginia shore. The consequent result is that the Potomac River lies wholly in the State of Maryland, and in the absence of any further legislative compact between the two States, the State of Virginia would have no criminal jurisdiction over the waters of the Potomac.

The Compact between the two States (section 14 of the Code of Virginia) does indeed make provision for concurrent jurisdiction of the two States over certain crimes under certain conditions, to-wit:

"All piracies, crimes, or offenses committed * * * by any persons, not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the Commonwealth of Virginia, which hath legal cognizance of such offense * * * "

This article, however, has reference only to offenses committed against the person. See Hendricks v. Commonwealth, 75 Va. 934, where it is said:

"This article has reference only to offenses against the citizen or individual. When the offense is against the State, and not against an individual or citizen, there is no declaration as to the court of which State shall take cognizance of it. The jurisdiction in such case is left to be regulated by the public law, * * * (75 Va. 934, 941).

This holding was approved in Wharton vs. Wise, 153 U. S. 155, 38 L. Ed. 669, 14 S. Ct. 783.
Both of the aforesaid cases involved Virginia statutes punishing unlawful fishing, which statutes expressly covered offenses in the Potomac River and Chesapeake Bay, and which were enacted with the consent and approval of the State of Maryland, and on this ground convictions were sustained.

Operation of a slot machine is not an offense against a citizen of Virginia, but an offense purely against the State; therefore, it is not within the provisions of the Compact.

The slot machine statute does not purport to cover the waters of the Potomac, and I have been unable to find any general criminal statute which purports to give Virginia general criminal jurisdiction over those waters. It is my opinion, therefore, that the State of Virginia has no jurisdiction to enforce the slot machine statutes on the waters of the Potomac River.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Lands Acquired By United States.

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

My dear Mr. Marsh:

I have your letter of August 21, 1944, in which you request my opinion upon the question of the jurisdiction of a coroner to investigate a death occurring under unusual circumstances upon certain lands known as the District of Columbia Reformatory and Workhouse, a part of which is located in Fairfax County.

The answer to your question would seem to depend upon whether the land in question would be considered as having been acquired by the United States for governmental purposes. Generally speaking, over lands which have been acquired by the United States for governmental purposes other than military or naval, both the State and the Federal Governments have concurrent jurisdiction. It would seem that the purpose for which the land in question was acquired would not come within the classification of a naval or military purpose, and, therefore, even if the government of the District of Columbia would be considered as a governmental agency of the United States in the sense that acquisition of land by it would be deemed acquisition by the United States, it would appear that the State would have concurrent jurisdiction over the land. See sections 17 to 19f, inclusive, of Michie's Code. Some of these section numbers are not the correct official Code section numbers. These various sections, and other Acts relating to jurisdiction, have been amended from time to time, and it sometimes happens that the nature and extent of the Federal jurisdiction depends upon the time of acquisition.

The foregoing may be summarized as presenting two questions which are to some extent factual. The first is whether or not the land would be deemed, as a matter of law under the facts and circumstances of the case to be acquired by the United States of America, and, second, whether, if this question is to be answered in the affirmative, the purpose for which the land was acquired would be deemed to be a military or naval purpose. If both of these questions are to be answered in the affirmative, in my opinion the United States has exclusive jurisdiction over the lands; if not, the State has at least concurrent jurisdiction.

I know of no statute by which the Commonwealth of Virginia has ever undertaken to cede to the government of the District of Columbia any juris-
diction over other lands acquired by such government, and, unless said gov-
ernment is to be regarded in legal intendment as a part of the United States
itself, I doubt very much the power of the State legislature to cede any such
jurisdiction.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Lands Ceded To The United States.

HONORABLE JULIUS GOODMAN,
Attorney for the Commonwealth,
Christiansburg, Virginia.

August 15, 1944.

My dear Mr. Goodman:

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

“As you know the Radford Ordnance Works, Radford, Montgomery
County, Virginia, is operated for the United States Government by Her-
cules Powder Company, the members at the Radford Ordnance Works,
employed by Hercules Powder Company and by the War Department,
recognizes a non profit, unincorporated association for recreational activities.
This club has been in operation for over two years.

“You will further recall that a deed as executed by the Governor of
Virginia and by yourself, ceding exclusive jurisdiction over the site of the
Radford Ordnance Works, to the United States of America. This deed is
dated April 22, 1942, and was recorded on June 26, 1942, in the Clerk's Office
of the Circuit Court of Montgomery County, Virginia.”

“The Radford Ordnance Club now desires to sell 3.2 beer on the
premises of the Radford Ordnance Works to its members and representatives
of the Hercules Powder Company and they have requested from me an
opinion as to the laws of the State of Virginia pertaining to such purposed
undertaking of the Radford Ordnance Club. By virtue of the deed above
mentioned, and in view of section 4675 (61)-(g) of the Code of Virginia,
it would appear that the Radford Ordnance Club would not be required
from the State of Virginia to pay any taxes to the same, in selling 3.2 beer
on the premises of the Radford Ordnance Works to its members, as outlined
above. Before formally advising the Hercules Powder Company, I would
appreciate an opinion from you with regard to this matter.

“Please advise me if the Radford Ordnance Club can sell 3.2 beer on
the premises, as outlined above, without having to receive a permit from
the ABC Board and without having to pay any license or tax of any kind
to the State of Virginia.”

The deed to which you refer cedes to the United States exclusive juris-
diction over the land described therein, with the proviso, in the event the
land or any part thereof shall be sold or leased to any private individual or any
association or corporation, under the terms of which sale or lease the vendee or
lessee has a right to conduct thereon any private industry or business, then
the jurisdiction ceded by the deed ceases and the Commonwealth resumes all
jurisdiction and power she originally had. There is an exception made, however,
for “post exchanges, officers' clubs and similar activities on said land.”

From what you state, the organization you describe appears to be an
activity similar to an officers' club. If this is a fact, and you are in a better
position than I to pass on the facts, I am of opinion that the organization would
not be required to secure a license from the Alcoholic Beverage Control Board
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to sell 3.2 beer on the premises as outlined by you, nor would it have to pay the excise tax on the beer sold. If the excise tax should be paid, I presume a refund could be made by the State Tax Department.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Warrants; Jurisdiction Of Justice Of The Peace.

W. R. MARSHALL, ESQ.,
Justice of the Peace,
Saltville, Virginia.

My dear Mr. Marshall:

I am in receipt of your letter of July 1, in which you ask the following questions:

"lst. Does a justice of the peace in his respective county have authority to issue criminal warrants charging non-support and/or desertion; 2nd. and/or in juvenile cases?"

In answer to your first question, I beg to advise that chapter 80 of the Code dealing with desertion and non-support, and especially section 1937, provides that proceedings in such cases shall be instituted upon petition "verified by oath or affirmation, filed by the wife or child, or by any probation officer upon information received, or by any other person having knowledge of the facts, which said petition shall set forth the facts and circumstances of the case." The section expressly stipulates that "no warrant of arrest shall issue against any person coming within the terms of this Act, but all proceedings shall be instituted upon petition as aforesaid." There is one exception, however, and that is upon affidavit of the wife or other person that there is reasonable cause to believe that the husband or father is about to leave the jurisdiction of the court with intent to desert the wife or child, "any justice of the peace of said county or city may issue his warrant for such person returnable before such court." In view of the provisions of the section, it is my opinion that the only time a justice of the peace may issue a warrant in desertion and non-support cases is under the exception I have mentioned above.

Likewise, section 1907 of chapter 78 of the Code dealing with delinquent, dependent and destitute children provides that proceedings under the chapter shall be instituted by verified petition filed by any reputable person having knowledge or information that the child is within the provisions of the chapter or subject to the jurisdiction of the court, or by a probation officer having such knowledge or information. In this class of cases, therefore, I am of opinion that a justice of the peace may not issue a warrant, since the statute provides that the proceedings shall be instituted by petition.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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LICENSES—When Attorney At Law Must Procure Real Estate Agent's License.

September 6, 1944.

HONORABLE D. W. McNEIL,
Attorney for the Commonwealth,
Lexington, Virginia.

My dear Mr. McNeil:

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

"I write to inquire if you can give me an official opinion on the following matter: does a regular licensed attorney at law have to have a real estate agent's license in order to sell or buy real estate for a client? Or to negotiate rental of real estate, and collect and pay over rent for clients? Section 4359(78) of the Code of Virginia defines a real estate broker, and then makes certain exceptions to which the Act does not apply, among which exceptions is an attorney at law while acting in his capacity as attorney. Section 196 of the Tax Code defines a real estate agent, and makes certain exceptions, among which exceptions an attorney is not included."

I assume that your inquiry is directed solely to the liability of the attorney to the revenue license imposed by section 196 of the Tax Code of Virginia. As you state, this section makes no exception for an attorney at law. However, after consideration, I think the better view is that, where an attorney in dealing with real estate is acting for a regular client and the particular transaction is purely incidental to the attorney's professional business, then a revenue license as a real estate agent should not be assessed. However, if the attorney, in addition to the practice of his profession as an attorney at law, engages in the business, or holds himself out to engage in the business of buying and selling real estate, then I am of opinion that the revenue license should be assessed. After all, the question can only be determined by a consideration of the facts existing in each particular case.

I may say that I have conferred with Honorable C. H. Morrissett, State Tax Commissioner, and he concurs in the view I am expressing herein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

LITERARY FUND—Effect of Amendment To Section 134 Of The Constitution.

September 14, 1944.

HONORABLE COLGATE W. DARDEN, JR.,
Governor of Virginia,
Richmond 12, Virginia.

My dear Governor Darden:

This is in reply to your request for my opinion upon the question whether or not, under the provisions of the proposed amendment of section 134 of the Constitution of Virginia relating to the literary fund, the General Assembly would be empowered, if said amendment is adopted, to expend any part of the principal in excess of ten million dollars for current expenses of the schools, or for any other governmental operating costs. The proposed amendment consists of adding at the end of the present section 134, which provides for setting apart the literary fund, the following:
"**provided that when and so long as the principal of the literary fund amounts to as much as ten million dollars, the General Assembly may set aside all or any part of moneys thereafter received into the principal of said fund for public school purposes including teachers retirement fund to be held and administered in such manner as may be provided by general law."

Since the language of the proposed amendment clearly contemplates that the General Assembly may set aside all or any part of such excess moneys received, and that same shall be held and administered in such manner as may be provided by law, in my opinion, it is not contemplated that such excess principal funds may be used for current school operating expenses. The legislature would be thereby authorized, in my opinion, to use said excess principal only to establish or contribute to some permanent fund, such as the teachers retirement fund, and the object of any such fund must be restricted solely to public school purposes.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MARRIAGE AND DIVORCE—Proof Of Marriage Where There Has Been No Minister’s Return.

HONORABLE JENNINGS L. LOONEY,
Clerk of the Circuit Court,
Grundy, Virginia.

My dear Mr. Looney:

I have your letter of February 9, which I quote in full as follows:

"On January 6, 1940, one Clyde Lee Barker and Garnett Edna Keen applied to the Clerk of the Circuit Court of Russell County, Virginia, for a marriage license, which was given to them and they were sent to a certain place where they were told they could find a minister who would marry them, and they went to this place and found the person to whom they had been sent and were married and have been living together as husband and wife since that date up until now; and, in the meantime, two children have been born to this marriage.

"Something like a year ago, these parties applied for a copy of their marriage record and obtained a copy of the record that showed the marriage license was issued, but no minister’s return showing the marriage. The marriage certificate that was given to them at the time they were married has been lost; and they were not positive that they remembered the minister’s name who performed the ceremony, but have gone back to Lebanon and also to the State of Tennessee in an effort to locate the person whom they thought performed the ceremony but have not been successful.

"This man is now being inducted into the Armed Services of the United States, and feeling that since there is no record of his marriage that he should re-marry at this time, he has had the blood test as required by law and made application to me as Clerk for a marriage license; therefore, I will appreciate an opinion from you as to the proper procedure in issuing this license—whether to treat the parties as single and use the lady’s maiden name. In other words, whether or not to disregard the former marriage. The parties have agreed to wait for a reply from you before I issue the license.

"Should you know of a better procedure for these people other than
re-marrying at this time and care to do so, I am sure advice along this line will be very much appreciated.

"This man leaves for service in the Army on the 19th; therefore, a prompt reply will be very much appreciated."

With reference to these parties being remarried, it does not seem to me that this would be a satisfactory solution of the problem with which they are presented, which I understand it is to have the wife and children of Mr. Barker acquire the status of his dependents when he is inducted into the Army. Section 5074 of the Code, providing for the issuance of marriage certificates, provides that the parties shall state under oath or by affidavit their condition before the contemplated marriage, "whether single, widowed or divorced." In order for them to acquire a license at this time they would have to recognize the fact that the former marriage was invalid, which, of course, they would not wish to do inasmuch as they have two children. Furthermore, a marriage performed at this time would not be very satisfactory evidence of the fact of the dependency of the children in the absence of the former marriage.

I have talked with Major Frank, who is an attorney in the Richmond office of Selective Service, and he tells me that the regulations with respect to the evidence necessary to establish dependency where no marriage certificate is available provide that any evidence is sufficient to establish the fact of dependency which would be sufficient to establish the fact of marriage under the laws of Virginia. In this connection, you will note that section 5074 of the Code, above referred to, recognizes affidavits as sufficient evidence of the fact that a person is not married to justify the issuance of a marriage license to such person.

Section 5082 of the Code provides as follows:

"No marriage solemnized under a license issued in this State by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, or any defect, omission or imperfection in such license, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

In my opinion, the affidavits of Mr. and Mrs. Barker stating the facts set out in your letter above quoted, together with a certified copy of the license, and supplemented if desired by affidavits of third parties that they have lived together as man and wife as stated in your letter, would under the laws of Virginia be accepted as sufficient evidence of the marriage.

I am informed by Dr. Plecker that an affidavit has already been filed in his office stating substantially the facts contained in your letter, and it may be that a copy of the same affidavit would be sufficient. I am also enclosing herewith two extra copies of this letter, and suggest that Mr. Barker attach same to the affidavits and copy of marriage license for presentation to the proper authority in order to establish the fact of the dependency of his wife and children.

There is no doubt under the laws of Virginia as to the validity of the marriage, the only question being as to the type of evidence of that fact required by the authorities in the armed forces.

Sincerely yours,

ABRAM P. STAPLES,  
Attorney General.
MARRIAGE AND DIVORCE—Waiting Period After Divorce.

HONORABLE EARL A. FITZPATRICK,
Member of House of Delegates,
Roanoke, Virginia.

My dear Mr. Fitzpatrick:

This is in reply to your letter of July 13, from which I quote as follows:

"At the last session of the General Assembly we amended section 5113 of the Code, which made the waiting period after a decree of divorce four months instead of six months. This Act can be found at page 181 of the Acts of Assembly.

"The question has now arisen among many of the members of the bar as to whether this Act will apply only to decrees entered after the Act took effect, or whether the same will apply to those decrees which had been entered prior to the effective date of the Act when six months waiting period was required. I will appreciate very much your giving me an opinion on this matter, and would appreciate your sending me about five copies of your opinion, as there are quite a number of interested parties. I would appreciate your giving me this opinion as soon as possible."

It is well settled that in the absence of any positive indication in a statute or an amendment thereto that the Legislature intended for it to operate retroactively it will not be given retrospective effect. I can find nothing in section 5113 of the Code, as amended by Chapter 142 of the Acts of 1944, which indicates that the Legislature intended that the change in the waiting period should apply to divorce decrees entered prior to the effective date of the Act. I am constrained to advise, therefore, that in my opinion in cases of divorce decrees entered prior to the effective date of section 5113 as amended neither of the parties should marry again for six months from the date of the decree. You will realize that this question cannot be determined with any degree of finality except by a court. I am expressing this opinion, however, not only on account of the rule of statutory construction to which I have referred, but also on account of the serious consequences to the parties to a divorce granted before the effective date of the Act if either of them erroneously acted upon the assumption that the shorter waiting period was applicable to such a divorce.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MILITIA—When Compensation To Be Paid To Virginia State Guard.

BRIGADIER GENERAL S. GARDNER WALLER,
The Adjutant General of Virginia,
State Office Building,
Richmond, Virginia.

My dear General Waller:

I refer to your two letters of March 21 and April 7, with reference to the question of compensation of members of the Virginia State Guard in the event it should attend an encampment this summer at the State Military Reservation near Virginia Beach. It appears from your letters that the purpose of attending the encampment would be for drills and training.
In my opinion, if the Virginia State Guard, which is a part of the militia of the State (sections 2673(1) and 2673(73) of Michie's Code of 1942, as amended), is called by the Governor into the active service of the State, its members are entitled to the compensation provided by law. See sections 2673(69) and 2673(76) of Michie's Code of 1942. However, the authority of the Governor to call the unorganized militia into active service is by sections 2673(61) and 2673(72) in cases where "any combination shall become so powerful as to obstruct in any part of this State the due execution of the laws thereof," and "to execute the law, suppress riots or insurrections, or repel invasions."

