

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

From July 1, 1945 to June 30, 1946

LETTER OF TRANSMITTAL

October 1, 1946

HONORABLE WM. M. TUCK,
Governor of Virginia,
Richmond, Virginia

My dear Governor Tuck:

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

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

Respectfully submitted,

ABRAM P. STAPLES,

Attorney General.

Personnel of the Office
(Postoffice address, Richmond)

NAME	COUNTY	OFFICIAL TITLE
ABRAM P. STAPLES	Roanoke City	Attorney General
W. W. MARTIN	Henrico	Assistant
KENNETH C. PATTY	Tazewell	Assistant
G. STANLEY CLARKE	Henrico	Assistant
D. GARDNER TYLER, JR.	Charles City	Assistant
WALTER E. ROGERS	Richmond City	Assistant
M. RAY DOUBLES	Henrico	Assistant
CARRINGTON THOMPSON	Pittsylvania	Assistant
NERHEA S. EVANS	Charlotte	Secretary
LOUISE W. POORE	Richmond City	Secretary
MARIE L. BRITTS	Roanoke City	Secretary
ELEANOR L. WHITE	Smyth	Secretary
HELEN R. MILLER	Richmond City	Receptionist

Attorneys General of Virginia

From 1776 to 1936

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

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

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

Cases Decided in the Supreme Court of Appeals of Virginia

1. *Dawkins, D. J. Sidney v. Commonwealth.* From Corporation Court City of Lynchburg. Unlawfully inflicting bodily injuries.
2. *Gaskill, Adrain Marie v. Commonwealth.* From Corporation Court of the City of Lynchburg. Operating a house of ill fame.
3. *Huffman, O. A. v. Commonwealth.* From Hustings Court City of Roanoke. Murder.
4. *Jessup, Thomas v. Commonwealth.* From Circuit Court of King William County. Housebreaking.
5. *Moore, W. R. Commissioner, etc. v. Jack W. Sutton.* From Court of Law and Chancery of City of Norfolk. License to practice photography.
6. *S. & L. Straus Beverage Corp. v. Commonwealth.* From Circuit Court City of Richmond. Merchant's license tax.

Cases Decided In The Supreme Court Of Appeals Of Virginia.

1. *Bevley, Cassell v. Commonwealth.* From Circuit Court of Campbell County. Voluntary manslaughter. Reversed and remanded.
2. *Blankenship, Preston v. Commonwealth.* From Circuit Court of Appomattox County. "Hit and run" statute. Affirmed.
3. *Bowie, John Earl v. Commonwealth.* From Circuit Court of Spotsylvania County. Involuntary manslaughter. Affirmed.
4. *Branch, Rufus v. Commonwealth.* From Corporation Court City of Norfolk. Housebreaking with intent to commit larceny. Affirmed.
5. *Brenan, William Greggs v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Robbery. Affirmed.
6. *Calamos, George v. Commonwealth.* From Circuit Court of Spotsylvania County. Contempt of court and interdiction from sale of alcoholic beverages. Reversed and dismissed.
7. *Coleman, John, Jr. v. Commonwealth.* From Circuit Court of Buchanan County. Murder. Reversed and remanded.
8. *Dodson, Aubrey S. and others v. Commonwealth.* From Circuit Court of Campbell County. Violation of A. B. C. Act. Reversed and remanded.
9. *Dunlavey, Thomas Orval v. Commonwealth.* From Hustings Court City of Richmond. Grand larceny. Affirmed.
10. *Evans, Leonard Lee v. Commonwealth.* From Circuit Court of Wise County. Seduction. Reversed.
11. *Flanary, Jeff v. Commonwealth.* From Circuit Court of Wise County. Murder. Reversed and dismissed.
12. *Gilland, R. L. v. Commonwealth.* From Circuit Court of Pulaski County. Receiving stolen goods. Affirmed.
13. *Granbery, Joseph Harvey v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Attempt to commit rape. Affirmed.
14. *Gray, Samuel W. v. Commonwealth.* From Circuit Court of Arlington County. Rape. Affirmed.
15. *Harris, Russell V. v. Commonwealth.* From Hustings Court City of Richmond, Part II. Housebreaking. Affirmed.
16. *Herchenbach, Eugene C. v. Commonwealth.* From Circuit Court of Prince George County. "Hit and Run Statute". Reversed and Dismissed.
17. *Huffman Construction Co. v. Unemployment Compensation Commission.* From Circuit Court City of Richmond. Unemployment compensation. Affirmed.
18. *Ives, Roosevelt v. Commonwealth.* From Corporation Court City of Norfolk. Robbery. Affirmed.
19. *Johnson, Clinton v. Commonwealth.* From Circuit Court of Elizabeth City County. Rape. Affirmed.
20. *Johnson, Garrett v. Commonwealth.* From Circuit Court of Nelson County. Malicious wounding. Reversed and remanded.

21. *Jones, Lieutenant v. Commonwealth.* From Circuit Court of Halifax County. Malicious assault. Reversed.
22. *Jones, William, and George Patrick v. Commonwealth.* From Corporation Court City of Bristol. Vandalism. Reversed and dismissed.
23. *LeMarr, Lazozier v. Commonwealth.* From Hustings Court City of Portsmouth. Involuntary manslaughter. Affirmed.
24. *Lane, Thomas A. v. Commonwealth.* From Hustings Court, Part II, City of Richmond. Receiving stolen goods. Affirmed.
25. *LaRue, Edward v. Commonwealth.* From Hustings Court City of Roanoke. Grand larceny. Confessed error.
26. *Latham, James, Jr. v. Commonwealth.* From Corporation Court, Part II, City of Norfolk. Knowingly and feloniously receiving stolen goods. Affirmed.
27. *Lewis, Barbara v. Commonwealth.* From Circuit Court of Nelson County. Assault and disorderly conduct. Reversed and remanded.
28. *Livingstone, Joseph v. Commonwealth.* From Corporation Court City of Norfolk. Bribery. Affirmed.
29. *Martin, Frances Marian v. Commonwealth.* From Circuit Court of Fredericksburg. Murder. Affirmed.
30. *Miller, Wilson V. v. Commonwealth.* From Hustings Court City of Richmond, Part II. Housebreaking. Affirmed.
31. *McDiarmid, J. T. v. Commonwealth.* From Circuit Court City of Hopewell. Alcoholic Beverage Control Act. Reversed.
32. *Pannill, Henry v. Commonwealth.* From Circuit Court of Pittsylvania County. Murder. Reversed and remanded.
33. *Preddey, D. E. v. Commonwealth.* From Circuit Court of Orange County. Attempt to commit rape. Affirmed.
34. *Presley, Barney v. Commonwealth.* From Circuit Court of Buchanan County. Murder. Reversed and remanded.
35. *Ritholz, Benjamin D. et als. v. Commonwealth, Etc.* (State Board of Examiners in Optometry). From Circuit Court of City of Richmond. Unlawful practice of optometry. Affirmed.
36. *Rountree, Victoria, Trading as Rountree Dairy v. State Milk Commission.* From Virginia State Milk Commission. License to sell milk denied.
37. *Seaboard Finance Corp. v. Commonwealth.* From Hustings Court City of Richmond. State income and capital tax. Affirmed.
38. *Seay, Leo M. v. Commonwealth.* From Hustings Court City of Richmond. Violation of A. B. C. Act. Reversed and remanded.
39. *Slayton, Lloyd E. v. Commonwealth.* From Circuit Court of Campbell County. Revocation of suspended sentence. Affirmed.
40. *Slayton, Lloyd E. v. Commonwealth.* From Circuit Court of Campbell County. Perjury. Affirmed.
41. *Taylor, Edward V. v. Commonwealth.* From Circuit Court of York County. Involuntary manslaughter. Reversed and remanded.
42. *Taylor, William v. Commonwealth.* From Circuit Court of Washington County. Rape. Reversed and remanded.
43. *Thacker, Ira v. Commonwealth.* From Circuit Court of Scott County. Grand larceny. Reversed.
44. *Tillman, Spencer v. Commonwealth.* From Corporation Court City of Norfolk, Part II. Murder. Affirmed.
45. *Updike, Alexander v. Commonwealth.* From Circuit Court of Pittsylvania County. Voluntary manslaughter. Affirmed.
46. *White Cecil Riley v. Commonwealth.* From Circuit Court of Norfolk County. Murder. Affirmed.
47. *Whitlow, J. H. v. Commonwealth.* From Circuit Court of Brunswick County. Larceny. Reversed and dismissed.

Cases Decided in the Supreme Court of the United States

1. *Bailey, Bernard B. v. Anderson, State Highway Commissioner of Virginia.* On appeal from Supreme Court of Appeals of Virginia. Eminent domain. Decided in favor of the Commonwealth.
2. *Morgan, Irene v. Commonwealth of Virginia.* On appeal from Supreme Court of Appeals of Virginia. Segregation law. Reversed.

Cases Decided in United States District Court for the Eastern District of Virginia

1. *Bowles, Chester, Admr., v. T. Wilson Seay, Sheriff of Henrico County, Virginia.* Motion to dissolve injunction restraining sale of automobiles forfeited to Commonwealth at prices in excess of ceiling price established by O. P. A. Injunction dissolved and cause dismissed.
2. *Davis, Willie v. Frank Smith, Jr., Superintendent of the Virginia State Penitentiary.* Habeas Corpus. Writ denied. Case decided.

Cases Pending in United States District Court for the Eastern District of Virginia

1. *Kelsey v. Moore, et als.* Suit to enjoin collection of capitation tax. Pending.
2. *Michael, Lawrence v. Hunter G. Cockerell.* Civil complaint to enjoin collection of capitation taxes in 8th Congressional District and to declare said tax in violation of Federal Constitution.

Cases Decided in United States Circuit Court of Appeals—Fourth District

1. *Davis, Willie v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* On appeal from the United States Circuit Court. Habeas Corpus. Writ denied.

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

1. *Atlantic Stores Corporation v. Commonwealth.* Circuit Court City of Norfolk. Merchant's License Tax. To be dismissed.
2. *Carpenter, C. C., Construction Co. v. Commonwealth et als.* Circuit Court of City of Richmond. Claim under Highway Contract.
3. *Coal Processing Corporation v. Unemployment Compensation Commission.* Circuit Court of City of Richmond. Involving rates—section 1887 (99) (8) UCC Act. Decided in favor of Commission.
4. *Commonwealth v. Lauren M. Griffith.* Circuit Court City of Richmond. Tax on intangible personal property.
5. *Commonwealth, ex rel. State Corporation Commission v. Mason and Dixon Lines.* State Corporation Commission. Violation of use tax on motor fuel Act. Judgment for Commonwealth.
6. *Commonwealth v. Meister Tailoring Company.* Circuit Court City of Richmond. Merchant's license tax. Judgment for Commonwealth.
7. *Commonwealth v. Norva Beverage Corporation.* Circuit Court City of Richmond. Wholesale Merchant's license tax.
8. *Commonwealth v. S. & L. Straus Beverage Corporation.* Circuit Court City of Richmond. Merchant's license tax. Judgment for Commonwealth.
9. *Cooper, David M. and Rose Cooper v. Commonwealth.* Circuit Court of Warwick County. Income tax.
10. *First National Bank of Alexandria, Trustee, and Arlington Hall Junior College v. Commonwealth.* Corporation Court of Alexandria. Tax on intangible property.
12. *Goodcill Industry and Gospel Mission of Roanoke v. Commonwealth.* Hustings Court city of Roanoke. Merchant's license tax.

11. *Ford, Gloria Mae v. Commissioner of Public Welfare.* Chancery Court of City of Richmond. Petition for adoption. Petition for final decree dismissed.
13. *Kapell, William W. v. Commonwealth.* Corporation Court City of Alexandria. Income tax. Petition dismissed.
14. *McSweeney Meat Market v. Commonwealth.* Hustings Court of City of Richmond. Merchant's license tax.
15. *Perkins, W. Allen, et als., Executors and Trustees of William J. Rucker Estate v. Mary Sheridan, et als.* Corporation Court of City of Charlottesville. Bill in Chancery for construction of Will. Decree construing Will in accordance with contention of the University of Virginia.
16. *Pilot Life Insurance Company v. Commonwealth.* State Corporation Commission. Petition for refund of retaliatory license tax. Judgment of plaintiff.
17. *Powell, Blanche P. v. Commonwealth.* Hustings Court City of Richmond. Tax on intangible personal property.
18. *Price, Earle v. W. Frank Smyth Jr., Superintendent of Virginia State Penitentiary.* Circuit Court of Mecklenburg County. Habeas Corpus. Prisoner Discharged.
19. *Price, Mrs. Effie G. v. Commonwealth.* Circuit Court City of Richmond. Tax on intangible personal property.
20. *Safeway Stores, Inc. v. Commonwealth.* Law and Equity Court of City of Richmond. Merchant's license tax.
21. *Seaton, Emmett T., T/A Richmond Fuel Company v. S. L. Swindell, T/A Princess Laundry.* Circuit Court of City of Richmond. Receivership — Involves priority of liens—UCC party by petition filed.
22. *Sheffield, L. A. v. Commonwealth.* Circuit Court of Chesterfield County. Petition for refund of road taxes.
23. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. Dewey Agee.* Hustings Court of City of Richmond. Revocation of Pardon. Pardon revoked.
24. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. Charles Brown.* Hustings Court of City of Richmond. Revocation of Pardon. Pardon revoked.
25. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. Willie Carson.* Hustings Court of City of Richmond. Revocation of Pardon. Pardon revoked.
26. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. Elijah Crawley.* Hustings Court of City of Richmond. Revocation of Pardon. Pardon revoked.
27. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. Hilliary, Henry.* Hustings Court of City of Richmond. Revocation of Pardon. Pardon revoked.
28. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. B. H. Bunn.* Circuit Court of Mecklenburg County. Revocation of Pardon. Pardon revoked.
29. *Smyth, W. Frank, Jr., Superintendent of the Virginia State Penitentiary v. Annual Gordon Hudson.* Hustings Court of City of Richmond. Revocation of Pardon.
30. *The Great Atlantic and Pacific Tea Company v. Commonwealth.* Law and Equity Court City of Richmond, Part II. Merchant's license tax.
31. *Thornhill, John v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Circuit Court of the City of Richmond. Habeas Corpus. Dismissed.
32. *Watkins, Patrick Henry v. W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary.* Circuit Court of Brunswick County. Habeas Corpus.

OPINIONS

AGRICULTURE AND IMMIGRATION—Use of Meter Stamp on Containers Approved.

October 17, 1945.