An encampment such as you describe is not, in my opinion, included within the scope of the quoted language.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MINES AND MINING—Use Of Gasoline Prohibited.

September 1, 1944.

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

My dear Mr. Moore:

This is in reply to your letter of August 31, in which you request my opinion upon the question whether or not the prohibition of section 1879 against the use of gasoline in underground mining operations applies to an operation consisting solely of getting out limestone. You state that the lime dust is not explosive; in fact, is used in coal mines to prevent explosions.

Section 1879 is very brief and I quote same in full:

"No gasoline, benzine, kerosene or other inflammable oils shall be used underground in operating machinery."

It is very clear that the section itself does not provide any exception as to any particular type of underground mining operation. The section is part of chapter 76 of the Code which is applicable to all mining operations in the State, although there are some sections which have especial application to coal mines.

I do not believe it can be said that there is an implied exemption permitting the use of gasoline in operating underground machinery, even though there may be no explosive dust or gasses present. There is always the possibility that the gasoline engine itself will explode or become damaged in some way so as to permit gasoline to escape and endanger the lives of persons who may not have any means of egress or escape from the mines.

Since the legislature has made no exception, I believe that the Commissioner of Labor is correct when he states that he has no authority to grant permission to do any act which would be in violation of said section.

Sincerely yours,

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

MOTOR VEHICLE CODE—Liability For Failure To Report An Accident.

February 6, 1945.

My dear Mr. Watkins:

This is in reply to your letter of February 5, 1945, in which you set out the following facts in a case now pending before the Trial Justice of Prince Edward County:

"The accused was living in Crewe, Virginia. Three young boys who he hardly knew were sitting in a car on the street. The car was owned by one of the boy's parents. The accused, who was drinking, got into the car and started driving towards Farmville, without their consent. About 5 miles from Farmville while driving at a rapid rate of speed the car turned over while going around a curve. Two of the young boys in the car were injured, though not seriously. The accused helped one of the boys, who at the time was unconscious, out of the wrecked car, but left the scene of the accident immediately—not going for help and did not report to the police."

You ask my opinion on whether the accused is subject to punishment under section 2154(104) of Michie's Code of Virginia.

In my opinion the acts of the accused do not fall within the intendment of section 2154(104) but are punishable under sections 42 and 52 of chapter 384 of the 1944 Acts of the General Assembly, carried in Michie's 1944 Supplement of the Code as sections 2154 (a42) and (a52). Sections 2154(104) and (105) refer to special aggravated sets of facts which carry increased punishment for violation thereof. Insofar as these sections apply to injury to persons, they apply, in my opinion, only when injuries are sustained by "the driver or some other occupant of the vehicle collided with." The sections would seem to apply, therefore, only where there has been a collision with another vehicle.

On the other hand, sections 42-52 of chapter 384 of the 1944 Acts of the General Assembly, carried in Michie's 1944 Supplement as sections 2154(a42)-(a52), which replace the former repealed section 2154(106) of Michie's Code, provide that

"The driver of any vehicle involved in any accident resulting in injury to or death of any person or some person for him shall immediately give notice of the accident ** * "

and section 2154(a52) makes it a misdemeanor for failure to make such report. These sections do not, however, require the driver to give aid to the person injured.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Stopping When School Bus Is Discharging School Children.

September 28, 1944.

My dear Major Nunn:

This is in reply to your letter of September 26, from which I quote as follows:
REPORT OF THE ATTORNEY GENERAL

"Due to the concerted enforcement effort which is now being put forth on the violations of motorists who fail to stop behind or in front of a school bus which is stopped for the purpose of loading or unloading school children, it will be deeply appreciated if you will render an opinion under section 61; subsection (b) (5) of the Motor Vehicle Code of Virginia which reads as follows:

"'Fail to stop at a school bus while taking on or discharging school children, whether going in the same or the opposite direction and to remain stopped until all school children are clear of the highway, or ***"

"The request for the opinion is made because of the fact that this section fails to discriminate between traffic on two, three or four-lane roads or on four-lane roads which are divided in the boulevard type, etc.

"A number of Trial Justices and Commonwealth Attorneys have brought this to our attention. In their opinion some discrimination should be made between two-lane and four-lane roads and particularly two-lane roads and boulevard type roads."

As you state, the statute which you quote makes no distinction between two, three or four-lane roads or boulevard type roads, and I am of opinion that such distinction cannot be put into the law by interpretation. If as a matter of policy a distinction should be made, this should be done by appropriate amendment by the General Assembly. I can appreciate the fact that in the case of certain boulevard type roads, where there may be an unusually wide space separating the two avenues of traffic, the provisions of the statute may not be necessary, but, as I have stated above, this as a matter for consideration by the Legislature.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NAMES—When Changed Name Of Adopted Child To Be Recorded.

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

My dear Mr. Huffman:

I am in receipt of your letter of January 24, in which you ask if a final order of adoption, in which the name of the person adopted is changed, should be recorded in the deed book.

Section 5983 of the Code provides that an order changing the name of a person shall be entered upon the current deed book in the clerk's office.

Section 5333-e of the Code (Michie, 1942) provides that in adoption proceedings a child's name may be changed if the court is satisfied that such is for the best interest of the child.

In my opinion, it is reasonably plain that section 5983 only applies to orders entered in connection with proceedings instituted under that section and I, therefore, do not think that the clerk would be required to record in the deed book an order entered in adoption proceedings where the name of the adopted child is changed. However, in some clerks' offices it might be helpful if the orders you describe in adoption proceedings be recorded in the deed book, and I know of no reason why it would not be permissible to record them. This would appear to be a matter of policy and I suggest, therefore, that you consult with the judge of your court.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
NOTARIES PUBLIC—Name Need Not Appear On Seal.

February 12, 1945.

HONORABLE RALPH E. WILKINS,
Secretary of the Commonwealth,
Richmond 12, Virginia.

My dear Mr. Wilkins:

This is in reply to your letter of February 2, 1945, in which you enclosed a letter of Mr. R. I. Barnes, Clerk of the Circuit Court of Richmond County, in which he inquired as follows:

"A deed was brought into my office today which showed that the acknowledgment was taken before Ruby H. Stevenson, at Norfolk, Virginia. She used her SEAL, with nothing on the seal except 'Notary Public,' her name not appearing at all. It appears that she is using a seal that formerly was used by someone else and the name had been cut off.

"Please advise whether or not a seal of this kind is official. I am calling your attention to this as it might cause her some trouble in the future, if it is not official."

I have been unable to find any Virginia statute requiring a notary's seal to be in any particular form. In the absence of such statutory requirements anything that comes within the purview of sections 5 cl. 2 and 5562 of the Code as a seal would be sufficient. 46 C. J., section 36, page 522 (Notaries); 39 Am. Jur., sections 34-44, pages 225-229 (Notary Public); 7 A.L.R. 1663. A number of cases from other jurisdictions are collected in 7 A.L.R. at 1667 which hold that in the absence of any statutory provisions the notary's name does not have to be on the seal. I would therefore say that the seal used by the notary in question is sufficient under the Virginia law.

I do not know of any requirement that a notary's seal be affixed to the acknowledgment in order for the deed to be recorded and it, therefore, in that particular case, is surplusage.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES PUBLIC—Non-resident Should Not Be Appointed.

March 2, 1945.

HONORABLE DONALD T. STANT,
Acting Commonwealth's Attorney,
Bristol, Virginia.

My dear Mr. Stant:

This is in reply to your letter of February 26, in which you ask if a non-resident of Virginia may be appointed a notary public.

From such an investigation as I have been able to make, I must say that I feel that it is quite difficult to answer your inquiry with any degree of finality. It can be strongly argued, I think, that section 32 of the Constitution contemplates that, with the exception of officers requiring special technical or professional training and experience, officers shall be residents of the State.

In 1936 I expressed the opinion that section 2850 of the Code required that a notary must be a resident of Virginia. However, the section then contained the following language:
REPORT OF THE ATTORNEY GENERAL

The removal of a notary from the county or city in which said notary resided when appointed, unless said removal be into another county for which said notary may have been appointed, shall be construed as a vacation of said office, and the clerk of the circuit court of said county or corporation court of said city shall at once inform the governor of the fact.

The section, however, no longer contains the quoted language and instead it is provided that a notary "may or may not be a resident of any county or city for which he is appointed." But this latter provision was probably placed in the section for the sole purpose of overcoming the former provision and not to authorize the appointment of a non-resident of the State as a notary. Certainly considerable doubt may be said to exist as to the validity of the appointment of a non-resident as a notary and in view of the potential harm that might result from an invalid appointment, I am of the opinion that non-residents should not be appointed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PENITENTIARY—Validity Of Commitment Papers.

July 12, 1944.

MAJOR R. M. YOUELL,
Commissioner of Corrections,
Richmond, 6, Virginia.

My dear Major Youell:

Re: John Elderkin

This is in reply to your recent communication in connection with the commitment papers under which the above named convict is being held in custody. The commitment papers come from two courts, viz., Hustings Court of the City of Portsmouth, and the Civil and Police Court of the City of Portsmouth, and I note from the correspondence of the Superintendent of the Penitentiary that he is in doubt as to the validity of the commitments but that he has been unable to get any satisfactory explanations from the clerks of the two courts, respectively.

You then ask this question:

"Is it proper that this office should hold the prisoner for the full term carried in the court order regardless of whether it is legal or not? In other words, Mr. Smyth just wants to be sure that by complying with the court order, there will be no criticism of his action in this matter."

It appears that the Superintendent of the Penitentiary has already accepted custody of the prisoner and is at present holding him pursuant to the order of the Hustings Court of the City of Portsmouth. While it is proper for the Superintendent to get all the information he needs for his files, I do not believe he should question the validity of the commitment papers under which he is actually holding a prisoner. If there be criticism of the validity of the commitment, the Superintendent is not the one who would be subject to it.

The prisoner is not at present being held under the commitment from the Civil and Police Court of the City of Portsmouth. These papers purport to commit him to one year's imprisonment for "drunkenness." I can find no authority for the imposition of such a sentence. The punishment for "drunkenness" is a fine not to exceed $10.00 (Code §4568). In such a case, where the Superintendent has not taken the prisoner into custody, it would in my opinion
be proper for the Department of Corrections, if it feels so advised, to instruct the Superintendent to return the order of commitment to the court from whence it came.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PENITENTIARY—Duties Of Superintendent When Convict Suspected Of Being Insane.

January 4, 1945.

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 concerning your duties in cases where a convict in the penitentiary becomes insane or feeble-minded.

I have been unable to find any statutory authority whereby you are authorized to institute court proceedings to have the issue adjudicated in order that a transfer of the person to some other appropriate institution may be effected.

Your duties are set out in section 5007 of the Code of Virginia, which provides:

"** 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 this section uses only the word "insane," nevertheless, when construed in connection with sections one thousand and twenty-two, etc., of the Code, to which this section makes express reference, it would seem to cover cases of insane, epileptic, and feeble-minded persons.

Therefore, it is my opinion that your sole responsibility in such cases is to make a report of the facts to the governor whenever you have "reasonable ground to doubt the sanity" of such convict.

Very sincerely yours,

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

POLICEMEN—Right To Receive Arrest Fee.

HONORABLE W. C. ARMSTRONG, JR.,
Attorney for the Commonwealth,
Front Royal, Virginia.

My dear Mr. Armstrong:

I am in receipt of your letter of June 12, in which you inquire whether members of the local police force in Front Royal are entitled to an arrest fee of $1 in cases of arrest made for violation of town ordinances and where the fees are taxed as a part of the costs and paid by the defendant.

You are, of course, familiar with section 2991 of the Code, which provides in part that a policeman shall not receive any fee out of the treasury of the town for services rendered under the provisions of chapter 121 of the Code. However, I can find nothing in the general law prohibiting the town policemen from receiving an arrest fee in cases involving violations of town ordinances where the fee is taxed as a part of the costs and paid by the defendant, but neither can I find any provision of general law providing for an arrest fee to a member of a town police force. It may be, however, that there is an ordinance of the town of Front Royal providing for such a fee, adopted pursuant to a charter provision authorizing such an ordinance. As to this, I am, of course, not advised.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Clerks Of Court Not Entitled To Interest Earned On Official Bank Accounts.

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

My dear Mr. Downs:

I am in receipt of your letter of September 26, in which you state that some of the clerks of courts of the State "have arranged with local banks to pay interest on balances of funds on deposit in their official accounts." I understand from a telephone conversation with you that your inquiry is limited to whether or not a clerk is entitled personally to the interest which may be paid on such funds belonging to the Commonwealth or to a county, city, or town, which have been deposited in accordance with the provisions of section 3516-o of the Code (Michie, 1942).

Your question is not answered by any statute which I have been able to find, but in my opinion it is contrary to sound public policy for an officer to profit from public funds in his charge in the absence of specific statutory authority. While it has been held that a person in charge of public funds is entitled to the interest earned thereon where he is absolutely liable for their loss, the majority view is thus stated in 43 American Jurisprudence, Public Officers, Section 317:

"* * * But it is generally held, irrespective of his liability, that the ownership of public funds does not pass to the custodian, and that a public officer is bound to account for interest which he receives on money which comes into his hands by virtue of his office. This is the rule although the
The above rule is all the more applicable in Virginia because, by virtue of section 3516-o, to which I have referred, the clerk is relieved from loss of the public funds which he deposits in bank where such loss results from failure or insolvency of the bank. It is my opinion, therefore, that the clerk of a court is not entitled to the interest earned on the public funds described in the first paragraph of this letter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility: Assistant State Librarian May Serve On City School Board.

June 29, 1945.

DR. DARNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Dr. Lancaster:

I am in receipt of your opinion of June 28, in which you ask for an opinion on the following question:

"My opinion has been asked about whether the Assistant State Librarian is eligible to serve as a member of the Richmond City School Board. It seems to me that the question is dependent upon whether the Assistant State Librarian is classed as a State official or a State employee. * * *"

Section 786 of the Code, dealing with city school boards, provides in part that "no State officer * * * shall during his term of office be chosen or allowed to act as a school trustee * * *." Section 351 of the Code provides that "the (State) library board shall * * * appoint a librarian and other employees." None of the statutes dealing with the State Library board recognizes an assistant State librarian as an officer; he has no prescribed term of office nor any duties imposed by statute upon him. It is my opinion, therefore, that an assistant State librarian is not a State officer. Indeed, the language which I have quoted to the effect that the library board shall appoint a librarian "and other employees" clearly indicates that an assistant librarian is not a State officer. It is my opinion, therefore, that an assistant State librarian is eligible to serve as a member of the Richmond City School Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICERS—Compatibility: Clerk Of Court May Be A Commissioner Of Accounts, Or A Commission In Chancery.

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

My dear Mr. Hargis:

I am in receipt of your letter of January 5, in which you ask the following questions:

"Is a clerk of court eligible for appointment as commissioner of accounts, or assistant commissioner of accounts?"

"Is a clerk of court eligible for appointment as a commissioner in chancery of his court?"

Section 2702 of the Code provides, among other things, that no person holding the office of county clerk shall at the same time hold any other office, elective or appointive. However, there are certain exceptions in the section to this prohibition, including a commissioner in chancery and a commissioner of accounts. In view of the exceptions, I am of opinion that both of your questions must be answered in the affirmative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility: Deputy Sheriff May Be School Attendance Officer.

HONORABLE DANIEL WEMYOUTH,
Attorney for the Commonwealth,
Heathsville, Virginia.

My dear Mr. Weymouth:

I regret that my reply to your letter of October 3 has been unavoidably delayed. You asked the following question:

"Please advise whether or not section 2702 of the Code of Virginia or any other Code section prohibits the County School Board of Northumberland County from naming a full-time deputy of Northumberland County as a school attendance officer for the county pursuant to section 684."

Section 2702 of the Code, prohibiting certain officers from holding any other office elective or appointive at the same time, does not in terms apply to deputies, and it is my opinion that it should not be so construed. I know of no other statute that would prohibit a deputy sheriff from being a school attendance officer. However, as you know, the salaries of full-time deputy sheriffs are fixed by the State Compensation Board and it may be that in fixing the salary of the deputy to whom you refer the Board did not contemplate that he should draw another salary for filling another public office. I suggest, therefore, that this phase of the question be taken up with the State Compensation Board for an expression of its views.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICES—Compatibility: Deputy Sheriff May Not Be A Registrar.

HONORABLE CLAUDE S. WILSON,
Commonwealth's Attorney,
Lebanon, Virginia.

My dear Mr. Wilson:

This is in reply to your letter of September 14, in which you inquire whether or not a deputy sheriff is eligible to hold the office of registrar.

The last sentence of section 84 of the Election Laws provides that "No person, nor the deputy of any person, * * * holding any elective office of profit or trust in the State, or in any county, city or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election. It seems very clear, therefore, that a deputy sheriff comes expressly within the prohibition of this section.

With best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility: Federal Employee May Be Member Of Board Of Visitors Of University Of Virginia.

HONORABLE S. THOMAS MARTIN,
Member House of Delegates,
Lynchburg, Virginia.

My dear Mr. Martin:

This is in reply to your letter of August 17, 1944, in which you request my opinion upon the question whether the provisions of sections 290 and 291 of the Code render officers and employees of the United States ineligible to hold the office of member of the Board of Visitors of the University of Virginia.

Section 290 of the Code provides, in effect, that no person holding an office of profit, trust or emolument under the Government of the United States shall hold any office of honor, profit or trust under the Constitution of Virginia. By Chapter 4 of the Acts of the Extra Session of 1942, p. 10, the General Assembly exempted from the foregoing provisions, during the existence of the "present state of war" between the United States and any foreign power, any State officer who receives compensation less than $1200 per year from the State. This exemption, of course, would apply during the war to a Visitor of the University of Virginia who received no compensation.

The specific question upon which you desire my opinion is stated in the third and fourth paragraphs of your letter, which I quote:

"As you know, Section 290 of the Code of Virginia provides that officers and employees of the United States Government are ineligible to hold public office in Virginia. Section 291 and succeeding sections make numerous exceptions. Section 291 starts out by providing that Section 290 shall not be construed 'to prevent members of Congress from acting as * * * Visitors of the University of Virginia.' It later provides that Section 290 shall not be construed 'to prevent any person holding office or post of profit, trust or emolument, civil, legislative, executive or judicial under the government of the United States from being * * * a director in a State Institution.'"
"In view of the fact that an express exception is made in Section 291 as to members of Congress acting as Visitors of the University of Virginia, a question arises in our minds as to whether the latter part of the above quoted matter, referring to directors in State Institutions, would or would not apply to Visitors of the University."

Section 291 of the Code contains many qualifications of or exceptions to the provisions of section 290. Section 291 was designated as section 164 of the Code of 1887 and has been amended sixteen times between 1893 and 1938, each amendment usually adding a new exception, and leaving it now in what might be described as a patchwork condition. As the section appeared in the Code of 1887, there were few exceptions to the preceding disqualifying section. Among them, however, was that permitting members of Congress to act as Visitors of the University of Virginia and Virginia Military Institute, and to hold office in the militia. The exception allowing a director of a State institution to hold Federal office was first inserted by the revisors of the Code of 1919. But they did not rewrite section 291 or eliminate repetitions therein. For instance, the section as it appears in the original Code of 1919 carries the provision authorizing members of Congress to hold offices in the militia and later grants authority to all persons holding Federal office or employment to be "a member of the militia or hold office therein." Since the revisors of the Code did not eliminate the provision with respect to members of Congress holding offices in the militia, although a subsequent provision in the section had the same effect, it does not seem to be significant that the provision with respect to members of Congress acting as Visitors of the University was not stricken out when the same privilege was extended as to all directors in State institutions. Therefore, this omission to eliminate would not justify the inference that Visitors of the University are not directors of a State institution.

The answer to your question depends therefore upon whether such Visitors are in face directors of that institution, and this will now be considered.

Section 806 of the Code provides that "The University of Virginia shall be continued, and the visitors thereof shall be and remain a corporation, under the style of 'the Rector and Visitors of the University of Virginia,' and shall have, in addition to its other powers, all the corporate powers given to corporations by the provisions of chapter one hundred and forty-seven * * *" In this chapter of the Code is section 3789, which provides that "There shall be for every corporation a president and directors, who shall be a board to have all things done that are proper to be done by the corporation, * * *." Section 807 and succeeding sections refer to the Rector and Visitors as a board, and to their meetings as "meetings of the board." Section 811 and succeeding sections vest in the Board of Visitors powers substantially the same with respect to the management of the affairs of the University of Virginia as a board of directors of an ordinary corporation would possess in conducting its affairs.

The words "a director in a State institution" obviously refer to the kind of office to be held, not to any specific office. In this connection it is significant that section 1097 of the Code, as it now exists and as it appeared in the original Code of 1919, refers to "the boards of directors of the various institutions of learning," although in said 1919 Code the official designation of all of these boards was "board of visitors." If a member of the Board of Visitors of the University is not a director of a State institution, then I know of no officer of any State institution who could now be so characterized. Since the language of the section must be given some meaning and effect, it follows from the foregoing that I am of the opinion that a Visitor of the University is a director of that institution within the meaning of section 291 of the Code and that an officer or employee of the Government of the United States is eligible to hold the office of member of the Board of Visitors of the University of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICES—Compatibility: Registrar May Not Be Justice Of The Peace.

May 7, 1945.

Mr. William C. Pancake,
Secretary Electoral Board,
Staunton, Virginia.

My dear Mr. Pancake:

I am in receipt of your letter of May 4, from which I quote as follows:

"A question has arisen here recently as to whether a man serving as registrar in one of the city wards of the city of Staunton is eligible to offer himself as a candidate for the office of justice of the peace for the city of Staunton.

"It seems to be perfectly clear that he cannot hold both offices at the same time, but the question that our board is somewhat uncertain about is whether he can announce his candidacy and run for the new office while he is still serving as registrar."

Section 97 of the Code provides as follows:

"No person who acts as registrar shall be eligible to an office to be filled by election by the people at the election to be held next after he has so acted as registrar."

It is clear from this section that your question must be answered in the negative.

Very sincerely yours,

Abram P. Staples,
Attorney General.

PUBLIC OFFICIALS—Bond Required Of Acting Officials.

March 8, 1945.

Honorable Ross S. Gibson,
Acting Commonwealth's Attorney,
National Bank Building,
Fredericksburg, Virginia.

My dear Mr. Gibson:

I have your letter of March 5, in which you request my opinion upon the question whether or not an acting commissioner of the revenue or an acting clerk of the court, who are acting by reason of the absence of the regular occupants of these offices in the armed forces, are required to execute bond for the faithful performance of their duties.

It seems to me clear that, under the provisions of section 291b of the Code, the status of an acting officer in so far as his duties and obligations are concerned is identical with that of a regular officer, and, in my opinion, is required to execute bond just as a regular officer is required to do.

I do not believe that any bond which may have been executed by the regular officer prior to his departure would cover the acting officer, for the reason that it does not seem to me that the regular officer is legally liable or responsible for any act performed by the acting officer.

Cordially yours,

Abram P. Staples,
Attorney General.
PUBLIC OFFICIALS—Duties Of Clerks Of Court Who Administer Oaths Of Office.

August 22, 1944.

My dear Mr. Dobyns:

I am in receipt of your letter of August 18.

In my opinion, it is not incumbent upon the clerk in administering the oath of office to an elective official to pass upon whether or not such an official is eligible to hold the office to which he has been elected, so as long as you are satisfied that the person presenting himself to qualify is the person elected you may administer the oath.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICIALS—When Use Of Free Pass On Public Carrier Prohibited.

November 14, 1944.

My dear Mr. DuVal:

Honorable C. H. Morrissett, State Tax Commissioner has referred to this office your letter of November 2, in which you ask if while Examiner of Records you may use a pass over the Gloucester-Yorktown Ferry.

You are, of course familiar with the provisions of section 161 of the Constitution, in effect prohibiting any transportation or transmission company from granting free passes to members of the General Assembly, or to any State, county, or municipal officer, and prohibiting such persons from using such passes.

However, our Supreme Court of Appeals has held in effect in Commonwealth v. Gleason, 111 Va. 383, that, where an officer receives a pass as a part of the compensation for his services to the company granting the pass, such a pass is not a "free pass" within the meaning of said section 161.

If the pass that you have received, therefore, represents compensation for services rendered the transportation or transmission company, I am of opinion that its use by you is not violative of section 161 of the Constitution.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

PUBLIC OFFICIALS—Interest In Public Contracts; Commissioner Of Revenue.

February 16, 1945.

My dear Mr. Higginbotham:

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

"Mr. J. H. Fray, who is engaged in general insurance business and who
has policies with the County of Orange, on the 22nd day of January, 1945, was appointed Commissioner of Revenue to fill the unexpired term of the late J. C. Brooking. Questions have arisen as to the validity of insurance agreements with the County which Mr. Fray as agent for various insurance companies has written, with particular reference to the following situations:

1. the insurance agreements which were in force and for which the premiums were paid on the said 22nd day of January;
2. insurance agreements which were in force on the said 22nd day of January but on which the premiums had not been paid on that day;
3. the bonds of individual officers of the County the premiums on which are paid by the Board of Supervisors;
4. the renewal of policies with the County covering business already on the books;
5. as to new policies.

I have had occasion in the past to express an opinion as to the proper construction of section 2707 of the Code as it applies to transactions similar in principle to those you set out. My conclusion is that the contracts included in numbers 4 and 5 are unquestionably prohibited by this section. It does not seem to me that the prohibitions of the section are applicable to the contracts included in numbers 1 and 2. Such contracts were made in good faith before Mr. Fray became a public officer and I do not think that they are covered by the letter of the section and in no sense by the spirit thereof.

As to the contracts included in number 3, I am of opinion that the same principles apply as to the insurance contracts.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICIALS—Interest In Public Contracts Prohibited; Commonwealth Attorney.

HONORABLE STANLEY A. OWENS,
Attorney for the Commonwealth,
Manassas, Virginia.

My dear Mr. Owens:

This is in reply to your letter of June 26, from which I quote below:

"For several years I have been local agent for certain fire insurance companies and as such have written fire and windstorm policies for the Board of Supervisors and the Board of Education.

"Would you please let me have your opinion as to the propriety of my continuing to write such policies for these Boards—if this is in violation of Section 2707 of the Code, certainly I do not wish to renew the policies when they expire."

Section 2707 of the Code prohibits, among other things, any “paid officer” of a county from becoming interested, directly or indirectly, in any contract or in the profits of any contract made by or with any person acting on behalf of the Board of Supervisors. The Attorney for the Commonwealth is unquestionably a “paid officer” of the county and some of the insurance contracts to which you refer seem to be made on behalf of the Board of Supervisors. Under the provisions of the section, therefore, I think it is clear that an Attorney for the Commonwealth is prohibited from representing for compensation an insurance company which does business with the Board of Supervisors.

I can find no similar prohibition which has the effect of forbidding your representing for compensation an insurance company which does business with the local school board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICIALS—Keeper Of The Rolls: Authority To Certify To Correctness Of Copies Of Documents Of Which He Is Custodian.

June 21, 1945.

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

My dear Colonel Dodson:

This is in reply to your letter of June 20, which I quote as follows:

"Please read the enclosed draft for a House Joint Resolution concerning the copy of Article XVII of the Constitution to be transmitted by the Governor to the General Assembly at its next session, and give me the benefit of your advice for the members of the House.

"And I shall thank you to advise me whether the Keeper of the Rolls of the State has sufficient authority to certify copies of Article XVII, which was certified to him for preservation in the same manner as acts of the General Assembly are preserved, or should such authority be given by act or joint resolution?"

It is a general rule of law that any custodian of a public document is authorized to certify to the correctness of copies of such document, and it is my opinion that no resolution or act of the General Assembly is required to authorize such action by the Keeper of the Rolls of the State in certifying copies of Article XVII of the Constitution.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—County Having County Manager Form Of Government Required Nevertheless To Have Local Board Of Public Welfare.

December 15, 1944.

HONORABLE GEO. S. DESHAZOR, JR., Clerk,
Circuit Court of Warwick County,
Denbigh, Virginia.

My dear Mr. DeShazor:

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

"Please advise me if it is necessary to have a local Board of Public Welfare in Warwick county after the first day of January, 1945, or if the affairs of the local Department of Public Welfare can be administered by the local Superintendent alone. Warwick county recently voted to adopt the County Manager Plan of Government and there seems to be a conflict in the law relative to the local Department of Public Welfare. I refer to section 1904 (6) and 2773 (62)."

Section 2773-n-39 of the Code, as enacted by chapter 368 of the Acts of 1932 (appearing in Michie's Code of 1942 as section 2773 (62)) provides that the Superintendent of Public Welfare in a county adopting the County Manager Form of Government shall exercise all the powers and perform all the duties of the County Board of Public Welfare. The section further provides that the Board
of County Supervisors may appoint two citizens of the county who together with the Superintendent of Public Welfare shall constitute the County Board of Public Welfare. Thus, under this section, it is entirely discretionary with the Board of Supervisors as to whether or not there shall be a Board of Public Welfare.

However, section 6 of chapter 379 of the Acts of 1938 (the Virginia Public Assistance Act of 1938, which appears in Michie's Code of 1942 as section 1904 (6)) provides that there shall be a local Board of Public Welfare in each county consisting of three members appointed by the Judge of the Circuit Court of the county. Subsection (f) of this section contains a number of exceptions as to the method of appointing the Board of Public Welfare in counties adopting certain special forms of government, and one of the exceptions is that in a county adopting the County Manager Form of Government provided for in sections 2773-n-1 to 2773-n-56 the local Board shall be appointed by the County Manager.

You will observe from what I have written that the Virginia Public Assistance Act of 1938 was enacted subsequent to chapter 368 of the Acts of 1932, which enacted section 2773-n-39 of the Code, and that section 6 of the Virginia Public Assistance Act makes it mandatory that each county have a local Board of Public Welfare consisting of three members. This mandatory provision is clearly applicable to counties adopting the County Manager Form of Government under the authority of chapter 368 of the Acts of 1932, since the section takes cognizance in subsection (f) thereof of the permissible forms of county government set up in the earlier Act and then expressly requires, as I have pointed out, that the local Boards of Public Welfare in such counties shall be appointed by the County Manager.

My conclusion is that, if Warwick county has adopted the County Manager Form of Government as provided for in chapter 368 of the Acts of 1932, it should have a local Board of Public Welfare consisting of three members appointed by the County Manager.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Salaries Of Probation Officers; How State's Share To Be Paid.

HONORABLE H. G. COCHRAN, Judge, Juvenile and Domestic Relations Court, Norfolk, Virginia.

October 17, 1944.

My dear Judge Cochran:

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

"The 1944 General Assembly provided (1944 Acts of Assembly, page 743) for the payment by the State of Virginia of part of the salaries of probation officers in Juvenile and Domestic Relations Courts."

"The State is now paying, since the first of July, 1944, approximately half of the salaries of probation officers of this court, which amounts to some $8,000 annually."

"Henceforward, these salaries have been paid in full by the City of Norfolk."

And the procedure which has been adopted is for the State to reimburse the City of Norfolk monthly through the State Department of Public Welfare one-half of this amount.

"The purpose of this letter is to inquire whether the payment of this amount by the State can be made direct to the probation officers of this court individually, or perhaps by one check for the aggregate amount to
the order of the judge of the court, rather than being paid by the State into the City of Norfolk treasury."

The provision in the Appropriation Act to which you refer states that "the State Board of Public Welfare shall monthly reimburse each county and city accordingly as herein provided." The word "reimburse" is so clear in its meaning of "paying back" or "repaying" money which has already been spent by someone else that I cannot advise you that a payment by the State direct to the probation officers of the court individually or to the judge of the court for distribution to the officers would constitute a reimbursement. The statute plainly contemplates that the money first shall have been spent by the county or city and then reimbursement made to such county or city.

It is my opinion, therefore, that the method in which the matter is now being handled, i.e., by monthly reimbursements to the county or city made through the Department of Public Welfare, is correct and in accordance with the statute.

Very sincerely yours,

ABRAM P. STAPLES
Attorney General

RECORDATIONS—Fee To Be Charged For Recording Deed Even Though Fee Was Previously Charged For Recording Contract Of Purchase.

September 20, 1944

HONORABLE B. D. PEACHY,
Attorney for the Commonwealth,
Williamsburg, Virginia.

My dear Mr. Peachy:

This is in reply to your letter of September 19, in which you state the following case:

"The Clerk of our Circuit Court has requested me to get a ruling from you on the following statement of facts:

"She has admitted to record a contract for the purchase of real estate and the tax has been paid on the full amount of the consideration. The purchaser has completed the payment of the purchase money and is now offering to record the deed to the property described in the contract and the Clerk wants to know whether or not she should charge another tax on the consideration for the property.

"Section 121 of the Tax Code provides that no tax shall be paid for admitting to record any deed of trust, contract, or other writing supplemental to any deed of trust, mortgage, contract, agreement or other writing theretofore admitted to record and upon which the tax herein imposed has been, hereinafter called the original instrument.' I am constrained to believe that this section obviates the necessity of paying the tax on the deed, which merely carries out the provisions of the contract and therefore is supplemental thereto, but I still have some doubt as to this and would thank you to give me the benefit of your opinion."

I would be inclined to agree with the tentative view you express were it not for the fact that the language which you quote from section 121 of the Tax Code is followed by this proviso:

"* * * where the sole purpose and effect of the said supplemental deed of trust, mortgage, contract, agreement, or other writing is to convey, set over, or pledge property, real or personal, in addition to or in substitution
(in whole or in part) of the property conveyed, set over, or pledged in the original instrument, to secure or to better secure the payment of the amount contracted for in the original instrument . . .

It does not appear to me that a deed conveying real estate, executed pursuant to a contract for the purchase of real estate which has already been recorded, comes within the scope of the language I have quoted, and, since such a deed is not included within this language, it is afforded no exemption from the regular recordation tax.