HONORABLE LAWRENCE T. BERRY, *Assistant Commissioner*,
Department of Agriculture and Immigration,
Richmond, Virginia.

My dear Mr. Berry:

I am in receipt of your letter of October 3, from which I quote as follows:

"Under the provisions of section 1239 of the Code of Virginia each and every manufacturer, jobber, importer, agent, or seller of any concentrated commercial feeding stuff, as defined in section 1233, is required to pay an inspection tax of 15c per ton, evidenced by a tag or stamp furnished by the commissioner of agriculture. For a number of years it has been the custom to furnish such manufacturers adhesive stamps to be affixed to the package when offered for sale within the state.

"In some states optional use of meters to show payment of the state tax on feed has been authorized, and we have been approached by certain of the larger manufacturers for grant of this privilege. The meter is the same as that used extensively for payment of postage on mail matter and its use approved by the U. S. Postal Authorities

"As it would operate in the collection of this state tax on feeds; we would set the meter register to correspond with the amount of tax prepayment, the meter user would then imprint a tax stamp as needed, directly on bags when made of paper, on analysis labels, or on the reverse side of analysis tags, in denominations corresponding to the weight of the contents of the container.

"We would like your opinion as to whether or not the use of this method of collecting this tax would conform with the section of the Code herein referred to, and whether we would be within our rights in issuing a permit, under competent regulations, authorizing the optional use of such meters."

In my opinion, if the collection of the inspection tax imposed by section 1239 of the Code can be assured by the use of such meter as you describe, and if by such use a tax stamp can be imprinted on each package of commercial feeding stuff sold, offered or exposed for sale, this would constitute a substantial compliance with the section. In order that any possible doubt may be removed, I suggest that it would be advisable to request the next General Assembly to sanction the payment of this tax by the use of meters.

Very sincerely yours,

ABRAM P. STAPLES.

Attorney General.

**AGRICULTURE AND IMMIGRATION—Tobacco Warehouses:
Regulations of.**

November 2, 1945.

HONORABLE L. M. WALKER, JR.,
Commissioner of Agriculture,
State Office Building,
Richmond 19, Virginia.

My dear Mr. Walker:

This is in reply to your letter of October 29, which is as follows:

"Under the terms of the commission merchants law, section 1257-1265 of the Code of Virginia, as amended by the acts of 1942, tobacco warehouses are required to obtain license from the Commissioner of Agriculture. Section 1259 requires the applicant to file a schedule of his maximum commissions and charges for service in connection with the produce handled on account of, or as agent for the parties and such designated commissions and charges shall not be changed or varied for one year thereafter, subject to certain qualifications.

"We would like your opinion as to whether or not there would be any constitutional inhibitions that would prevent an amendment to this law intended to regulate the practices and service charges of tobacco warehouses handling leaf tobacco consigned to them for sale at auction to what extent such charges might be regulated by the administrative officer, and whether such warehouses might legally be required to make available to the Commissioner of Agriculture their records incident to the handling and sale of such tobacco for purposes of determining what would be a fair and equitable charge for such services."

Our Supreme Court of Appeals has held that the fact that "public (tobacco) warehouses are affected with a public interest and hence subject to regulation has not been seriously questioned here since the decision of *Munn v. Illinois*, 94 U. S. 113, * * *," *Reaves Warehouse v. Commonwealth*, vvd Va. vtd. And the Supreme Court of the United States has held that charges for handling tobacco by tobacco warehouses may be regulated. *Townsend v. Yeomans*, 301 U.S. 441, 57 S. Ct. 842. It would also appear that this power to fix charges may be conferred upon administrative authorities. 42 Am. Jur. Public Administrative Law, section 52. See also annotations in 79 L. Ed. 474, and in 119 A. L. R. 985.

It is my opinion that the weight of authority supports the view that the General Assembly may constitutionally delegate to the Commissioner of Agriculture the authority to regulate the charges of tobacco warehouses, and may authorize such officer to have access to the records of such warehouses. I need not say that such an act as you suggest should provide for notice and hearing, and that the charges be just and reasonable.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL ACT—Local Option Elections:
When Town Residents May Not Vote In County Elections.**

June 26, 1946.

HONORABLE JOSEPH WHITEHEAD, JR.,
Commonwealth's Attorney,
Chatham, Virginia.

My dear Mr. Whitehead:

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

"The town of Chatham held a referendum last week on local option, as provided under Section 4675(30) of the code, and voted against the sale of beer and wine and against the sale of alcoholic beverages."

"The county is going to hold a referendum on the same proposition as provided under Section 4675(30) of the code."

"Please advise whether or not the voters of the town of Chatham who participated in the town election have a right to vote in the county referendum."

Section 4675(31) of the Code (Michie 1942) provides in part, in dealing with local option elections that "for the purpose of this section, when any election shall have been held in any town, separate and apart from the county in which such town or part thereof is located, such town shall be treated as being separate and apart from such county."

Construing the quoted provision, it is my opinion that where an election has been held in a town and another election is proposed to be held for the county those voters qualified to vote in the town are not eligible to vote in the county election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ALCOHOLIC BEVERAGE CONTROL ACT—Granting of Beer License
to Certain Types of Stores.**

February 1, 1946.

COLONEL R. McC. BULLINGTON, *Chairman*,
Virginia Alcoholic Beverage Control Board,
Richmond 11, Virginia.

My dear Colonel Bullington:

This is in reply to your letter of January 31, which I quote in full as follows:

"The following facts have been submitted to this board for consideration:

"The Safeway Stores who have a great number of outlets in Virginia, also operate in a number of other States, among which are California, Nevada, and Utah. In the last three mentioned States, because of the laws peculiar to those localities, they have a wholesale beer license. Under this license they buy beer from manufacturers and distribute the same among

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their own retail outlets. They now desire to obtain a license in Virginia to sell beer at retail, off-premises.

"Section 21 of the Alcoholic Beverage Control Act, among other things, provides that the Alcoholic Beverage Control Board shall not grant any retail off-premises license to any manufacturer, bottler, or wholesaler of alcoholic beverages, whether licensed in this State or not.

"It has been suggested that although the Safeway organization holds a wholesale license, it does not actually engage in the wholesale business, in that it actually makes no sales whatsoever under its wholesale license, but merely distributes the alcoholic beverages purchased by it to other outlets owned by it, and consequently should not be termed a wholesaler.

"This Board would like an opinion from you as to whether or not the provisions of Section 21 preclude the issuance of an off-premises license to any person who *holds* a wholesale license, or should the test be whether or not such person is engaged as a wholesaler actually selling alcoholic beverages."

Section 21, to which you refer, prohibits the issuance of the retail license to any "manufacturer, bottler, or wholesaler of alcoholic beverages, whether licensed in this State or not".

The answer to your question depends, therefore, upon the fact whether or not the applicant for the license is actually a wholesaler of alcoholic beverages in some other State. In my opinion, the mere fact that, in order to carry on a retail business in some other State it was necessary to procure a license which also carried with it the privilege of conducting a wholesale business would not render the holder of the license a wholesaler unless he exercised such privilege. If the Board, therefore, is satisfied that the applicant is not engaged and will not engage in business as a wholesaler pursuant to any such license permitting same, but will restrict its activities under said licenses to the retail business, in my opinion the board should issue the retail license applied for if all other requirements of the Board are met.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

APPROPRIATIONS—Not Defeated By Change In Name of Beneficiary of Appropriation.