Some years ago I had occasion to pass on this same question in a letter to the Clerk of the Circuit Court of Culpeper County (Opinions of the Attorney General 1937-38, page 164) and I reached the same conclusion at that time. I enclose for your information a copy of that opinion.

I may say also that the opinion I am expressing is in accord with the long continued administrative construction of section 121 of the Tax Code by the State Tax Department.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Deed To Church Parsonage Subject To Tax.

November 8, 1944.

HONORABLE H. ELMER KISER, Clerk,
Circuit Court of Tazewell County,
Tazewell, Virginia.

My dear Mr. Kiser:

I am in receipt of your letter of November 7, in which you raise the following question:

"The question has arisen as to whether or not section 122 of the Tax Code is broad enough to exempt the collection of the recordation tax on a deed conveying real property to the trustees of a church which will be used as a residence for the pastor of that church.

"Please advise me at your earliest convenience as to whether or not I am required to collect the tax on a deed of this type. I have promised the interested parties in this case that I would secure a ruling from you as to the collection of this tax before collecting it."

Section 122 of the Tax Code, prescribing what deeds are exempt from the State recordation tax, provides that the tax "shall not apply to any deed conveying land as a site for a school house or a church * * *"

Unless, therefore, the deed now before you can be said to convey the land as a site for a church, I am of the opinion that the regular recordation tax should be charged.

Very sincerely yours,

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

RIPARIAN OWNERS—Right To Take Sand From River.

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

My dear Mr. Singleton:

This is in reply to your inquiry of January 2, 1945, whether a person owning land fronting on the James River would have a right to take sand from the river in front of his property.

It is well settled that the James River is considered to be navigable even above tidewater. **Old Dominion Iron Company v. C. & O., 116 Va. 166, 81 S. E. 108.** It is likewise well settled that the beds of navigable streams belong to the Commonwealth. **Oliver v. Richmond, 165 Va. 538, 178 S. E. 48; Code §3573.** Although the riparian owner to a navigable stream has certain rights, such as wharfage, etc., which are enumerated in **Taylor v. Commonwealth, 102 Va. 759 at 773, 47 S. E. 875, 102 Am. St. Rep. 865,** I have been unable to find any authority giving the riparian owner the right as such to take sand or gravel from the adjacent navigable stream. In fact, it is held in 45 Corpus Juris, §157, p. 507 (Navigable Waters), that a statute prohibiting persons from removing sand applies to the adjacent owner as well as others. However, the underlined portions of section 4441(1) of the Code, below, do make certain exceptions to the general law as set out above:

"It shall be unlawful for any person or corporation to dredge, dig or otherwise remove and carry away any part of any deposit of sand or gravel, or mixture of sand and gravel from any part of the fast land, or beach or bluff, abutting upon any of the rivers, streams or other waters within the jurisdiction of this Commonwealth, or from any part of the bed of such rivers, streams or other waters between high and low water marks."

"In case any such deposit extends uninterruptedly from low water mark out into the bed of such waters, it shall, except as hereinafter provided, be unlawful to dig and carry away any part of such extended deposit lying between such low water mark and the middle line of the said waters."

"Any person or corporation violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not exceeding three hundred dollars, or imprisonment not exceeding six months, or both, in the discretion of the court."

"That any owner of any such fast land or beach, bluff, or bed of stream, between high and low water mark on which any such deposit exists or from which it extends towards the middle line of the water, as aforesaid, may, by appropriate proceedings brought by such owner, have a perpetual injunction against any person or corporation removing and carrying away or attempting to remove and carry away any such deposit or extension thereof, and may, in such proceeding, or by separate action, recover against such violation of this act damages in treble the value of the material removed."

"The prohibitions of this act shall not apply to any owner of any fast land, bluff, beach or bed of stream, upon or in front of which such deposits may lie, nor to any person or corporation acting under written permission from, or contract with such owner, nor to any person or corporation, acting under the authority of the United States, necessarily removing such deposit in the lawful improvement or regulation of navigation of any waters subject to the authority of the United States."

"Provided, that none of the provisions of this act shall be deemed to interfere in any manner with the provisions of any law of this State relating to taking fish and oysters."

"The provisions of this section shall not apply to Princess Anne county nor to Pulaski county or New river therein."

January 8, 1945.
I concur in your conclusion that, because of the underlined exceptions above, if there were a sand or gravel deposit extending out into the river from the adjacent owner's property, he would have a right to remove it, but he would not have a right to remove any such deposit unless it did in fact extend out from his property.

Section 3573 of the Code, supra, provides that the beds of rivers "not conveyed by special grant or compact according to law" shall be the property of the Commonwealth. I have been unable to find any provisions for a permit to remove sand from the James River and there would have to be a special grant or compact as allowed above.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—May Not Be Abolished.

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

My dear Mr. Ross:

Replying to your letter of January 29, I beg to advise that county and city school boards are provided by section 133 of our Constitution and I know of no authority for a board of supervisors, or even for the Legislature, to abolish the school board in a county unless the Constitution is amended.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


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

My dear Governor Darden:

This is in reply to your letter of November 24, in which you set forth two suggestions contained in the report of the commission to make a study of the system of public free schools in Virginia (the Denny Commission), and ask to be advised whether these suggestions can be accomplished without a constitutional amendment. The first suggestion is:

"To this end, the Commission recommends that the Board of Supervisors, to be elected in June of an off-year from that of the other county officials, and on the basis of an educational platform as well as one concerned with other county interests, appoint from the county at large the County School Board for staggered terms, no member succeeding himself for more than one term. The Commission further recommends that the same tenure provisions be applied to City School Boards."
Unquestionably the General Assembly, pursuant to the provisions of section 133 of the Constitution, has the power to authorize the boards of supervisors of counties to select the members of local school boards from the county at large and to prescribe their terms and also to place a limit on the number of times a member may succeed himself. This is entirely clear from that portion of the section which I quote below:

"The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly." (Emphasis supplied).

It is plain from the quoted language of section 133 that the General Assembly may also grant the same power to the authority selecting school boards in cities.

As to the recommendation that boards of supervisors of counties "be elected in June of an off-year from that of the other county officials," I call your attention to section 112 of Article VII of the Constitution requiring elections for county and district officers to "be held on Tuesday after the first Monday, in November." Therefore, I do not think that this recommendation can be carried out by the General Assembly except by a statute passed by virtue of the last paragraph of section 110 of Article VII of the Constitution, which is as follows:

"Notwithstanding the provisions of this article, the General Assembly may, by general law, provide for complete forms of county organization and government different from that provided for in this article, to become effective in any county when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon."

A change in the time of election of members of boards of supervisors could be incorporated as a part of a statute providing a different form of county organization and government, but such a statute would not be effective in any county until approved by the people in an election held for the purpose.

The second suggestion is:

"The Commission recommends that the necessary changes be effected in the laws of the State so as to give the State Department of Education the authority to create a division school board functioning for two or more counties or a city and one or more counties as a single unit."

I do not think that any of the powers of the existing county and city school boards to supervise the schools in their respective counties and cities can be by the General Assembly conferred upon such a division school board as is suggested by the Commission. Section 133 of the Constitution provides that "the supervision of schools in each county and city shall be vested in a school board to be composed of trustees to be selected in the manner, for the term and to the number provided by law." The quoted language is mandatory and makes it plain, in my opinion, that there shall be a school board for each county and city. I can find nothing in any other section of the Constitution which can be said to give the General Assembly authority to enact legislation contrary to this mandatory constitutional provision.

The view I have expressed above seems to be that of our Court of Appeals as expressed in *School Board v. Shockley*, 160 Va. 405, 409, wherein it was said:

"* * * Section 133 of the Constitution provides for the creation of a school board for each county and city, vested with the supervision of the public schools within their several jurisdictions, to be selected in the manner prescribed by law. * * *"

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See also Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 273 (Advance Sheets).

Very probably the General Assembly could create a division school board, but in view of section 133 of the Constitution, as well as section 136, its powers would necessarily be so restricted that I should not think the object of the recommendation of the Commission could be accomplished.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Contract To Buy Electric Current Over Ten-Year Period Is Valid:

HONORABLE DABNEY S. LANCASTER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Dr. Lancaster:

This is in reply to your letter of September 14, in which you present the question below:

"A Virginia County Board of Education has been offered by a reliable company supplying electric current a ten year contract for supplying such current at a very attractive figure. This particular School Board last year paid $2,045 to this company for electric current, and under the ten year contract, if they use the same amount of current next session as used last session, the cost would be only $824.

"The School Board in question, by resolution, has agreed to enter into contract, provided it is legal for them to do so. They have asked us to ascertain the legality of such action and I will appreciate very much your giving me an opinion as to whether they can negotiate such a contract."

Two possible objections might be made to the making of such a contract. These objections may be stated to be (1) whether a school board in making a contract of this duration, which extends beyond the terms of office of its members, has the power to bind its successors in office, and (2) whether such a contract is a debt within the meaning of section 115-a of our Constitution and thus prohibited by that section unless approved by the qualified voters of the county.

In my opinion, neither objection would have the effect of making the contract invalid.

The first objection is clearly answered by the authoritative McQuillin on Municipal Corporations (2nd. Ed.), which in volume 3, section 1356, thus states the rule:

"* * * Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist. Consequently, independent of statute or charter provisions, it is generally held that the hands of successors cannot be tied by contracts relating to legislative functions, but may as to contracts relating to business affairs, * * *"
"Generally, contracts for public utilities, such as water supply, gas, electricity, etc., are considered as relating to the business affairs of the municipality, rather than the legislative or governmental powers, and it is no objection thereto that they bind the municipality beyond the term of office of the officers making the contract ** **"

To the same effect is 37 American Jurisprudence, Municipal Corporations, Section 66; and see also an annotation on the subject in 70 A. L. R. at page 794.

In the absence of any statutory provision to the contrary, and I know of none in Virginia, it is my opinion that the above principle is also applicable to contracts made by a local school board.

Concerning the second objection, section 115-a of the Constitution provides among other things that no debt shall be contracted by any school board without a vote of the people, with certain exceptions not pertinent here. In view of this prohibition it becomes necessary to decide whether a contract to purchase electric current over a period of years is a debt within the meaning of the section. From my examination of the authorities the majority view is that a continuing contract for the furnishing of electric, water, or other service, where the contracting governmental agency agrees to pay in instalments as the service is furnished, does not give rise to a present indebtedness for the aggregate amount of all the payments to become due during the term of the contract within the meaning of a constitutional limitation upon incurring indebtedness. 38 Amer. Jur., Municipal Corporations, Sec. 463; 44 C. J., Municipal Corporations, Sec. 4063; 103 A. L. R. 1160. It should be borne in mind that the type of contract you describe is a contract to purchase and the amount to become due is not ascertainable until the service has been rendered. There is a very real distinction between this type of contract and a contract of purchase, where the amount due and to become due is definitely fixed. See, in this connection, American LaFrance v. Arlington County, 164 Va. 1.

My conclusion is that a local school board may validly make a contract of the type you describe to purchase electric current. I suggest, however, that out of an abundance of caution the contract contain a provision to the effect that it is conditioned upon the board of supervisors providing by appropriation a sum to pay the amounts to become due.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Contracts In Which Member Has An Interest.

HONORABLE STANLEY A. OWEN,
Attorney for the Commonwealth,
Manassas, Virginia.

My dear Mr. Owen:

I am in receipt of your letter of June 6, from which I quote as follows:

"I have been requested to give our county school board an opinion on the legality of a member of the school board selling to the board itself a piece of machinery to be used on school property and to be paid for from school funds. The member of the board happens to be a member of a machinery firm and this firm is a low bidder by some $300.

"Would you please let me have your opinion as to the law in a case of this kind?"
You do not mention the character of the machinery to be used on the school property, and so I cannot categorically advise you whether section 708 of the Code, to which I call your attention, prohibits the transaction you mention. The general spirit of the section certainly is opposed to contracts between the school board and a member thereof. However, I call your attention to the fact that a contract may be entered into “by permission of the State Board of Education evidenced by resolution spread on the minutes of said Board.” In view of the penalties imposed by the section, I suggest that it would be prudent to bring the matter before the State Board of Education.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Consolidation Of School Boards Of Several Counties Prohibited.

HONORABLE HARRIS HART,
Division of the Budget,
Capitol Building,
Richmond, Virginia.

My dear Mr. Hart:

This is in reply to your letter of July 15, in which you present the following questions at the request of the committee on Administration of the Public School System, appointed by the Virginia Education Commission:

“Under section 132 of the Constitution, the first duty and power of the State Board of Education is to divide the State into appropriate school divisions under certain limitations. As a result, there are a number of school divisions composed of two or more counties. At the present time, each one of these counties has a County School Board, appointed in accordance with section 133 of the Constitution.

“The Committee desires to know whether, under the language of the Constitution in this section, it would be possible for the General Assembly of Virginia to pass legislation making a school division of two or more counties an effective operating unit rather than a combination, as at present, of two or more county units. Each magisterial district constitutes a separate school district, unless otherwise provided by law. Would the Legislature be competent to provide that each county might constitute a separate school district in divisions made up of two or more counties, with the division School Board composed of the total from the several counties?

“The Committee on Administration is exploring possibilities under the present language of the Constitution to ascertain what simplification may be brought about in those divisions comprising two or more counties without proposing an amendment to the Constitution.”

In my opinion, your questions must be answered in the negative. Section 133 of the Constitution provides that “the supervision of schools in each county and city shall be vested in a school board to be composed of trustees to be selected in the manner, for the term and to the number provided by law.” The quoted language is mandatory and makes it plain, in my opinion, that there shall be a school board for each county and city. I can find nothing in any other section of the Constitution which can be said to give the General Assembly authority to enact legislation contrary to this mandatory constitutional provision.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE DABNEY S. LANCaster,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Dr. Lancaster:

Please pardon my delay in replying to your letter of January 2, which was occasioned by press of court work and other business. Your letter reads in part as follows:

"Prior to March first, it will be necessary for the State Board of Education to send to each local school board in Virginia a list of those persons who are eligible to be appointed division superintendent of schools for the four-year term beginning July first, nineteen hundred and forty-five. In view of the constitutional provision that the superintendent must be appointed for a four-year term, and the statutory provision that members of the State Retirement System must retire upon reaching the age of seventy or at the end of the year immediately following, except during the war period, I wish your opinion on the following points:

1. May the State Board of Education legally place upon the eligible list the names of individuals who will reach the seventieth birthday prior to July first, nineteen hundred and forty-five, or who will reach the seventieth birthday during the four-year term of office beginning July first?

2. If the war should terminate during the four-year period following July first, nineteen hundred and forty-five, would it be necessary for any superintendent of schools who had reached the age of seventy to retire at once or at the end of the then current fiscal year, or under the constitutional provision would he be entitled to serve out the four-year term for which he was appointed?

3. In view of the provision of the State Retirement Act, would it be possible for a local school board to appoint a superintendent for less than four years, even though the Constitution specifies the four-year term?"

Since receipt of your letter you have advised me that it would be sufficient for your present purposes for me to limit my reply to those individuals who are now on the eligible list and who are actually holding the office of division superintendent of schools and were holding such office at the time the Retirement Act went into effect in 1942.

Section 8 of the Virginia Retirement Act (Chapter 325 of the Acts of 1942) provides for compulsory retirement of members of the System who have attained seventy years of age. However, the section contains the following exception:

"Notwithstanding the foregoing provisions, however, until the conclusion of the war in which the United States is engaged at the time of the enactment of this act, upon the request of his employer, in the case of a teacher, or of the head of the department, institution or agency by which he is employed, in the case of a State employee, such member may remain in service for such period or periods as may be determined by such employer or department, institution or agency head, with the approval of the Board, if such member is mentally and physically able to perform his duties efficiently, but, upon conclusion of the said war, any member so remaining in service shall be retired forthwith."

It seems clear from the quoted language that while the present state of war exists it was the intention of the General Assembly that the compulsory retirement feature should not be applicable to a member of the System where such
is the wish of his employer and meets with the approval of the Retirement Board. In view of this exception, therefore, it is my opinion that the State Board of Education may retain on its eligible list the names of individuals now holding the office of division of superintendent of schools, even though such individual will reach their seventieth birthday prior to July first or will reach their seventieth birthday during the four-year term of office beginning July first.

Your second question is answered by an opinion of this office dated December 11, 1942, to Major Frank P. Evans, Director of the Virginia Retirement System. This was the question asked by Major Evans:

"The Board of Directors of the Virginia Retirement System has directed me to ask your opinion as to the application of the first sentence of section 8 (b) of the Virginia Retirement Act as to division school superintendents.

"In a copy of the State Constitution in our possession, section 133, the following language occurs:

"'There shall be appointed by the school board or boards of each school division, one division superintendent of schools who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years.'

"In view of the above language in the Constitution, could a division superintendent of schools, who is a member of the Virginia Retirement System, be forced to retire upon attaining age seventy, or at the end of a fiscal year during which he attained age seventy, if at that time he was serving a four year term on appointment by a school board?"