September 12, 1945.

HONORABLE J. H. BRADFORD,
Director of the Budget,
State Capitol,
Richmond, Virginia.

My dear Mr. Bradford:

This is in reply to your letter of September 6, from which I quote as follows:

"The Governor has been asked by officials of the Atlantic Rural Exposition, Inc., to make available to this agency the appropriation provided by Item 426, Chapter 407 of the Acts of Assembly of 1944, for the Virginia State Fair Association, Incorporated. I quote the first paragraph of a letter

written the Governor by Paul Swaffer, Secretary and General Manager of the Atlantic Rural Exposition, Incorporated, on August 17, 1945:

"You have previously had some correspondence with Mr. C. C. Read relative to an appropriation made to the Virginia State Fair Association, Incorporated. As explained by Mr. Reed, the Atlantic Rural Exposition is the successor to the Virginia State Fair Association and operated under the same charter, aside from the change of name. We are most anxious to be granted the use of this appropriation as already made for the purpose of awarding premiums to agricultural products in our Spring Exposition of 1946."

"At the request of the Governor, I am asking your opinion as to whether the appropriation referred to can legally be made available for the use of the Atlantic Rural Exposition."

It appears from the enclosures with your letter that there has been no change in the identity of the corporation, nor any change in its purpose, by the two amendments which were approved by the State Corporation Commission. One amendment merely changes the name of the corporation and the other changed the number of acres of real estate which the corporation should be permitted to own. The mere change of the name of a corporation does not in any way effect its identity or prevent it from being the same corporation.

Since there has been no such change the essential purposes of the corporation are the same, especially in view of the fact that Item 426 of the Appropriation Act of 1944 provides that the money shall be used towards the payment of premiums upon the agricultural, horticultural, livestock and poultry exhibits, which must be approved by a committee of five, including the Governor, and the other four to be appointed by him.

It is my opinion that the funds appropriated to the corporation under the name of the Virginia State Fair Association, Inc., may be made available to it under its amended name Atlantic Rural Exposition, Inc.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**APPROPRIATIONS FOR BIENNIUM—When Unexpended Funds Not
To Revert To General Fund.**

June 28, 1946

MR. S. C. DAY, JR.,
Assistant Comptroller,
P. O. Box 6-N,
Richmond 12, Virginia.

My dear Mr. Day:

I have your letter of June 26, the first two paragraphs of which I quote as follows:

"Section 70, Chapter 407, Acts 1944, page 795, provides in part as follows:

"All the appropriations herein made out of the general fund of the State Treasury for the two years ending, respectively on June 30, 1945, and on June 30, 1946, which have not actually been disbursed by warrants drawn

by the Comptroller * * * shall * * * revert to and became a part of the general fund of the Commonwealth."

"A number of the general fund agencies have orders issued to vendors for certain equipment and supplies which can not be delivered prior to July 1, 1946, due to conditions beyond the control of the vendors. Since these are bona fide contracts it is possible that some of these agencies will not have sufficient funds in the next biennium to pay for said equipment and supplies. I will thank you to advise whether or not the Comptroller may, in his discretion, issue warrants to vendors upon properly certified invoices and hold the checks until we are advised by the agencies that delivery has been made."

Under the circumstances mentioned the agencies in question should submit to the Comptroller invoices covering the price of the equipment and supplies which have been ordered, but delivery of which have been delayed due to present economic and industrial conditions, and, if the Comptroller is satisfied that the transactions are normal and were not entered into for the purpose of avoiding a legitimate and proper reversion of a part of the appropriation of any such agency to the general fund of the State Treasury in accordance with the provisions quoted in the first paragraph of your letter, it is my opinion that it would be proper for the Comptroller to issue the warrants prior to the time when the funds involved would revert and hold them for transmission to the vendees upon being advised by any such agency which issued the invoices that the supplies and material covered by the invoices and warrants have been delivered.

In the third paragraph of your letter you state the following:

"A number of special fund agencies, such as the Division of Motor Vehicles and the Department of State Police, likewise, have outstanding orders for equipment and supplies, and there seems to be no reference to the reversion of these appropriations at the end of the biennium. Would the Comptroller be within his rights in carrying forward a sufficient balance in these appropriations to cover said orders, or should he follow the procedure mentioned above for general fund items?"

Since neither the Appropriation Act nor any other statute applicable contains any provision for the reversion of funds appropriated to State agencies out of special funds as distinguished from the general fund of the State Treasury, it is my opinion that it would be proper for the Comptroller to issue the warrant covering the purchase price of any such equipment or supplies upon delivery of same. The foregoing, however, is subject to this qualification that, unless the 1946 Appropriation Act has reappropriated to such agency the funds involved, it is necessary that warrants be drawn before the expiration of two years and six months after the end of the session of the General Assembly at which the law is enacted appropriating same. This limitation is provided for in section 186 of the Constitution. In the event of the failure to deliver any such equipment and supplies prior to the expiration of said time, invoices and warrants should be drawn and the practice followed as recommended for general fund agencies.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ARRESTS—Issuance of Warrant By Justice of Locality Other Than That of Officers.

January 17, 1946.

HONORABLE K. C. MOORE, *Trial Justice*
Rockingham County and City of Harrisonburg,
Harrisonburg, Virginia.

My dear Mr. Moore:

This is in reply to your letter of January 14, 1946, in which you wish to know whether an arrest warrant can be issued by a Justice of the Peace of Harrisonburg for a crime committed in Rockingham County, or whether such a warrant would have to be issued by a Justice of the Peace of Rockingham County.

The statutes concerning the issuance of warrants for arrests are found in section 4823, *et seq.*, of Michie's Code. Section 4827 expressly provides for warrants issued in one county or corporation for a crime committed in another county or corporation as follows:

"Where a warrant is issued in a county or corporation, other than that in which the charge ought to be tried, the justice before whom the accused is brought, shall, by warrant, commit him to an officer, that he may, and such officer shall carry him to the county or corporation in which the trial should be, and there shall take him before, and return such warrant to, a justice thereof, unless otherwise provided."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ATTORNEYS—When Persons Other Than Attorneys At Law May Be Employed by Counties To Collect Taxes.

March 26, 1946.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond, Virginia.

My dear Mr. Bennett:

I have your letter of March 18, which I quote in full as follows:

"Chapter 58 (Senate Bill 105) was passed by the 1946 General Assembly and was approved by the Governor on February 27, 1946. This chapter amends Section 403 of the Tax Code, and the amendment is related to Sections 251 of the Tax Code and 2503 of the Code. The referred to amendment is as follows:

"Whenever the services of any attorney employed under the provisions of this section, or section two hundred fifty-one of the Tax Code, or section twenty-five hundred three of the Code of Virginia, to collect taxes which are a lien on real estate, result in the collection of any such tax, such attorney may be compensated for his services whether or not any suit is instituted for the collection of the tax or the sale of the real estate. All payments heretofore made to attorneys for services in collecting such taxes on real estate, when no suit was instituted for the collection of the tax or the sale of the real estate, are hereby validated, and no refund thereof shall be required."

"Webster's Unabridged Dictionary states that an attorney is either

public or private and that a private attorney (or an attorney in fact) is a person appointed by another by a letter or power of attorney to transact any business for him out of court.

"In view of the amendment and the definition of an attorney as given by Webster's it would appear to me that a board of supervisors in a county would be empowered to employ someone other than an attorney at law to collect delinquent real estate taxes—recorded as liens against property in the office of the clerk of the court—where such collections were made without the necessity of instituting court proceedings. I should appreciate it very much if you would give me your opinion as to whether an individual other than an attorney at law may be employed by a board of supervisors to collect delinquent real estate taxes as described above provided such collections can be effected without any action before a court."

I concur in the view you have expressed. The effect of the amendment is unquestionably to divide the type of services to be contracted for by the board of supervisors into two classes, one of which contemplates the services of an attorney at law in connection with the institution of suits, and the other, services which may be performed by any agent or attorney who is not an attorney at law, inasmuch as no court action is involved. In connection with services of the latter type, in my opinion, it is not necessary for the employee to be an attorney at law.

Your very truly,

ABRAM F. STAPLES,
Attorney General.

BAIL AND RECOGNIZANCES—Authority To Appoint Bail Commissioners In Cities.

April 8, 1946.

HONORABLE J. MELVIN LOVELACE,
Commonwealth's Attorney City of Suffolk,
Suffolk, Virginia.

My dear Mr. Lovelace:

This will acknowledge receipt of your letter of April 6, requesting my opinion as to whether or not the Judge of the Circuit Court of the City of Suffolk can appoint a bail commissioner for the City of Suffolk.

As your letter indicates, section 6188 of the Code provides:

"The circuit court of each county, or the judge thereof in vacation, shall appoint one or more of the commissioners in chancery of said court, bail commissioners for said county."

By virtue of chapter 16 of the Acts of Assembly of 1926, this section was amended so as to provide that judges of corporations or hustings court in cities which have no justice of the peace except police justices, civil justices, civil and police justices, or juvenile and domestic relations courts could appoint a commissioner in chancery as bail commissioner for such city. This section was again amended and re-enacted by Acts of 1930, page 341, and was restored to its original form without any reference to bail commissioners in cities. It would, therefore, appear from this statute that the Judge of the Circuit Court of the City of Suffolk could not appoint a bail commissioner for said city.

However, I invite your attention to section 4830 of the Code as amended and re-enacted by chapter 394 of the Acts of the General Assembly of 1942, pp. 632, et seq. This provides in part:

*"A bail commissioner or the clerk of the circuit court of any county or city having criminal jurisdiction. * * * shall have the power and jurisdiction to remit to bail upon recognizance with surety all persons charged with crime in their respective cities and towns; * * * Any such bail commissioner or clerk shall have authority to admit to bail any person charged with a criminal offense, for the appearance of such person in the trial justice court or any other court in which such person is required to appear to answer to such offense, whether, any, such court be a court of the county or city of such bail commissioner or clerk, or of some other county or city in this State."* (Italics supplied)

It would, therefore, appear to me that the Judge of the Circuit Court of Nansemond County, who is the same person as the Judge of the Circuit Court of the City of Suffolk could appoint a bail commissioner from one of the commissioners in chancery of the Circuit Court of Nansemond County, and that the said bail commissioner would then be fully authorized under the last quoted statute to admit to bail all persons charged with offenses before any of the city courts of Suffolk.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**BOARD OF CORRECTIONS—Authority To Adopt Regulations As To
Safekeeping of Certain Prisoners**

October 29, 1945.

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

My dear Major Youell:

You have shown me a copy of a memorandum dated October 15, prepared by you and addressed to the State Board of Corrections, from which I quote as follows:

"As you gentlemen, of course, know, the law establishing the Department gave authority for promulgating rules and regulations for the operation of jails and lock-ups. I have been wondering if our Board should not have a regulation which would prohibit a prisoner who had been charged with rape or murder or who had been convicted of either of these two crimes, from being held in a jail that did not have on duty 24 hours per day in the jail building full-time deputies or guards.

"I attach hereto a clipping from the local paper in regard to a prisoner who was lynched in Florida recently; and the sheriff or jailor gave as his excuse for the prisoner being taken from the jail and lynched that he lived near the jail, but kept no guards on duty at the jail.

"Virginia has gone a considerable number of years without any lynchings having taken place; and I believe our Board should take every precaution in seeing that jails are so operated that there will be no likelihood of such an occurrence as recently happened in Florida.

You ask for my opinion on the question of whether or not the State Board of Corrections has the authority to adopt such a regulation as you describe.

The State Board of Corrections, by section 11 of chapter 217 of the Acts of 1942, is given the power to "prescribe * * * minimum requirements for the feeding, clothing, medical attention, attendance, care, segregation, and treatment of all prisoners confined in such jails and lock-ups and at such jail farms." The Act of which the quoted language is a part gives to the State Board of Corrections general supervision of the penal system of the Commonwealth and of the political subdivisions thereof. It is my opinion, therefore, that when the broad purpose of the Act is considered together with the specific authority to which I have referred, the Board has authority to adopt such regulations as you propose.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**BOARD OF SUPERVISORS—Authority To Appropriate Money To
Promote Agriculture.**

June 21, 1946

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

My dear Mr. Pulley:

I am just in receipt of your letter of June 19, in which you ask if the Board of Supervisors of Southampton County may appropriate and pay to the Association of Peanut and Hog Growers, a non-stock corporation, three cents for each acre of peanuts seeded in Southampton County for the calendar year 1946. The Association has very broad powers as outlined in your letter. Generally speaking, however, it is organized to promote and protect the welfare of peanut and hog growers.

The only authority that I can find that might be said to justify such an appropriation is section 2734 of the Code, which provides, in substance, that the board of supervisors of a county may, out of the general county levy, "apply and expend annually a sum not exceeding one thousand dollars for the purpose of promoting agriculture in said county." It should be noted that the section provides that the board of supervisors shall "apply and expend." You state, however, that the appropriation is requested to be paid over to the Association and to be spent by it for whatever purposes it thinks proper and in conformity with its by-laws. In view of the provision that the board of supervisors shall "expend" the funds, I am inclined to be of the opinion that an appropriation without restrictions or limitations as to the purposes for which it may be expended, or the manner in which it may be expended, would constitute an unlawful delegation of the power of the Board. If, however, the Board is of opinion that an appropriation to this Association (within the limitation of the amount authorized by section 2734) would, if properly expended, tend to promote agriculture in Southampton County, I believe such an appropriation could be legally justified. But, I am further of the opinion that the resolution of the Board making the appropriation should expressly provide how and for what purposes it should be expended, the purposes, of course, being limited to the promotion of agriculture, and that the resolution should further require an accounting to be made. In other words, it is my view that the Board should retain complete control over the expenditure of any money that might be appropriated.

In substance, the Board would be, in effect, designating the Association as its agent in expending these funds for the promotion of agriculture in the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

**BOARDS OF SUPERVISORS—No Authority To Supplement Salary of
Circuit Court Judge.**

December 12, 1945.

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

My dear Mr. Thompson:

I am in receipt of your letter of December 4, in which you ask if the Board of Supervisors of a county has authority under the present law to supplement the salary of the Circuit Judge.

Section 3466-a of the Code (Michie, 1942) prescribes the salaries of Judges of Circuit Courts and provides that half of such salaries shall be paid by the counties. Section 103 of the Constitution and section 3469 of the Code provide that cities may increase the salaries of their Corporation and Circuit Court Judges, but I can find no authority for Boards of Supervisors of counties to increase or supplement the salaries of Judges of the Circuit Courts of such counties. In the absence of such authority I am of opinion that the Boards of Supervisors do not have such power.