My reply to which was as follows:

"The effect of section 6 of the Act establishing the Virginia Retirement System (Acts 1942, page 481) is to give to a division superintendent of schools in office at the date of the establishment of the System the privilege of electing whether or not he will remain a member of the System. Having elected to remain a member of the System, I am of the opinion that a division superintendent of schools is bound by its provisions, and that section 8 (b), providing for compulsory retirement at the age of seventy with certain exceptions not pertinent here, is therefore applicable to him.

"My conclusion is, therefore, that the question asked in the last paragraph of your letter must be answered in the affirmative."

The answer to your third question must unquestionably be in the negative. There is no authority for the election of a division superintendent of schools for a term of less than four years.

While I have given mature consideration to the questions raised by you, I have not attempted to go into argumentative detail in replying. A division superintendent of schools is one of the very few officers with a term of office prescribed by the Constitution who are members of the Retirement System, and the interpretation of the Retirement Act in its application to such an officer is extremely difficult and by no means free from doubt. Should the war terminate during the term of office of a division superintendent who has attained the age of seventy, the question of his right to continue in office, with the law as it exists at present, can only be finally determined by a court. I suggest, therefore, that you and your Board consider the advisability of suggesting such clarifying legislation as the General Assembly may think proper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS AND SCHOOL BOARDS—Time Within Which Member-Elect May Qualify.

HONORABLE BERNARD MAHON,
Attorney for the Commonwealth,
Bowling Green, Virginia.

My dear Mr. Mahon:

This is in reply to your letter of June 28, in which you ask the following question:

"Where the school trustee electoral board regularly appoints a member of the school board for a term beginning July 1, 1945, and the appointee fails to qualify before the clerk of the court prior to July 1, 1945, can he qualify after July 1, 1945, and, if so, within what period of time?"

Section 653-a-1 of the Code, dealing with county school boards, provides that the members "qualify before the county clerk by taking the oath prescribed for State officers." While, of course, a person appointed as a member of the board should qualify at or prior to the time his term of office begins, I can find no statute making this mandatory or prescribing the effect of his failure to qualify at such a time.

It is my opinion, therefore, that, if the appointee to whom you refer cannot qualify on or before the day his term begins, he may qualify thereafter, but such qualification should certainly be within a reasonable time.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Teachers Should Be Employed On Annual Basis.

DR. DABNEY S. LANCASTER,
Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.

My dear Dr. Lancaster:

I am in receipt of your letter of September 9, from which I quote as follows:

"The State Board of Education has requested me to secure from you an interpretation of section 664 of the Code of Virginia, which provides for written contracts to be made with teachers. The exact wording of the section which bears on this point is as follows:

"'Written contracts shall be made by the school board with all public school teachers, except those temporarily employed as substitute teachers, before they enter upon their duties, in a form to be prescribed by the Superintendent of Public Instruction.'

"The question at issue is whether under the provisions of this section of the Code a contract continuing for more than one year would be legal. ** **"

I can find no statute expressly prohibiting a local school board from making a contract with a teacher for more than one year. However, it is my opinion that the better view is that the pertinent statutory provisions contemplate that contracts with teachers shall be made annually by the local school boards. For ex-
ample, section 660 of the Code, dealing with the duties of local school boards in connection with the employment of teachers, provides in part that the school board shall employ teachers "on recommendation of the division superintendent." It is apparent, therefore, that if a school board employed a teacher or teachers for more than one year, it would to that extent deprive a new division superintendent of his authority to make recommendations concerning what teachers shall be employed. Similarly, one school board, by employing teachers for more than a year, could deprive a successor school board or a school board in which a change in membership has taken place of its authority to employ teachers. Furthermore, I can readily conceive of difficulties that would arise in connection with the amount of salary to be paid a teacher where the contract is for more than one year. Again, where the board commits itself to employment for more than one year, I can foresee difficulties that might arise in connection with the budget to be submitted to the board of supervisors, due to a change in the financial or other conditions in a particular locality.

My information is that in the past the statutes as they are now written have been uniformly construed to authorize only the making of annual contracts with teachers, and, as I have stated, I am of opinion that this is the proper construction.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Payment Of Bonuses To Teachers.

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

My dear Mr. Butler:

I am in receipt of your letter of October 11, in which you ask the following question:

"Will you please give me an opinion as to whether or not it is legal for the School Board of Alleghany County, Virginia, to pay bonuses at the end of a school year to teachers who are under contract to teach for a school year of nine months at a fixed salary per month. I understand that these bonuses are probably based on the number of months of service rendered and are, of course, in addition to the salaries provided in the aforementioned contracts."

I assume that the School Board intends to act now and that the so-called "bonuses" are to be paid at the end of the current school year. Upon this assumption, if the School Board at this time so decides, as an incentive to the teachers to complete their current contracts, it may lawfully amend such contracts by agreeing to pay stipulated additional compensation at the end of the school year to those teachers who complete their contracts. Since this additional compensation probably was not contemplated or provided for in the estimate submitted to the Board of Supervisors or in the school budget adopted by the Board pursuant thereto, I am of the opinion, in view of the provisions of section 656 of the Code, that the consent of the Board of Supervisors to the paying of this additional compensation should first be obtained.

Very sincerely yours,

ABRAM P. STAPLES
Attorney General.
SCHOOLS AND SCHOOL BOARDS—Approval Of Warrants For Teacher’s Salaries Required Before Payment. August 15, 1944.

Mr. Floyd S. Kay,
Division Superintendent of Schools,
Warm Springs, Virginia.

My dear Mr. Kay!

I am in receipt of your letter of August 12, in which you ask in effect if school teachers under contract may be paid their salaries without the warrants therefor having first been approved by the School Board.

In my opinion, your question must be answered in the negative. Section 656 of the Code provides that:

"* * * The acts prohibited by section twenty-seven hundred and twenty-four-a of the Code of Virginia with respect to the ordering of the issuance of warrants by a board of supervisors and the signing and countersigning of such warrants by the clerk, deputy clerk, chairman, and acting chairman of such board shall apply to the ordering of the issuance of warrants by a county school board * * *

Section 2724-a of the Code (Michic 1942) provides that no Board of Supervisors shall order any warrant issued for any purpose other than the payment of a claim received, audited and approved by such board. This provision, in my opinion, means that the teacher’s salary must be due before the warrant therefor is approved by the School Board. I observe that you state that your School Board holds monthly meetings on the first Tuesday in each month. This being true, there will be only a slight delay in paying the teachers for each month. While it might appear in cases of teachers who are under contract to the School Board that to require the approval of the warrants for their salaries after the end of each month is a useless technicality, yet, when the principle involved is considered, it would be entirely contrary to the express policy of section 2724-a of the Code for the board to approve in advance claims that are not due.

Very sincerely yours,

Abram P. Staples,
Attorney General.


Honorable Dabney S. Lancaster,
Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.

My dear Dr. Lancaster:

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

"In connection with the tax on wine imposed by the General Assembly at the 1944 session, the language of the statute contains the following words:"

"All amounts collected by the board pursuant to the provisions of this section shall be promptly paid into the State treasury and credited to the general fund in the treasury and two-thirds of said amount shall be paid to the several counties and cities of the Commonwealth in proportion to their respective population, and in those counties wherein is
situated any incorporated town constituting a special school district, the county treasurer shall pay into the town treasury the proper proportionate amount received hereunder by him in the proportion that the population of such town bears to the population of the entire county.

"There are in Virginia twenty-six (26) towns which are set up as separate school districts. Seven (7) of these towns are school districts for purposes of representation on the county school board only. Nineteen (19) are constituted as separate school districts for purposes of separate administration and operation.

"The question I wish to ask is whether or not a school district which is an independent school district for purposes of representation on the county school board only is entitled to a part of the wine tax which, under the section referred to, is returned to the counties and cities of the State. I shall appreciate your opinion."

The tax on wine to which you refer was imposed by Chapter 285 of the Acts of 1944. While the term "special school district" is used in the Act, I take it that there can be no question but that this language refers to the "separate school districts" mentioned in sections 653-a-1 and 654-a-2 of the Code.

In my opinion the language of the Act is so plain that there can be no interpretation placed thereon other than that every town constituting a separate school district is to receive from the county treasurer of the county in which it is located its proportionate share of the distribution made to the county.

As you point out, there are two classes of separate school districts, (a) those which are established for the purpose of representation on the county school board only, and (b) those which are established for the purpose of administration and operation of the schools of the town by a board of three members. See sections 653-a-1 and 653-a-2 of the Code. It has been suggested, therefore, that the General Assembly intended that only towns being actually operated as separate school districts should share in the distribution, the funds to be used for the support of the schools of such towns. But this suggestion overlooks the fact that no such distinction is made in the Act, as could easily have been done—see, for example, section 653-a-3 of the Code; it also overlooks the fact that, although there was considerable discussion of the question on the floors of the two Houses, the share of the localities in this tax was not earmarked for schools, nor indeed, is the distribution based on school population. A town constituting a separate school district for purposes of representation only may use its share of the fund for the benefit of the schools in the town or for any other town purpose—and this is equally true of towns operated as a separate school district.

Section 698-a of the Code authorizes the councils of towns to levy a special tax "for the support and maintenance of the public schools in the town" or to make a cash appropriation for such purpose. There is no reason, therefore, why a council of a town constituting a separate school district of either class should not be able to appropriate the receipts from the wine tax for the purpose of increasing the salaries of teachers in the schools of the town, or, in fact, for any other proper school purpose. If it be assumed, therefore, that the purpose of the 1944 Act was to make the proceeds from the tax available for school purposes in the discretion of the boards of supervisors of counties or the councils of towns constituting separate school districts, such purpose is accomplished equally as well in the towns which constitute a school district of one class as it is in the towns of the other class.

In my opinion all towns constituting separate school districts are included in the language used in the Act.

Very sincerely yours,

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

SENTENCE AND PUNISHMENT—Trial Justice Has No Jurisdiction To Convict For A Felony.

Major R. M. Youell,
Commissioner of Corrections,
Department of Corrections,
Richmond 6, Virginia.

May 23, 1945.

My dear Major Youell:

I acknowledge your letter of May 21, 1945, with the file attached in the matter of Commonwealth of Virginia v. James Frazier.

It appears that the defendant was tried before the Trial Justice of Wise County on the charges of stealing an automobile; was convicted of a felony in that respect; and by consent of the Commonwealth's Attorney and the defendant, was given a jail sentence of twelve months.

While it is true that a Trial Justice may commit a man to jail for a period of twelve months, he can do so only in misdemeanor convictions. A Trial Justice has no jurisdiction to convict of a felony whatsoever, irrespective of the punishment imposed, and, as his jurisdiction is conferred by law, it cannot be enlarged by consent of the parties.

It is my opinion, therefore, that it would be irregular for you to receive custody of the defendant.

Very truly yours,

Abram P. Staples,
Attorney General.

SENTENCE AND PUNISHMENT—Trial Justice Has No Authority To Suspend Payment Of Costs By Convicted Misdemeanant.

Honorable Loring C. Kackley,
Trial Justice for Clarke County,
Berryville, Virginia.

December 19, 1944.

My dear Mr. Kackley:

I am in receipt of your letter of December 15, in which you ask for an opinion on the following question:

"In cases where the trial justice suspends imposing sentence, and places the convicted person on probation, is it mandatory that the costs in the case be assessed and collected?"

I take it that you refer to persons who have been convicted by the trial justice and that it is his intention to suspend the imposition of sentence under authority of section 1922-b of the Code (Michie, 1942). The accused in every criminal case is liable for the cost of his conviction. Section 4964 of the Code. Costs are no part of the penalty for punishment prescribed for an offence, but are an exaction for the purpose of reimbursing the public treasury for the expense to which the State has been put by the conduct of the defendant. Commonwealth v. McCue, 109 Va. 302, 304. It is, therefore, my opinion that a person convicted of an offence should be assessed with the costs, and a trial justice has no authority to relieve him of the same, although additional time may be given to pay such costs.

Very sincerely yours,

Abram P. Staples,
Attorney General.
HONORABLE WILLIAM S. MEACHAM, Chairman,
Parole Board,
Richmond, Virginia.

My dear Mr. Meacham:

This is in reply to your letter of August 16, 1944, in which you set out the following facts concerning an inmate of the State Penitentiary:

"The above-numbered prisoner was convicted of burglary and house-breaking in the Hustings Court of Petersburg on January 3, 1936 and sentenced to serve 19 years in the Penitentiary. He was released on parole on April 12, 1944. On July 15, 1944, Radcliffe was arrested by Petersburg authorities and charged with assault. On account of this offense a warrant was issued by me for this man as a parole violator on July 25, 1944.

"Upon trial on the assault charge, Radcliffe received a sentence of 18 months in the Penitentiary. The question now arises as to how much time off for good behavior under the statute passed by the 1944 session of the General Assembly, Radcliffe is to receive."

The answer to your inquiry is governed by a previous opinion rendered by me to the Superintendent of the Penitentiary on May 3, 1944, in which the 1944 amendment to Section 5017 of the Code was construed. That opinion dealt with a case in which an inmate who, having a remainder of more than one but less than two years to serve, escapes, and who upon recapture is sentenced to an additional year for the escape, leaving him thereupon with an aggregate of over two years to serve.

It was my opinion that such person was, beginning from the date of his sentence for escape, entitled to a credit of an additional ten days credit for every twenty days served as provided in paragraph 3 of Section 5017 of the Code as amended in 1944.

The only difference in this case you put is that the unserved remainder of the original sentence resulted from a parole instead of an escape, but I cannot see that that would make any difference, and I am of the opinion therefore, that what I said in the opinion previously referred to is applicable in the present case, and I quote therefrom as follows:

"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 example 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."

I also call to your attention the second sentence of paragraph 2 of Section 5017 of the Code as amended in 1944, which deals with the credit to be allowed to persons who were convicted prior to October 1, 1942, and who, after a conditional pardon, etc., are returned to serve the remainder of their original sentence for violation of the conditional pardon; they too are allowed an additional ten days credit for every twenty days served. While this paragraph does not specifically mention "parolees," the spirit of the language used would seem to be broad enough to cover such persons.

It is my opinion, therefore, that in the case you put, the prisoner should be allowed ten days good behavior credit for each twenty days served from the date of his 1944 conviction in Petersburg.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Good Behavior Credit: In Case Of Arrested Parolees And Escaped Convicts.

HONORABLE R. M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Major Youell:

This is in reply to your letter of January 20, from which I quote as follows:

"Sometimes when parolees are arrested on warrants issued by the Virginia Parole Board, it is necessary to hold such parolees in jail several days or longer awaiting transfer to the Penitentiary. Parolees are confined in jails of other states as well as this State while awaiting transfer to the Penitentiary.

"When a parolee is held in jail as aforesaid, what credit should be allowed on his term of confinement for the time he is held in jail?"

Section 4788k, subsection (d), of the Code of Virginia reads in part as follows:

"Any parolee for whose arrest a warrant has been issued by the Parole Board or by the Director shall, after the issuance of such warrant, be treated as an escaped prisoner, and the time from the issuing of such warrant to the date of his arrest shall not be counted as any part of the time to be served under his sentence "*

This section makes the status of such parolee that of an "escaped prisoner." The status of an escaped prisoner, with respect to credit on sentence, is fixed by section 5017 of the Code of Virginia as amended by the 1944 Acts of the General Assembly, which provides for both flat-time and good-behavior credits for persons held in any part of the State prison system after sentence as well as after escape. For all time spent in any part of the Virginia prison system after conviction, whether it be spent awaiting original transfer to the penitentiary or
transfer after escape or violation of pardon or parole, the prisoner is entitled to both flat-time credit and such good-behavior credits as are specified in section 5017 of the Code.

What I have said above applies only in those cases where the prisoner is held in a part of the Virginia prison system, and he is entitled to no credit of any sort for time spent in a jail of another State awaiting transfer to Virginia. See my former opinion to this effect in 1943-1944 Opinions of the Attorney General, page 161.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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SENTENCE AND PUNISHMENT—Good Behavior Credit: Calculation Of In Misdemeanor Cases.

HONORABLE CHARLES G. STONE,
Commonwealth's Attorney,
Warrenton, Virginia.

My dear Mr. Stone:

Your letter of January 26, to Mr. W. Frank Smyth, Jr., Superintendent of the Penitentiary, concerning the matter of good behavior credits to be allowed to misdemeanants, has been forwarded by Superintendent Smyth to me for answer.

You have set out three illustrative cases and I will answer them in order.

"(1) John Doe is legally arrested on January 1, 1945 and put in jail. On January 10th he is tried by the Trial Justice and sentenced to 60 days in jail and is an exemplary prisoner. Should he be credited with the 1/3 good behavior allowance from the day of arrest or only after the day of sentence?"

The prisoner is entitled to "flat-time" credit for the period January 1-10, i.e., ten days he spent awaiting trial (Section 5019 of the Code). After conviction on January 10, he is entitled, in addition to each twenty days he serves, ten days good behavior credit (Section 5017 of the Code as amended in 1944).