The question of the authority of the Board of Supervisors of Norfolk County to increase the salary of the Judge of its Circuit Court was gone in to quite extensively several years ago, and it was the consensus of opinion of all those interested that the Board did not possess the authority to increase or supplement said salary.

While the Constitution confers direct authority upon the councils of cities to increase salaries of their Judges, there is no prohibition against the General Assembly conferring like authority upon Boards of Supervisors, and, in my opinion conferring such authority would not be in violation of the Constitution.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General

**BOARD OF SUPERVISORS—Authority To Appropriate Salary For Sec-
retary To Judge.**

June 28, 1946.

HONORABLE W. EARL CRANK,
Commonwealth's Attorney,
Louisa, Virginia.

My dear Mr. Crank:

I am in receipt of your letter of June 27, in which you ask if the Board of Supervisors of Louisa County may, in its discretion, contribute a sum each month

or annually to help pay the salary of a secretary to the circuit court judge. Certainly, so far as I can find, there is no statute which would prohibit such an expenditure on the part of the Board and in my opinion the Board would have the implied authority to make such an appropriation. A judge of the circuit court is required by statute to perform a number of duties for the county and I should think it would be entirely proper for the county to assist in furnishing him a secretary to help him to carry out these duties.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority To Appropriate Funds to Assist Citizens In Purchase of Fire Fighting Equipment.

December 17, 1945.

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

My dear Mr. Parsons:

I am in receipt of your letter of December 12, from which I quote as follows:

"Some of the citizens of Ivanhoe and that vicinity propose to purchase certain fire equipment, to be used at Ivanhoe, Austinville, and in that section of Wythe County. The citizens have made up a part of the money and have asked the Board of Supervisors of Wythe County to make an appropriation to assist in paying for the fire equipment.

"I understand title to the equipment is to be taken in the name of certain trustees.

"I wish you would please advise whether the Board of Supervisors would have authority to make this appropriation."

There are several statutes dealing with fire fighting in counties, but I can find none that authorizes an appropriation such as you describe.

I have recently had occasion to examine the laws relating to fighting fires in counties and it appears to me that their authority in this respect is quite limited, and it might be deemed advisable by your Board of Supervisors to have enabling legislation introduced at the coming session of the General Assembly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Appropriation For Purchase of Land.

July 5, 1945.

HONORABLE VALENTINE W. SOUTHALL,
Commonwealth's Attorney,
Amelia Court House,
Virginia.

My dear Mr. Southall:

I am in receipt of your letter of July 2, with regard to the proposed purchase of 25.63 acres of land by the county of Amelia "for the purpose of exhibiting beef cattle thereon and thereby encouraging the raising of such cattle, and also for other incidental purposes for the betterment of the County at large".

There are several sections of the Code dealing with the purchase of land by counties, and I am inclined to agree with your view, therefore, that unless a statute can be found giving to the board of supervisors specific authority for the purchase of land the board does not have authority to purchase the amount of land mentioned in your letter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**BOARDS OF SUPERVISORS.—Authority To appropriate Funds To
Virginia State Guard.**

April 25, 1946.

HONORABLE A. DUNSTON JOHNSON,
Commonwealth's Attorney,
Windsor, Virginia.

My dear Mr. Johnson:

This is in reply to your letter of April 10, requesting my opinion as to whether or not the Board of Supervisors of Isle of Wight County can make a monetary contribution to Company 23 of the Virginia State Guard. You state that Company 23 is located in the Town of Franklin and in Southampton County, but that four residents of your county are also in the Company. I take it that the Company is so organized as to be utilized in the territory of Isle of Wight County in case such a necessity should ever arise.

I have previously taken the position that such contributions are proper to furnish uniforms for such military forces. See Annual Reports of Attorney General 1940-41, page 16, and 1942-43, page 16. I do not see how this differs materially from that and it is my opinion that such a contribution would be proper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Authority To License Taxicab Drivers.

May 9, 1946.

HONORABLE W. R. BROADDUS, JR.,
Attorney for the Commonwealth,
Martinsville, Virginia.

My dear Mr. Broaddus:

This will acknowledge receipt of your letter of May 8, in which you ask my opinion as to whether or not there is any method by which Henry County can regulate the issuance of permits to taxicab drivers and prescribe character qualifications for them.

I do not know of any authority which would permit you to do this. However, I would like to call your attention to chapter 45 of the Acts of the General Assembly, Extra Session of 1945. Section 3 of this Act is to this effect:

"The governing body of any county or town may prescribe such reasonable regulations as to the character and qualifications of operators of any such vehicle as they deem proper, and may provide for the designation and allocation, by the sheriff or chief of police, of stands for such vehicles and the persons which may use same."

The language of the above section seems broad enough to cover Henry County. However, the Act purports to apply only to certain counties and towns, and I do not believe that Henry is one of these. This statute was amended and re-enacted by chapter 45 of the Acts of the General Assembly of 1946, but I have checked that Act in Colonel Dodson's office and do not believe its provisions extend to Henry County.

If Bassett or any of the other communities in your county beset by this problem are incorporated they would probably have the necessary power under their charters as municipal corporations. See *Kizee v. Conway*, 184 Va. 300, 35 S. E. 2d. 99 (1945).

I repeat, as the situation now stands, I do not believe such regulatory power can be exercised by the Board of Supervisors of Henry County.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority To Guarantee Debts Of Private Persons.

August 6, 1945.

HONORABLE W. C. ARMSTRONG, JR.,
Commonwealth's Attorney for Warren County,
Front Royal, Virginia.

My dear Mr. Armstrong:

I am in receipt of your letter of August 3, which I quote in full below:

"There has been established here at the Front Royal Remount Depot a prison camp for German prisoners and these prisoners have been working around for numerous farmers over the county.

"It seems that whenever a farmer enters into a contract for so many prisoners for so many days he has to sign numerous contracts for each individual prisoner and these contracts have to be approved by some government agency in Baltimore and then returned here to Front Royal and then when these prisoners are employed by some other individual the same thing has to be done and, as a result of this, there is always a delay of two or three days when the prisoners are idle and cannot work for anyone.

"One of the officers in charge of the prisoners appeared before the Board of Supervisors of Warren County and stated that in order to eliminate this red tape and delay that if the Board of Supervisors would enter into a contract guaranteeing the payment for any and all labor performed by these prisoners to the various farmers here in the county, that then this one contract would be all that would be necessary and that the prisoners would then be allowed to work every day and not lose any time from work, and would, of course, be of lots more service to the farmers.

"As attorney for the Board of Supervisors I advised them that it was my opinion that such a contract would not be legal and that the Board of Supervisors, in my opinion, had no right whatsoever to bind the county or to make the county in any way liable for the wages which the farmers might have to pay and might fail to pay these prisoners, and I also informed them that by entering into such a contract, if the same was not legal, that they might themselves become individually liable in case there was a default in the payment.

"The Board said that they would like me to write you asking that you give me an opinion on this question."

I am writing to say that I entirely agree with the opinion expressed by you. In addition, I direct your attention to section 185 of the Constitution, which provides in part that "neither the credit of the State, nor of any county, city, or town, shall be, directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation * * *." Such a contract as is described in your letter, it seems to me, would also be in violation of this constitutional provision.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority To Lease Land to Another.

September 19, 1945.

HONORABLE HAROLD R. STEPHENSON,
Attorney for the Commonwealth,
Palmyra, Virginia

My dear Mr. Stephenson:

I am in receipt of your letter of September 17, with reference to the right of the Fluvanna County School Board to lease some school land for a long term of years to Fork Union Military Academy for the purpose of sinking and maintaining a well thereon.

I note that you have advised the Board that it does not have this power under existing statutes. I have considered the matter and must advise that I agree with the conclusion reached by you. If the Board is desirous of en-

tering into the lease, I am sure that the Fluvanna County representative in the General Assembly could get an enabling Act passed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**BOARDS OF SUPERVISORS—Authority To Execute Long Term Lease
Of Courthouse Grounds.**

June 6, 1946.

HONORABLE FERDINAND F. CHANDLER,
Attorney for the Commonwealth,
Montrose, Virginia.

My dear Mr. Chandler:

This will acknowledge receipt of your letter of May 30, the first paragraph of which I shall quote.

"The Board of Supervisors of this county is considering leasing to the Tidewater Telephone Company, under a ninety-nine year lease, a certain portion of the public or court house grounds at Montrose, on which the said Telephone Company proposes to erect a building to be used in giving to the patrons of the Telephone Company in this county an improved and more modern telephone service, and I would like to get an opinion from you as to whether or not the Board of Supervisors has the right to make such a lease."

In my opinion, this matter is controlled by section 2854 of Michie's Code of 1942, which in effect provides that the Board of Supervisors of a county shall acquire land for a court house, clerk's office and jail to the extent of two acres, and any surplus thereof which is not needed for this purpose shall be planted with trees and kept as a place for the people of the county or city to meet and to confer together. As you will see from a reading of this statute, there are many exceptions therein, such as where there are buildings already on the court house square when the land is purchased, etc., but I cannot find an exception which covers your case.

In *County of Alleghany v. Parrish*, 93 Va. 615, it was held that the county had no authority to authorize the erection of a law office on land comprising a part of the court house square upon the payment of a ground rent. The opinion of the court goes on to indicate that the terms of the statute (section 2854 of the Code of 1919) are mandatory as to the use which may be made of the court house square or grounds and, if all the land is not necessary for the purpose of a court house, jail, or clerk's office, it is mandatory that the residue be planted in trees and kept as a place for the people of the county to meet and confer together.

I am, therefore, of the opinion that the Board of Supervisors of Westmoreland County could not execute a lease to the Tidewater Telephone Company of a portion of the public or court house grounds at Montrose.

I would suggest that you study the provisions of the statute very closely, inasmuch as the land you have in mind may have been acquired since the erection of the court house, clerk's office or jail, in which case some other portion of the statute might be applicable.

Very sincerely yours.

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—How Bond Issue To Be Disposed Of.

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

May 29, 1946.

My dear Mr. Marsh:

This will acknowledge receipt of your letter of May 25, with reference to the creation of a sanitary district in Fairfax County. Enclosed with you letter is a proposed contract submitted by Stifel-Nicholas and Company, Inc., a firm of investment bankers, of Chicago, in which they propose to make a survey as to the cost and desirability of constructing a water system. The contract further provides that, if the report of the firm is approved by the Board of Supervisors and the bonds are issued to cover the costs after an election duly held, the Board of Supervisors agrees to sell all the bonds to the investment firm at par value.

Your specific inquiry is as to whether or not the Board of Supervisors can make an outright sale of all the bonds to the investment house without first requiring bids to be submitted and then awarding a sale of the bonds to the lowest responsible bidder. Your letter indicates that the county is proceeding under sections 1560-m through 1560-s of Michie's Code of 1942. The only restriction on the sale of these bonds contained in the statute is that the bonds shall not be sold at less than par. Section 1560-q, subsection (c). In the previous article, Article I of Chapter 65-a of the Code, the Board of Supervisors is authorized to employ agents to sell said bonds and pay said agents a commission not exceeding three per centum of the amount of the bonds sold, by them or to pay such sum to the purchaser of such bonds. No such provision is contained in your statute and, in the absence of any such controlling provision, I am of the opinion that the method of sale is discretionary with the Board of Supervisors so long as the bonds are not sold below par. For authorities supporting this decision see *Williams v. City of Rock Hill*, 177 S. C. 82, 180 S. E. 799, 100 A. L. R. 604 (1935) and cases there cited.

As to whether or not the Board of Supervisors might enter into such a contract as this, binding itself in advance of the election to sell all of said bonds to a particular company at an agreed rate of interest if the issue should be approved by the electorate, I am very doubtful. The proposition is without any statutory precedent in Virginia, so far as I have been able to find, and in the absence of clear legislative authority therefor I hesitate to approve it. For a situation somewhat analogous see *Scofield Engineering Company v. City of Danville*, 35 Fed. Sup. 668 (1940), and the same case on appeal, 126 Fed. (2d) 942 (1942).

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Authority To Employ Extra Help In Re-assessment Of Real Estate.

HONORABLE CHARLES B. GODWIN, JR.,
Attorney for the Commonwealth,
Suffolk, Virginia.

April 24, 1946

My dear Mr. Godwin:

I regret that unavoidable circumstances have delayed my response to your letter of April 5.

You state that there is to be a general reassessment of real estate in Nansemond County during the year 1946 and desire to know if the assessors, subject to the approval of the Board of Supervisors, may employ persons to render clerical assistance and to do other work in connection with the reassessment, such as making field surveys of property as to their condition, value, type, etc.

While the statutes dealing with general reassessments of real estate in counties (sections 242-250 of the Tax Code) do not in terms authorize the employment of such assistants as you describe, I am of opinion that the Board of Supervisors unquestionably has implied power to authorize such employment. Indeed, in many counties I should think that it would be physically impossible for the assessors alone to do a creditable job without clerical and other assistance. Furthermore, it is my opinion that, if such employment is authorized by the Board of Supervisors, the compensation of those employed may be paid out of the county treasury.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Bond Of Clerk Covered In His Bond As Clerk Of Court.

January 15, 1946.

HONORABLE A. D. LATANE, *Clerk*,
Circuit Court of Essex County,
Tappahannock, Virginia.

My dear Mr. Latane:

I am in receipt of your letter of January 1, in which you ask the following question:

"Will you kindly advise me if there is any provision in the statutes by which the Clerk of the Board of Supervisors is required to give a separate bond as Clerk of said Board in addition to his bond as Clerk of the Courts?"

"The question has arisen in my county, but I can find no reference to the same. There seems to be no reason for such a requirement, as the Clerk of the Board does not have any control of the funds."

I know of no such statute and, in my opinion, no separate bond as a Clerk of the Board of Supervisors is necessary. Section 2698 of the Code provides that the bond of the County Clerk "shall bind him and his sureties, not only for the faithful discharge of his duties as Clerk of said Court, but also for the faithful discharge of such other duties as may be imposed upon him by law * * *." And section 2770-a of the Code (Michie, 1942) provides that the County Clerk shall be ex-officio Clerk of the Board of Supervisors, and prescribes his duties.

It is my opinion, therefore, that the bond of the County Clerk also covers this officer as clerk of the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Powers Of Municipal Planning Commissioners Supersede Those Of Board of Supervisors.

July 13, 1945.