The statute does not provide for "1/3 good behavior allowance" as your letter suggests; no credit is to be given until the prisoner has actually served twenty days, and for each unit of twenty days that he serves "after sentence" he is allowed an additional ten days good behavior credit. Thus, in your illustration, the prisoner would receive credits as follows:

<table>
<thead>
<tr>
<th>Jan. 1-Jan. 10</th>
<th>10 da. (flat)</th>
<th>10 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan 11-Jan. 30</td>
<td>20 da. plus 10</td>
<td>30 days</td>
</tr>
<tr>
<td>Jan. 31-Feb. 19</td>
<td>20 da.</td>
<td>20 days</td>
</tr>
<tr>
<td></td>
<td></td>
<td>60 days</td>
</tr>
</tbody>
</table>

and would be entitled to discharge on February 19.

"(2) Take the same case, but Doe appeals his case to the Circuit Court and remains on in jail until the case is called in the upper court on February 10th, when the Circuit Judge hears the case and imposes the same 60 days the Trial Justice gave. When does the good behavior allowance begin to run—from the day of arrest or the day of conviction by the Trial Justice or from the day of conviction in the Circuit Court?"

The situation you present is not expressly covered in the statute, but a solution of the question is not difficult. In Malouf v. City of Roanoke, 177 Va.
846, it is held that an appeal from the judgment of a justice completely annuls the judgment; that the jurisdiction of the justice is at an end, except as to bail, and that the prisoner is to be held for trial de novo in the circuit or corporation court.

The result is, therefore, that the case is to be treated as if there were no intermediate trial before the justice. Thus in your illustration, the prisoner would receive credit as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 1-Feb. 10</td>
<td>41 da. (flat)</td>
</tr>
<tr>
<td>Feb. 11-Mar. 1</td>
<td>19 da.</td>
</tr>
</tbody>
</table>

and would be entitled to discharge on March 1.

“(3) Take the similar case, but the Trial Justice gives him 12 months on January 10th and Doe remains in jail until the truck from the State Farm comes for him on March 10, 1945. When does the 1/3 off begin to run?”

In this case, the prisoner gets only "flat-time" credit on his twelve month's misdemeanor sentence for the ten days spent in jail awaiting trial; but thereafter, while in jail awaiting transfer to the State Farm, he is entitled to good behavior credits of ten days for every twenty days actually served.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Attendance At Court; Fees Abolished.

July 11, 1944.

Mr. T. H. Lillard,
Sheriff of Madison County,
Madison, Virginia.

My dear Mr. Lillard:

I am in receipt of your letter of July 10, in which you inquire if you are entitled to the fee for attending court provided by section 3503 of the Code.

You are, of course, familiar with chapter 386 of the Acts of 1942, which abolishes the fee system as a method of compensating sheriffs and sergeants and in lieu thereof provides for a salary to be paid these officers as compensation for their services. The Act further expressly provides that sheriffs and sergeants shall no longer collect fees from the Commonwealth or from a county or city.

It is my opinion, therefore, that sheriffs and sergeants, who are now compensated by salaries, are not entitled to the fees provided by section 3503 of the Code.

Very sincerely yours,

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

SHERIFFS—Fees: Not To Collect Fees For Serving Papers On Behalf Of The Virginia State Bar.

R. E. Booker, Esq., Secretary-Treasurer,
Virginia State Bar,
408 Law Building,
Richmond, Virginia.

December 18, 1944.

My dear Mr. Booker:

I am in receipt of your letter of December 13, from which I quote as follows:

"In view of the fact that all the sheriffs in Virginia are now on a salary basis, is it proper that the Virginia State Bar should pay a sheriff any fee for serving papers on behalf of the Virginia State Bar?"

"The Virginia State Bar has not had occasion to have any papers served since the sheriffs have been on a salary basis, but it appears that in the very near future it will be necessary to have papers served by sheriffs in several of the counties and cities in Virginia."

Section 1(b) of chapter 386 of the Acts of 1942 provides in effect that sheriffs shall not collect fees from the Commonwealth in connection with the performance of their duties. Therefore, the Virginia State Bar being a State agency, it should not in my opinion be required to pay fees to sheriffs for serving papers on its behalf.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Sharing In Monies Seized In Forfeiture Cases.

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

October 14, 1944.

My dear Mr. Downs:

This is in reply to your letter from which I quote as follows:

"There seems to be a considerable confusion in the minds of a number of sheriffs throughout the State as to whether or not they can share in forfeited properties, now that they are on a salary basis, as they did when they were on a fee basis. This question has been propounded to us on numerous occasions, and the desire for an answer seems to be so general that we should appreciate it if you would give us your opinion as to whether or not sheriffs, who are now on a salary basis, may share in forfeited properties such as moneys seized in gambling games, slot machines illegally operated, etc."

The answer to your question depends upon the terms of the statute under which the seizure is made. For example, if, as in section 4676 of the Code, the statute provides that one-half of the money seized will be forfeited to the person making the seizure and the other half to the Commonwealth, I am of opinion that the sheriff making such a seizure is entitled to half of the money seized. I do not think that this provision is in any sense a fee, but is more in the nature of a reward and is intended to be an incentive to the better enforcement of the law.
Insofar as money seized in illegal slot machines is concerned, I call your attention to the fact that section 4694-a of the Code (Michie, 1942) apparently does not make any provision for any part of the money seized with such a machine to go to the officer making the seizure.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS, SERGEANTS, AND SPECIAL POLICEMEN—Costs And Mileage Of Special Policemen To Be Taxed In Criminal Cases.

HONORABLE R. H. RICARDO,
Trial Justice of Norfolk County,
101 High Street,
Portsmouth, Virginia.

My dear Mr. Ricardo:

I am in receipt of your letter of July 21, from which I quote as follows:

"I have noted with interest the provisions of Chapter 62, Acts of 1944, adding a new section numbered 4797-a to the Code of Virginia, which provides, among other things, that 'In criminal prosecutions there shall be charged and taxed for services rendered by special policemen of counties the same fees and mileage allowances provided by law to be collected for the services of sheriffs and their deputies in similar cases.'

"In Norfolk County there are two classes of special police officers, one group is paid a salary for the performance of their duties, are appointed by the Judge of the Circuit Court for a period of six months, and receive no other compensation other than the salary herein mentioned; the other group consists of special police on government projects, who receive no salary from the county, but receive a salary from the U. S. government in a capacity as 'guards' on such projects, but who have been clothed with the authority of special police on such projects by the Judge of the Circuit Court of Norfolk County.

"In order to secure definite information concerning the authority under which such latter police are appointed and other pertinent information with regard to their status, I recently wrote Mr. A. O. Lynch, Commonwealth's Attorney of Norfolk County, concerning the same asking for this information. Mr. Lynch's reply is enclosed herewith.

"In view of the facts above outlined, will you kindly advise me whether or not fees or mileage shall be allowed any of the special police above described in accordance with the laws of the State of Virginia, and disposition of the same."

Mr. Lynch advises that the special police to which you refer were appointed pursuant to the authority contained in Chapter 87 of the Acts of 1928. The wording of this Act is so framed that it is applicable to Norfolk County and provides for a "special police force" to be appointed by the Circuit Court of the County or the Judge thereof.

Section 4797-a of the Code (added to the Code by Chapter 62 of the Acts of 1944) provides for the taxing of fees and mileage in criminal cases for services rendered by "special policemen of counties," and further stipulates that such fees and mileage when collected shall be paid into the treasury of the county "for which the special policeman was appointed." This new section of the Code, from the number given it by the General Assembly, was, I surmise, in-
tended primarily to apply to the special police of counties provided for by sections 4797 to 4803 of the Code. However, the language of the new section is unquestionably broad enough to include the special police appointed under the authority of Chapter 87 of the Acts of 1928, and it is my opinion that the section is applicable to such special police, so that in criminal cases fees and mileage may be taxed for the service of these officers. However, when such fees and mileage are collected in accordance with the section, they must be paid into the treasury of the county and may not be paid to the special police themselves.

I call your attention to the fact that the new section does not provide for the payment by the Commonwealth of any fees or mileage taxed for these special police, and I am of opinion that the Commonwealth is not liable for any such fees or mileage.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

SOIL CONSERVATION—Procedure Where Part Of A Proposed Area Is Favorable And Part Unfavorable To Formation Of A District.

June 19, 1945.

Mr. E. W. Mundie, Administrative Officer,  
State Soil Conservation Committee,  
Virginian Hotel,  
Lynchburg, Virginia.

My dear Mr. Mundie:

This is in reply to your letter of June 18, in which you state the following facts:

"In a recent case the three counties of Loudoun, Fairfax and Prince William submitted petitions to the State Soil Conservation Committee for organization into a soil conservation district. The petitions were accepted and combined by the committee as provided for in the law. Later hearings were held on these petitions and on April 26 a referendum of land owners in the three counties was held to determine the sentiment of land owners for the organization of the district to include the three counties. The result of the referendum indicated that Prince William and Fairfax Counties were very favorable to the organization in that there was a very small descending vote cast, while Loudoun voted unfavorable to the organization."

Your letter then continues:

"The question which follows is: can the State Soil Conservation Committee determine it practicable and feasible to establish a district composed of Prince William and Fairfax Counties with the omission of Loudoun County from the area which has been proposed as a district?"

The answer to your question must be in the negative. Section 5 of Chapter 395 of the Acts of 1938, beginning at page 729, clearly contemplates that there shall be submitted to the qualified voters, who must be landowners, the question of establishing a soil conservation district within an area and boundary to be defined by the State soil conservation committee. Subsection (d) provides that the question to be voted on shall be for or against the creation of said district out of "the lands below described." Subsection (f) contains this provision:

"* * * provided, however, that the committee shall not have authority to determine that the operation of the proposed district within the defined
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boundaries is administratively practicable and feasible unless at least two-thirds of the votes cast in the referendum upon the proposition of creation of the district shall have been cast in favor of the creation of such district."

The effect of establishing the district is to create an entirely new subdivision separate and apart from the county or counties, or parts thereof, of which it is composed, and no significance attaches to whether or not the required two-thirds majority vote is from any one or more counties.

Since the voters in Fairfax and Prince William counties voted in favor of a conservation district which included a certain area in Loudoun County, it cannot be said that they voted in favor of any other or different conservation district.

It follows that it is my opinion that, in order to establish a different district from that submitted to the voters, it would be necessary to initiate entirely new proceedings, and submit to the voters in the area embraced within the proposed new district the question whether they are for or against the establishment of the district composed of that particular area.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE AUDITOR—Authority To Expend Part Of Appropriation For Membership In National Association.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

My dear Mr. Bennett:

I am in receipt of your letter of June 1, in which you ask if the State Auditor's office may join the Municipal Finance Officers Association of the United States and Canada and pay the annual dues of $30 out of the State appropriation to the Auditor's office. It appears from your letter that the purpose of joining this agency is to enable your office to secure copies of various publications of the organization relating to various phases of municipal accounting. You state that these publications would be of interest and assistance to members of your staff.

From the facts set out in your letter it is my opinion that it would be entirely proper for your office to secure a State membership in the organization and to pay the annual dues out of your appropriation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF MEDICAL EXAMINERS—Interpretation Of Reciprocity Rule.

DR. J. W. PRESTON, Secretary,
State Board of Medical Examiners,
Roanoke, Virginia.

My dear Mr. Preston:

This will acknowledge receipt of your letter of October 4, in which you raise the following question:
"An applicant, a graduate of an A-grade school, who for some time served as an officer of the Public Health Service of the United States but who did not pass the examination of any state board and who has surrendered his commission, now wishes to obtain a certificate in this state upon the basis of having held the commission as here stated. The applicant is now practicing in California, a state with which Virginia reciprocates, but in which state licensure was granted upon the basis of his commission. In this connection, it is best to state that it seems the law in California permits licensure upon the basis of a commission which has been surrendered.

"Having stated the above circumstances, I wish to say that the specific question is whether or not the Board, in accordance with section 1617(a) or section 1617(c), has the right to grant a certificate without examination upon the basis of either the commission which has been surrendered or on the basis of the endorsement of California, in which state the applicant registered without examination."

Section 1617 of the Code of Virginia provides that your Board may arrange for reciprocity with the authorities of other States having requirements equal to those of Virginia, and may issue certificates to applicants who have met such requirements. I observe that you state that your Board reciprocates with California. I assume, therefore, that after examination it has been determined that the requirements of California are equal to those of Virginia. I am of opinion, therefore, that since the applicant to whom you refer has his certificate from California the Board may issue him a Virginia certificate pursuant to the reciprocity provision to which I have referred.

I do not think that the fact that California issues a certificate to an officer of the Federal Public Health Service after he has surrendered his commission in such service in any way renders the requirements of California less than those of Virginia, for California does not issue such a certificate to an officer of the Federal Public Health service if the requirements of that service are "in any degree or particular less than those" of California. Codes of California (1937), Deering, Secs. 2212, 2215, 2216.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF MEDICAL EXAMINERS—Authority To Admit Certain Persons To Examination Who Have Not Graduated From Grade-A College.

April 27, 1945.

Dr. J. W. Preston, Secretary,
Board of Medical Examiners,
Roanoke, Virginia.

My dear Mr. Preston:

This is in reply to your letter of April 26, 1945, in which, after setting out certain pertinent sections of the Code dealing with the eligibility of applicants for examination for practice of one of the healing arts, you state:

"As you doubtless know, at the present time there is in certain sections of the state, particularly in the rural sections, a lack of a sufficient number of medical practitioners to meet the needs of such communities.

"Specifically, the Board would thank you for an opinion as to whether or not in its discretion it may admit to examination graduates of other than A-grade schools, provided that they meet the requirements as set out in
Section 1613 (d) last paragraph, such graduates having had five years or more of legal and reputable practice."

It is my opinion that the Board of Medical Examiners is given discretionary authority under section 1613(d) of the Code to admit to Part II of the examination applicants who, although not graduates of a fully accredited professional school, nevertheless have been engaged in "five or more years legal and reputable practice."

Section 1613 of the Code, which prescribes the requirements for admission to examinations, comprises sub-sections (a)-(f) and divides the examination into Parts I and II.

Subsections (a), (b), (c) and the first two paragraphs of (d) prescribe the requirements for taking Part I of the examinations, one of which is that the applicant must have studied at least two years in an accredited professional school.

Subsection (d) then continues as follows:

"The board shall admit to Part II examination for an additional fee of twelve dollars and fifty cents any candidate who has successfully passed Part I examination, or the board may, in its discretion, accept as the equivalent of all or any part of requirements (c) and (d) five or more years of legal and reputable practice and admit the candidate to Part II examination without taking part I examination.***"

It is apparent at this point that the General Assembly intended to and did vest the Board with discretion to allow five years of practice to be substituted for and accepted in lieu of the academic requirements contained in subsections (c) and (d) — "and admit the candidate to Part II examination."

The dilemma in which you state the Board finds itself arises out of the fact that subsection (d) then goes on to say:

"*** In addition to these requirements each candidate for Part II examination must be twenty-one years of age or older, must meet requirements (a) and (b), and must submit evidence verified by affidavit and satisfactory to the board that he or she:

"(e) Has studied for not less than four school years (in an accredited school) ***

"(f) Is a graduate of *** (an accredited school)."

It is apparent at once that, if these subsections (e) and (f) are deemed to apply to those applicants who have engaged in five years of practice, the previously expressed intent of the legislature would be nullified. This would do violence to previously expressed intent and an interpretation should be reached, if possible, to preserve the apparent legislative intent.

The rule applicable to such situations where provisos are included in statutes is as follows:

"Although the position of the proviso has considerable influence upon its real character, it is not necessarily controlling. Accordingly, if the meaning and purpose of the proviso is plain, any inference from its position may and should be disregarded. In other words, position cannot supersede the obvious intention of the legislature as ascertained from the context and all the provisions relating to the subject matter involved. It is therefore possible that the proviso may apply to sections or portions thereof which follow the proviso, or to the entire act, or, for that matter, even to the original statute of which the statute containing the proviso is an amendment. After all, it is the legislative intent that controls."

(Statutory Construction by Crawford)

It is my opinion, therefore, that subsections (e) and (f) of section 1613 of the Code apply only to those applicants who are required to take Part I of the
examination, and that they do not apply to those candidates who have practised for five years or more and whose applications for Part II of the examination, the Board, in its discretion, may approve.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF MEDICAL EXAMINERS—Naturopathy Defined.

October 3, 1944.

DR. H. E. McKINNEY, D.N.,
1518 Hull Street,
Richmond, 24, Virginia.

My dear Dr. McKinney:

This is in reply to your recent letter in which you request my opinion as to the meaning of the phrase "and other natural agents" appearing in the definitions of the practice of naturopathy in Section 1609(g) of the Code of Virginia as amended in 1944.

The section reads as follows:

"The term 'practice of naturopathy' means the treatment of human ailments, diseases or infirmities by means of heat, light, diet, massage, baths and other natural agents, but does not include the use of surgery, the X-ray, X-ray therapy, electrotherapeutics, obstetrics, osteopathy, or the prescribing of any drug or medicine."

I may say at the outset that the meaning of the phrase "other natural agents" would be governed by its accepted meaning in the fields of medicine and the healing arts. It would therefore be largely a question of fact upon which this office is not in a position to express an opinion.

There are several cases from jurisdictions other than Virginia in which the courts have given partial definitions of "naturopathy" but I have been unable to locate a definition of the phrase "natural agents."

In Perry v. Larson, 25 Fed. Supp. 728, the court said:

"... 'naturopathy,' which is defined by Dorland's American Medical Dictionary (16th Ed.) as 'a drugless system of therapy (treatment) by use of physical forces, such as air, light, water, heat, massage, etc., * * *"

In Millsap v. Alderson, 63 Cal. App. 518, 219 Pac. 469, in which the Legislature of California had provided for the licensing of naturopaths but had not defined the term, the Court adopted the definition used by the Association of Naturopaths of California in its by-laws, to-wit:

"... The materia medica shall consist of light, air, water, clay, heat, besides rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture. * * *"

Trusting that the foregoing, when read in the light of the express limitations contained in the section of the Virginia statute above quoted, will be of some assistance to you, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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STATE BOARD OF MEDICAL EXAMINEES—Board Of Examiners In Basic Sciences.

November 3, 1944.

DR. FRANK L. APPERLY, Chairman,
Special Board of Examiners in Basic Sciences,
Medical College of Virginia,
Richmond, Virginia.

My dear Mr. Apperly:

This is in reply to your letter of November 2, 1944, concerning the proper interpretation of certain portions of Chapter 195 of the Acts of Assembly of 1944, which are found as Chapter 68, sections 1608, et seq., of the 1944 Supplement to the Code.

Section 1613a(d) creates a special board of examiners in basic science consisting of three members to be appointed by the Governor from the faculties of accredited colleges and provides, among other things, that the said special board shall conduct an examination in November of each year on certain scientific subjects.

Subsection (e) of the same section then provides that certain persons may take this examination as follows:

"Any person not less than twenty-one years of age who produces satisfactory evidence before the special board hereby created that he is of good moral character and a graduate of a recognized school of chiropractic or naturopathy and that he was (1) a practicing chiropractor or a practicing naturopath in the State of Virginia on July first, nineteen hundred forty-four and for the twelve month period immediately preceding, or (2) was in the military or naval service of the United States on the effective date of this act and was a practicing chiropractor or naturopath in the State of Virginia at the time of entering such service, may, in lieu of the Part I examination given by the Board of Medical Examiners, take the examination given by the Special Board of Examiners hereby created. No such person shall take any special examination provided for herein unless he shall have, prior to November first, nineteen hundred forty-four, furnished to the board satisfactory evidence of his eligibility under this section, provided, however, that if such person is in the military or naval service on the effective date of this act, he may establish his eligibility at any time within six months after leaving such service. The Special Board shall determine the eligibility under this section of applicants to be examined. It shall prepare and give the examinations to applicants and grade the answers, and shall award a certificate of proficiency to any applicant making an average grade of fifty per cent on the basic science subjects named herein, which certificate shall authorize the applicant to take Part II of the examination provided for in the preceding sections of this chapter, and upon passing such examination, to receive a certificate to practice chiropractic or naturopathy, as the case may be. Any applicant who fails on an examination may take other examinations upon paying the fee required therefor. No applicant who applies for and is accepted as eligible to take the examination given by the Special Board shall be prosecuted for or enjoined from practicing chiropractic or naturopathy without a license prior to July first, nineteen hundred forty-nine, but in all other respects shall be subject to the applicable requirements of the preceding sections of this chapter." (Italics supplied.)

You ask in your letter whether the underlined board referred to in the above quoted section refers to the special board of examiners in basic science or the regular board of medical examiners for the State of Virginia.

It is true that section 1009(a) defines the term "board" in this whole act as the board of medical examiners unless expressly stated otherwise. However, the context of the whole section above quoted indicates that the special board of examiners in basic science is referred to. This is particularly true because
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it specifically says that the special board shall determine the eligibility of applicants and because the whole section refers to the duties of this special board.

It may well be that the regular board of medical examiners which has two chiropractors and one naturopath among its members is in a better position to examine the credentials of applicants under the above section than the special board which does not have any chiropractors or naturopaths among its membership, but the special board might consult with the regular board of medical examiners for any help deemed necessary on that account.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Annual Leave; Calculation Of.

August 21, 1944.

HONORABLE HARRIS HART,
Assistant Director of Personnel,
State Finance Building,
Richmond, Virginia.
My dear Mr. Hart:

This is in reply to your recent letter, in which you present the following question:

"A case has come up with reference to the application of one of the personnel rules on which it would be appreciated if we may have your opinion. Under separate cover I am sending you a copy of the Rules for the Administration of the Virginia Personnel Act. On page 19, paragraph 10.5, annual leave allowances are provided at rates varying with the length of full-time service. The Act, as you know, excludes from its operation teaching staffs at educational institutions. Mr. R. M. Musselman, of the University of Virginia, a former instructor, was transferred to the Bursar's office July 1, 1943. He raises a question as to whether the rate of his annual leave should not be based on the number of years in which he was an instructor in the faculty rather than upon the number of years since which he has been a regular State employee in the Bursar's office."

It is entirely true that the provisions of the Personnel Act would not have applied to Mr. Musselman while he was a teacher at the University of Virginia (section 6 of chapter 370 of the Acts of 1942), but it is likewise true that for practically all of the time that Mr. Musselman was a teacher at the University the Personnel Act was not in effect, it not having been enacted until 1942. Mr. Musselman as an administrative employee of the University since July 1, 1943, is included within the Personnel Act, and he has been an employee of the State for more than five years. It is my opinion, therefore, that his annual leave should be such leave as is granted all employees with more than five years of service. I see no reason why Mr. Musselman should be denied the benefit of his length of service in computing his vacation because of the fact that, if the present Personnel Act had been in effect during his prior service, he would not have been included within its scope.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE MILK COMMISSION—Authorized To Hold Hearings Outside Virginia.

Mr. R. W. Dickson, Secretary,
State Milk Commission,
Richmond 19, Virginia.

My dear Mr. Dickson:

This is in response to your inquiry of March 2, 1945, in which you state the following:

“The State Milk Commission has received a request from the Maryland-Virginia Milk Producers' Association of Washington, D. C. to hold a joint hearing of the State Milk Commission and the War Food Administration to consider some contemplated amendments to the Rules and Regulations for the supervision and control of the Arlington-Alexandria Milk Market.

“The Commission desires to know whether there is any legal reason why such a hearing could not be held in the District of Columbia and would action taken by the Commission as a result of such hearing be legal. Present indications are that it would be more feasible to hold a joint hearing in the District of Columbia than in Alexandria.”

Among the powers conferred upon the Milk Commission by section 1211y of Michie's Code of 1942 with reference to the conduct of hearings are the following:

“(f) To take depositions of witnesses within, or without, the Commonwealth * * *

“(i) * * * Such hearing may be held at such time and place and after such notice as the commission may determine.”

I, therefore, do not see any reason why such a hearing could not be conducted in the District of Columbia. I would like to point out, however, that any subpoena issued by the Milk Commission for a witness would not be effective to require such a witness to appear beyond the borders of the State of Virginia.

As to whether action could be taken by the Commission without conducting another hearing in Virginia, would probably depend upon the nature of the action to be taken. Upon this question, therefore, I would not like to advise you at this time.

Very sincerely yours,

ABRAM P. STAPLES,  
Attorney General.

TAXATION—Authority Of Commissioner Of Revenue To Amend Valuation In Taxpayer's Return.

HONORABLE R. I. BARNES, Clerk,
Circuit Court of Richmond County,
Warsaw, Virginia.

My dear Mr. Barnes:

I am in receipt of your letter of August 11, in which you ask in effect whether or not a commissioner of the revenue may change the evaluation placed on tangible personal property by a taxpayer in filing his return.

I am of opinion that the commissioner of the revenue has this power. Section 310 of the Tax Code provides that "each commissioner of the revenue
shall ascertain and assess, at fair market value, all the personal property not exempt from taxation, * * * in his county or city." This section, in my opinion, authorizes the commissioner of the revenue to place the proper fair market value upon tangible property reported by a taxpayer where in his opinion the correct value has not been placed thereon by the taxpayer in making his return. If the commissioner of the revenue did not have this power, then the result would be that the taxpayer would in reality be assessing himself, which would result in many cases in absolute lack of uniformity. It would be a good practice, I think, where a commissioner of the revenue made a change in the values reported by a taxpayer, for him to notify the taxpayer of such change.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Correction Of Erroneous Land Assessment; Wrong Owner.

October 18, 1944.

MR. GARRETT G. BALLARD,
Commissioner of the Revenue,
Bedford, Virginia.

My dear Mr. Ballard:

I am in receipt of your letter of October 16, in which you enclose a communication from Messrs. Oliver and Padgett, Attorneys at Law, Bedford, Virginia.

Your enclosure discloses a situation where two lots in the Town of Bedford have been for many years assessed for taxation in the names of persons other than the actual owners, who were and are the owners of record. You desire my opinion on the question of whether you, as commissioner of the revenue, "of your own initiative, may drop the assessments against" the persons to whom the lots have been erroneously assessed, "and assess the lots in the name of" the true owner.

I know of no authority given to a commissioner of the revenue to correct erroneous assessments of this character for prior years. You may, pursuant to section 258 of the Tax Code of Virginia, when the land books are made out next year, transfer these lots on your land books and enter them in the name of the true owners. I do not think that you can alter the land books for the current year. See section 256 of the Tax Code. Land books covering this year have no doubt been delivered to the treasurer.

As to the liability of the true owners of the lots for the current taxes and those which have been assessed in past years, this is a matter which does not come within the scope of your duties, since you are not charged with the collection of these taxes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Sale Of Delinquent Lands Of Members Of Armed Services.

October 18, 1944.

HONORABLE WILLIAM A. ADAIR,
Treasurer of Rockbridge County,
Lexington, Virginia.

My dear Mr. Adair:

This will acknowledge receipt of your letter of October 16, from which I quote as follows:
"As you know, the Virginia State tax laws direct that delinquent lands shall be offered for sale on the second Monday in December. Also, the last Legislature passed a law to the effect that taxes against anyone in the armed forces can not be forced. Now, suppose a member of the armed forces has real estate delinquent for the year of 1942 which the tax laws direct shall be sold on the second Monday in December, 1944, which law must the treasurer obey?

"I would appreciate your ruling on this, as the time is almost here when the lands must be advertised (30 days before date of sale) and offered for sale in obedience to the tax laws, and I think you can see the importance of the treasurers knowing about this."

The Act for the benefit of members of the armed services to which you refer (Chapter 48 of the Acts of 1944) provides that such a member during the period of his service and within one year after it is terminated may pay the principal of the tax on real estate owned by him without the addition of any penalty or interest thereon, and the Act further provides that the words "penalty or interest" as used in the Act includes "all accrued costs and charges" which may have been added to the principal of the tax. I am advised by the State Tax Commissioner that the provision relieving the members of the armed services from all accrued costs and charges has been construed by him to mean all such costs and charges that might accrue by reason of the sale of the land to the Commonwealth for delinquent taxes. The result is that when a member of the armed services desires to redeem his land which has been sold for delinquent taxes he may do so by the payment of the principal of the tax without the payment of any interest or penalty or costs or charges by reason of the sale. Thus the member has not been harmed by the former sale of his land for delinquent taxes.

Mr. Morrissett further advises me that he has instructed the treasurers in selling the land of a member of the armed services for delinquent taxes not to make such a sale to a private bidder, but the sale should only be made to the Commonwealth.

Construing the Act as outlined above and following the procedure suggested, I see no reason why lands belonging to members of the armed forces which are delinquent for taxes thereon may not be included in the sale to be made in December.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—License Tax On Partnership As A Successor To A Corporation; Computation Of.

HONORABLE C. H. MORRISSETT,
State Tax Commissioner,
Richmond 15, Virginia.

My dear Mr. Morrissett:

This is in reply to your letter of September 7, in which you state that the Dalton-Bundy Lumber Company was engaged in the wholesale mercantile business in Norfolk as a corporation for many years and was duly licensed as such. As of December 31, 1941, the corporation was dissolved and as of January 1, 1942, a partnership was formed to carry on the business, the partnership being composed of the officers, directors and stockholders of the former corporation with the several stockholders owning substantially the same interests in the partnership that they owned in the corporation, and the business of the partnership is being conducted by the same persons who formerly conducted the busi-
ness of the corporation. In applying for its wholesale merchant's license for the year beginning January, 1942, the partnership contended, and still contends, that the tax upon such license should be measured by the purchases of the corporation for the calendar year 1941, which unquestionably would have been the case if the corporation was continuing in business as such. See the first four paragraphs of section 188 of the Tax Code. The license was issued by the local Commissioner of the Revenue on this basis.

When the license was reached by the Department of Taxation in regular course of audit an assessment of additional license tax for the year 1942 was assessed by the Department against the partnership. This additional assessment was in order, according to the construction placed upon section 188 of the Tax Code by the Department, because the partnership for the purpose of license taxation for 1942 should have been treated as a merchant beginning business and the tax measured by the purchases of the partnership for the calendar year 1942. It so happens that the purchases of the partnership for the year 1942 were considerably more than those of the corporation for the year 1941. The Department relies on the following (sixth) paragraph of section 188 of the Tax Code as authority for the additional assessment:

“For the purpose of ascertaining the tax to be paid by a wholesale merchant beginning business, his purchases shall be considered to be the amount of goods, wares and merchandise bought to commence business with, including goods, wares and merchandise manufactured by him to be offered for sale at the place at which he conducts his business as a wholesale merchant, provided such place is not the place of manufacture, also including an estimate of purchases which the wholesale merchant will make between the date of the issuance of his license and the thirty-first of December following, and including an estimate of the amount of goods, wares and merchandise manufactured by him to be offered for sale at the place at which he conducts his business as a wholesale merchant, provided paragraph and the next succeeding paragraph shall be subject to correction such place is not the place of manufacture. Every underestimate under this by the Department of Taxation, whose duty it shall be to assess such wholesale merchant with such additional taxes as may be found to be due after the close of the license year on the basis of the true purchases.”

There is no controversy concerning the amounts involved, the only question being whether the 1942 license tax of the partnership should be measured by its purchases for 1942 or those of the corporation for 1941, and it is on this question that you desire my opinion.

After careful consideration I must concur in the position taken by the Department of Taxation. The partnership formed as of January 1, 1942, is a new legal entity entirely separate and distinct from the corporation which was dissolved as of December 31, 1941. When the partnership applied for the 1942 license the corporation was no longer in existence. There seems to me to be no reasonable doubt that the partnership applying for the 1942 license was within the meaning of section 188 of the Tax Code "a wholesale merchant beginning business," and that the tax upon such license must be measured as provided by the paragraph which I have heretofore quoted. While the persons who own, manage and control the business of the partnership are the same as the stockholders and directors of the corporation, yet there are material differences in their legal status. As stockholders and directors they were not liable for the debts and obligations of the business. As members of the partnership they are liable for same. The income from the business of the partnership is taxed by both the State and Federal Governments on an essentially different basis. The corporation was subject to an annual franchise tax and registration fee; the partnership is not. The name in which the business is now conducted is different.

If the change of ownership of the business had occurred on January 5, after the corporation had engaged in the business a few days, it would be subject
to a 1942 license. If this license of the corporation had been assigned to the partnership at that time, the partnership would have been liable for any increase in license tax due to additional purchases during the balance of the year. This would seem to negative any idea that there is a continuity of the exercise of the license privilege by one acquiring a going concern. The last sentence of section 140 of the Tax Code provides:

"* * * If the license tax already paid by the assignor is less than the license tax which would be assessable against the assignee but for the assignment, an additional license tax shall be paid by the assignee equal to the difference between the tax paid on the assigned license and the license tax which would be otherwise assessable against the assignee."

It is also significant in this connection that, although section 141 of the Tax Code preserves the continuity of existence for license tax purposes of a partnership business in case of a change of partners, there is no similar provision in the statutes with respect to a transfer of the business by a corporation to its stockholders. Under the rule expressio unius exclusio alterius it must be considered that the identity or continuity of the business in the latter case is not preserved.

You have further advised me that:

"The uniform ruling of the Department of Taxation has been that a partnership succeeding a corporation becomes a beginner for license tax purposes as well as for other purposes. The ruling is the same if an individual succeeds a corporation."

This practical construction given to the statute involved by the administrative officials is entitled to great weight. Hunton v. Commonwealth, 166 Va. 229, 242; South East Public Service Corp. v. Commonwealth, 165 Va. 116.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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HONORABLE C. F. JOYNER, JR., Commissioner,
Division of Motor Vehicles,
Richmond 10, Virginia.

My dear Mr. Joyner:

I have your letter of February 1, 1945, requesting my opinion upon the question of the liability of the Standard Oil Company for a twenty-five per cent. penalty with respect to the payment of the gasoline tax upon certain gasoline sold by the Standard Oil Company to the Continental Oil Company during the month of April, 1943. In addition to the facts set out in your letter, there are others contained in the letter from Mr. Gay to which you refer.

The material facts as I understand them are as follows:

In accordance with certain Federal regulations induced by the war emergency the gasoline supplies of the several oil companies, some of which were transported to Richmond via pipe line from Greensboro, were embraced in a common pooling arrangement. Pursuant to a contract of sale of gasoline by Standard to Continental certain deliveries were made direct to Continental from Greensboro,
without any physical handling in Virginia by Standard. As a result considerable confusion arose as to whether the report and payment of the tax thereon should be made by Continental or Standard. Both companies paid the tax for March, while only Continental filed the report and paid the tax for April. Subsequently, on May 17, Continental wrote to one of your officers stating that the tax for April had been paid both by Continental and Standard and requested a refund by way of credits on future tax payments. This statement of double payment was relied on as true by your division and the refund was allowed. It has now been agreed by all parties that the tax on such sales as are here involved should be paid by the seller, and should have been paid for April by Standard.

It further appears that if Standard had paid the tax to the Division the amount of same would have been repaid to Standard by Continental, and that Continental, under the belief that Standard had also paid the April tax, credited on its books to Standard the amount of the refund granted to it as above related. Thus Continental, in requesting the refund, thought it was doing so on behalf of and for the benefit of Standard. Obviously the refund would not have been requested, nor would it have been properly granted under these circumstances except under a mutual mistake of fact on the part both of Continental and the Division. Since Continental was ultimately to bear the burden of the tax, the payment by it under then existing confused conditions must be legally treated, so far as the penalty is concerned, as payment by whichever company should, in strict contemplation of law, pay the same. In my opinion, therefore, it must be considered that the tax was legally paid. To apply the penalty later because of the refund made under a mutual mistake of fact would be to penalize the refund, because if the refund had not been made there could be no penalty.

It is a well established principle that statutes imposing penalties are not favored in the law and will be strictly construed against their imposition in doubtful cases.

For the reasons stated, it is my opinion that the penalty imposed by the motor fuel tax act cannot be imposed in this case.

Sincerely yours,

 Abram P. Staples,
 Attorney General.

TAXATION—Release Of Real Estate Taxes In Certain Counties.

December 2, 1944.

Honorable E. Almer Ames, Jr.,
Attorney for the Commonwealth,
Onancock, Virginia.

My dear Mr. Ames:

I am in receipt of your letter of November 28, which I quote below:

"At the last session of the General Assembly an Act was passed authorizing the governing bodies of certain counties to release upon certain conditions the liability for interest, penalties and accrued costs on unpaid county and district taxes upon real estate for the year 1942 and all previous years, which Act is designated Chapter 295 and is found on page 431 of the 1944 Acts of Assembly.

"I have been requested to ascertain from you whether in your opinion by a majority vote of the governing body of Accomack County (the Board of Supervisors) the interest, penalties and accrued costs may be released in one district of the county without being released in all districts. I would like your opinion both on the matter of district taxes and county taxes. From a reading of the Act it would appear to me that the interest, penalties
and accrued costs as to district taxes might be released in one district without being released in all districts, but that as to county taxes the action must be uniform throughout the county. Any release would have to be by a majority vote of the governing body of the county."

I quite agree with you that as to county taxes on real estate the Board of Supervisors' action should be uniform throughout the county.

As to district taxes on real estate the language of the Act is probably broad enough to authorize the Board of Supervisors to release penalties and interest on district taxes in one district without releasing such penalties and interest in all districts. However, if the Board elected to act only as to district taxes in one district, I deem it proper to advise you that, in my opinion, unless the Board can show very compelling facts justifying these different classifications of the several districts, such action of the Board might very probably be open to a successful attack as denying taxpayers of the districts discriminated against equal protection of the laws.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TORTS—County Not Liable For Injuries Sustained By Workman.

August 25, 1944.

Mr. W. A. Scarborough, Superintendent,
Dinwiddie County School Board,
Dinwiddie, Virginia.

My dear Mr. Scarborough:

I am in receipt of your letter of August 22, in which you inquire whether or not a person who was injured while doing some work for the county school board may be reimbursed by the county for his hospital expenses incurred as a result of such injury and also may be paid compensation while he is unemployed.

While you do not give sufficient facts to enable me to determine whether or not the injury was caused by the negligence of an officer or employee of the county, even if such negligence exists, I know of no authority for the county to make the payments to which you refer. This office, pursuant to decisions of our Supreme Court of Appeals, has frequently expressed the opinion that a county is not liable for injury or damage sustained on account of the negligence of its officers or employees.

I call your attention, however, to the fact that employees of a county are covered by the Workmen's Compensation Act, and I suggest that you consult with your Attorney for the Commonwealth regarding the question of whether or not this accident should be reported to the State Industrial Commission for such action as the facts may justify that body in taking.

Very sincerely yours,

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

TORTS—Public Liability Insurance Carried By Commonwealth.

October 18, 1944.

HONORABLE J. B. FOGLEMAN, Treasurer,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

My dear Mr. Fogleman:

I am in receipt of your letter of October 13, in which you inquire as to insurance coverage to protect Virginia Polytechnic Institute in connection with the operation of aircraft in its Department of Aeronautics.

It is well settled in Virginia that the Commonwealth is not liable in tort for injury or damage sustained on account of the negligence of its employees, although a particular employee may be liable on account of his own negligence. Virginia Polytechnic Institute, being a wholly owned State institution, has the above immunity and, therefore, it is not necessary to carry insurance to protect the institution on account of injuries which may be sustained through the negligence of its employees in performing their official duties.

It has, however, now become a uniform practice for public liability insurance to be carried on State owned automobiles for the protection of the operators and of the public generally, and I should think that it would be extremely wise for the appropriate authorities to adopt this policy in connection with the operation of your aircraft. The question of the amount and type of insurance which should be carried is one which can be better determined by the authorities at the institution after consultation with those representing the insurance carriers.

I may say for your information that where public liability and property damage insurance is secured by State agencies the policy should carry a rider containing a waiver on the part of the insurance carrier of the right to interpose as a defense to any action the immunity of the State to which I have referred. I imagine that your insurance agent has a copy of such a waiver, but, if he has not, I shall be glad to secure one and send it to you.

Very sincerely yours,

ABRAM. P. STAPLES,
Attorney General.

TRADE-MARKS—Name Of A Corporation: “Best & Co.”

June 11, 1945.

HONORABLE R. E. WILKINS,
Secretary of the Commonwealth,
Richmond 12, Virginia.

My dear Mr. Wilkins:

This is in reply to your inquiry of May 10, concerning the application of Best & Co. for the registration of a trade-mark. It appears that merely the name “Best & Co.” was originally registered in 1925, under the then existing laws (Acts of Assembly of 1902-3-4, p. 262).

Under the present laws, the registration of the name as such is not permitted, Acts of Assembly of 1938, p. 438 (Michie’s Code §1458) providing in part:

“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 * * * .”
The word person is defined in Section 1455 to include a firm, association and corporation.

I do not, therefore, think that the re-registration applied for should be granted.

I note that the letter of application states that "Best & Co., is used not merely as a trade name but also as a trade-mark which is directly applied and affixed by means of labels and tags to all of the merchandise that it sells. The name Best & Co., is used in an unusual and distinctive manner and constitutes a common law trade-mark." If such can be shown, as a matter of fact, to be determined upon what is actually submitted with the application, I do not see any reason why such a mark cannot be registered.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TREASURERS OF COUNTIES—Compensation When Adjoining Certain Cities.

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

My dear Mr. Combs:

This is in reply to your request for my opinion upon the questions raised by your letter of May 8, which I quote in full as follows:

"Mr. Philip P. Burks, Treasurer of Bedford County, brought to the attention of the Compensation Board by letter, dated March 17, 1945, the fact that Bedford County adjoins the City of Lynchburg. This fact was unknown to the Compensation Board before the receipt of Mr. Burks' letter, and Mr. Burks while knowing that Bedford County and Lynchburg adjoin was not aware of section 6-a of the Compensation Act of 1934, which reads as follows:

"The minimum limits of the salaries, provided by this act are hereby increased to the extent of five hundred dollars in the case of treasurers in counties adjoining one or more cities of more than twenty-five thousand inhabitants, whether such cities be within or without this State."

"The salary of the Treasurer of Bedford County beginning January 1, 1940, which is likewise the date as of which Mr. Burks became County Treasurer, has been fixed at the sum of $4,000.00 per annum, this being the minimum statutory salary without respect to section 6-a of the Compensation Act.

"Upon receipt of Mr. Burks' letter, and after verification of the statement that Bedford county and Lynchburg City adjoin, the Compensation Board revised the salary of the Treasurer of Bedford County for the year 1945 and fixed it at $4,500.00.

"After this action was taken Mr. Burks wrote the Compensation Board that he thought he was entitled to receive the additional $500.00 per annum for the calendar years 1944, 1943, 1942, 1941 and 1940.

"The Compensation Board being in doubt as to what should be done with respect to the years mentioned conferred with you on May 4, 1945, and the object of this letter is to state the above facts and to secure your advice on the question whether or not the Compensation Board should not certify for payment the State's share of the additional $500.00 for each of
the past years mentioned above, the same to be paid out of the regular appropriation which is made in the general appropriation act for the payment of the State's share of the salaries of county and city treasurers.

"It appears to the Compensation Board that Mr. Burks' claim is a legal one and that the State's share of the earned but unpaid compensation should be now paid to him.

"Your attention is called to the fact, in considering the above matter, that the Compensation Act of 1934 with respect to county treasurers went into effect January 1, 1935, and that the minimum salary of $4,000.00, without reference to section 6-a of that act, was fixed for the county treasurer of Bedford County beginning January 1, 1935, and this salary of $4,000.00 was in effect for subsequent years up to January 1, 1945. From January 1, 1935 to April 15, 1935 Mr. W. R. Dooley was Treasurer of Bedford County. From April 16, 1935 to December 31, 1935 Mrs. Florence S. Dooley was such treasurer. From January 1, 1936 to December 31, 1939 Mr. R. L. Elliott was such treasurer. It is probable that these ex-treasurers or their personal representatives will make a claim for the additional sum of $500.00 per annum for the period during which such former treasurers served, and your opinion is requested on the point whether or not such claims, if presented, should be held to be legal claims and subject to payment.

"The files of the Compensation Board contain a letter from City Manager, R. W. B. Hart, of Lynchburg, stating that on January 1, 1926 the boundaries of the City of Lynchburg were considerably extended and that this action resulted among other things in the corporate limits of the City of Lynchburg extending on the west to the boundary line between Campbell County and Bedford County, also that the westerly portion of the corporation of the City of Lynchburg was made to embrace all that part of then Campbell county extending to the line of Bedford County. Therefore, he says, 'it is a fact that as of January 1, 1926 the westerly boundary of the corporation of Lynchburg has adjoined Bedford County.'

"You will also note that the population of the city of Lynchburg, according to the 1930 census, as well as according to the 1940 census, was in excess of 25,000.'

It appears from the foregoing that no doubt exists as to the incumbent Philip P. Burks having been the de jure treasurer of Bedford County during the calendar years 1940-1944, inclusive. There is also no dispute with respect to the fact that Bedford County adjoins the city of Lynchburg, and that the population of said city during said five-year period has been in excess of 25,000. It is clear, therefore, that during said period of time the smallest legal salary which could be fixed for the said officer was $4500 per annum, and that the $4,000 salary fixed by the compensation Board through a misunderstanding of the facts was inadequate to comply with the statutory provisions relating thereto. As said in Blair vs. Marye, Auditor, 80 Va. 485, "The right to the salary follows the office, as shadow follows the substance," and that the salary of a public officer is not a matter of contract in a case of the kind here involved, but solely a question controlled by the statute. See 8 Michie's Digest of Virginia-West Virginia Reports, title Public Officers, sections 68-71, inclusive, and cases therein cited. In view of the foregoing principle of law applicable to this claim of the treasurer, in my opinion, it is clear that he is entitled to receive, as the balance due on his salary of said office for the years 1940-1944, inclusive, the sum of $500 per annum, of which amount one-third is payable out of the State Treasury.

The additional question arises whether or not the Compensation Board is authorized to direct the payment of the State's share of this sum amounting to $833.33, or whether a claim should be presented to the Comptroller pursuant to the provisions of section 2173 of the Code. While the matter is not entirely free from doubt, the payment of the claim is one to be made to the present incumbent, who is subject to the jurisdiction of the State Compensation Board. In my opinion, the general powers of the Board are sufficiently broad to authorize action on its part to correct the mistake as to said officer.
You also state that during former years, since the said Compensation Act became effective, the office was held by other parties named in your letter. Since these officers have been severed of direct relations with the State and are no longer subject to the jurisdiction of the Compensation Board, it is my view that their claim should be presented to the Comptroller for allowance by that officer and, upon allowance by him, should be paid by warrant of the Comptroller as provided in section 2181 of the Code.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICES—Appeals Noted After Payment Of Fine.

February 23, 1945.

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

My dear Mr. Porter:

This is in reply to your letter of February 22, from which I quote as follows:

"A man was convicted in my Court of reckless driving. A fine was imposed which he at once paid together with the costs. An official receipt was given him. The defendant, about three hours after the adjournment of the Court stated that he wishes to appeal from decision of Court.

"Can this be done, or does the money automatically become the property of the State?"

Your inquiry presents a two-fold problem: (1) Does the voluntary payment of a fine in a justice's court preclude a later appeal therefrom? (2) Whether it does or not, what should the trial justice do with the money collected?

The answer to the first phase of this problem is that the question is an open one in this State, it having been left so expressly in the case of Ricketts vs. McCrory, 138 Va. 548. Under this condition of the law it will be a question for the Circuit Court of Louisa County to determine if the matter is presented to it, and it would not be proper for this office to express an opinion thereon meanwhile.

I know of no authority whereby you would be authorized to return the money paid by the defendant in satisfaction of his fine. In order that the matter may not be further complicated, however, I suggest that pending the decision of the Circuit Court of Louisa County you segregate, earmark, and retain in your official account the amount paid by the defendant, in order that proper disposition of the item may be made accordingly as later developments may dictate.

Sincerely yours,

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

UNEMPLOYMENT COMPENSATION COMMISSION—Reciprocal Agreement With Federal Agency.

HONORABLE JNO. Q. RHODES, JR., Commissioner,
Unemployment Compensation Commission of Virginia,
Richmond 11, Virginia.

My dear Mr. Rhodes:

This will acknowledge receipt of a request from you for an opinion concerning the right of the Unemployment Compensation Commission of Virginia to use the funds to the credit of the Commission in its benefit account for the purpose of making payment of claims to veterans under the provisions of the "Servicemen’s Readjustment Act of 1944," and your authority to enter into the agreement outlined below. You state that the Administrator of Veterans' Affairs has asked you to enter into an agreement with him pursuant to Chapter XI of said Servicemen's Readjustment Act, whereby the Commission will be utilized in the processing, adjustment, determination and payment of claims under Title V of said Act, and that in carrying out such agreement the Commission proposes to set up a revolving fund using funds from the Commission's benefit account for the payment of such claims, and that the funds advanced are to be reimbursed by the Veterans' Administration in accordance with section 1100(d) of said Act.

By reference to section 11(m) of the Virginia Unemployment Compensation Act, it will be observed that the Commission is granted the authority to enter into reciprocal agreements, subject to the approval of the Governor, with the "appropriate agencies * * * of the federal government (one) whereby wages or services, upon the basis of which an individual may become entitled to benefits under the unemployment compensation law * * * of the federal government, shall be deemed to be wages for employment by employers for the purposes of section three and section four (e)" of the Virginia Unemployment Compensation, "provided such * * * agency of the federal government has agreed to reimburse the fund for such portion of benefits paid. * * * " While the foregoing provision of the State law does not specifically make reference to the situation involved here, I am of the opinion that the broad purpose of the provision is to authorize the Commission to enter into reciprocal agreements with federal agencies whereby the Commission will pay unemployment benefits under any federal law in cases where the federal government obligates itself to reimburse the benefit account for such payments. Such agreements must be approved by the Governor.

In addition to the foregoing provision quoted from the State Act, subsection (1) of section 11 contains the following paragraph:

"The Commission may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law."

The two provisions of State law quoted herein, when read together, are sufficient, in my opinion, to justify the conclusion that the Commission has the authority to make advances from its benefit fund for the payment of unemployment benefits payable under a federal law.

Very truly yours,

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

WAR—Members Of Merchant Marine Are Not Members Of Armed Forces.

April 23, 1945.

HONORABLE V. S. PITTMAN,
Treasurer of Southampton County,
Courtland, Virginia.

My dear Mr. Pittman:

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

"The General Assembly's Regular Session in 1944 passed an Act to relieve those in the armed forces of penalty and interest on taxes, etc. as set forth in chapter 48, page 47, of the Acts.

"I would like for you to advise me if this Act can be construed to relieve those in the Merchant Marine of any such penalty and interest that might have accumulated."

While I have not had occasion to pass on the question you present, I am advised by the State Tax Commissioner that he has expressed the opinion that members of the Merchant Marine are not included within the scope of the Act. The Act, you will observe, is applicable to members of the "armed forces of the United States," and my information is that members of the Merchant Marine are not included in this classification.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General
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