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

My dear Mr. Marsh:

This is in reply to your letter of July 5, from which I quote as follows:

"Under chapter 389, page 624, of the 1942 Acts of Assembly of Virginia, it would appear that Fairfax County is one of the counties that may exercise the powers conferred by said Act, the same being (with certain exceptions) the identical powers that are vested by the Constitution of the State of Virginia, or the Acts of the General Assembly of Virginia, in the councils of cities and towns. I am satisfied that Fairfax County is one of the counties that can qualify under this Act from a factual standpoint:

"In the event that Fairfax County can qualify under this Act, then, in your opinion, under section 3091(27) to section 3091 (37) of Michie's Code of the State of Virginia, and particularly with reference to section 3091(35), is it possible for Fairfax County, after adopting a master plan as is provided in these sections, to prescribe in a subdivision ordinance the character and type of improvement to streets in a subdivision necessary to be made by a developer of a subdivision prior to the recordation of the plat and deed of dedication of a subdivision, and the offering for sale of lots in said subdivision?"

Section 3091(32) of the Code (Michie, 1942) gives to a municipal planning commission broad powers, among others, the power to prescribe "the general location, character and type of streets * * * ." After the master plan has been adopted, no street shall be constructed or authorized unless "the general location, character and extent thereof shall have been submitted to and approved by the municipal planning commission." See section 3091 (35) of the Code (Michie, 1942). This latter section also provides for appeals from the action of the planning commission in any particular case.

From a consideration of chapter 122-b of the Code (Michie, 1942) providing for municipal planning commissions, and especially the section to which I have referred, I am of opinion that a general ordinance such as you describe in the second paragraph of your letter is inconsistent with the powers granted to the commission and that the Board of Supervisors, therefore, does not have the power to adopt such an ordinance.

Very sincerely yours.

ABRAM P. STAPLES,
Attorney General.

**CITIES, TOWNS AND COUNTIES—County Planning Commissioners
May Not Be Abolished By Board Of Supervisors.**

July 21, 1945.

HONORABLE ROBERT WHITEHEAD,
Member of the House of Delegates,
Lovingston, Virginia.

My dear Mr. Whitehead:

I have your letter of July 18, which I quote in full as follows:

"Kindly advise me if a Board of Supervisors which has, pursuant to the provisions of Chapter 427 of the Acts of 1936, created and appointed a County Planning Commission for said county, which Commission has organized, can, during the term of office of the members prescribed by the Board of Supervisors for the appointees, enter an order either revoking the original order creating the Commission and appointing the members or otherwise abolish the Commission during said term."

In reply to the foregoing, I beg to advise that, in my opinion, the Act referred to provides for the creation of a county planning commission with continuing functions. There is no provision for its termination, nor is any provision made pertaining to the legal status of any plan which may have been adopted, or for amendments thereof, should there be an abolition of the commission. In my opinion, under the legislation as it now exists, the board of supervisors is without power to either abolish or otherwise affect the powers of the commission as provided for in the Act.

Your very truly,

ABRAM P. STAPLES,
Attorney General.

**CITIES, TOWNS AND COUNTIES—District Road Debt Fund; Disposition
Of Surplus In Fund.**

July 18, 1945.

HONORABLE F. B. HUBER,
Treasurer of Campbell County,
Rustburg, Virginia.

My dear Mr. Huber:

I am in receipt of your letter of July 13, in which you ask concerning the disposition of the surplus in a district road debt fund of a county after the payment of all indebtedness of the district.

I have had occasion to express an opinion on this question in the past, and for your information I will state that I have reached the conclusion that the Board of Supervisors in such a case could direct that this surplus be transferred to the general county fund. However, if the district involved has any debt at all, whether for roads or other purposes, I think that such surplus should be used to apply on this indebtedness, so that the taxpayers of the district from which the money was collected may receive the benefit of same.

I also direct your attention to the case of *Godwin v. Board of Supervisors*, 161 Va. 494, which also discusses the question you present.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees: Docketing Of Commonwealth Judgments.

November 28, 1945.

HONORABLE S. C. DAY, JR.,
Assistant State Comptroller,
Richmond, Virginia.

My dear Mr. Day:

I am in receipt of your letter of November 23, in which you inquire concerning the amount of the fee for docketing in the clerk's office an abstract of judgment in favor of the Commonwealth.

Section 3484 (31) of the Code provides "for docketing under chapter two hundred seventy-one a judgment, decree, bond or recognizance" a fee of 50 cents for the clerk. From what you say, the judgment in question is being docketed under the provisions of chapter 271 of the Code and especially section 6461 of said chapter. It is my opinion, therefore, that the only fee allowed to the clerk for this service is 50 cents

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Fees Authorized In Recordation Of War Veteran Information.

April 12, 1946.

HONORABLE W. R. BROADDUS, JR.,
Attorney for the Commonwealth,
Martinsville, Virginia.

My dear Mr. Broaddus:

This will acknowledge receipt of your letter of April 9, requesting my opinion as to what are proper fees for clerks of court in recording induction and discharge records for veterans of World War II.

Your letter refers to section 5 of Chapter 31 of the Acts of the General Assembly of 1944. I would like to call your attention to the fact that this section was amended and reenacted by Chapter 34 of the Acts of the General Assembly Extra Session 1945 at page 35. The provision now reads:

"The clerk shall be entitled to and paid from the funds of his county or city a fee of not to exceed fifty cents for copying in the Induction and Discharge Record, World War II, the information obtained from the draft

boards as to each such resident, but in no case shall any charge be made the resident who has served in the armed forces for recording his discharge papers."

It is my opinion this is the only statutory enactment governing such fees and that the clerk would be entitled to a fee from the county for recording the information secured from the local draft board, but would not be entitled to a fee for recordation of the information in the veteran's discharge papers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERK OF COURT—County In Which War Veteran Information To Be Recorded.

June 26, 1946.

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

My dear Mr. Powell:

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

"The Acts of 1944, Chapter 31, makes it the duty of the Clerk to record the Honorable or Dishonorable Discharge of any person who served in the armed forces of the United States during world war two and who was a resident of the County at the time of his induction.

"The case that I have in mind is this. I had presented to me a Navy Discharge. The person presenting the discharge enlisted in the Navy in New York and at that time he was not a resident of this County. He was discharged on May 29, 1946, and since receiving his discharge he has registered in this County, which is now his residence.

"Under our law, should I record his discharge in this office?"

My information is that a bill was introduced at the last session of the General Assembly authorizing the recordation of the discharge of a veteran in the county or city of his residence regardless of where he was inducted. This bill, however, did not become a law and, therefore, I am of the opinion that discharge of a veteran may be recorded under Chapter 31 of the Acts of 1944 only in the county or city from which such veteran was inducted into the armed forces.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—Use Of Copy Of Discharge In "Induction And Discharge Record, World War II."

August 6, 1945.

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

My dear Mr. Huffman:

I am in receipt of your letter of August 3, which I quote below:

"Returning service men have been told by the officers issuing them discharges never to surrender them to anyone or for any purpose, consequently, they are very reluctant to leave in the office for the purpose of recording and in several instances have refused, stating that they would have copies made and present a copy for recordation.

"As you know, it is a physical impossibility to record and verify, immediately, every discharge presented.

"I shall thank you to advise me if the Clerk can properly record copies of discharges in the induction and discharge record books in his office."

In my opinion, the clerk may require the original discharge to be presented to him for recordation and, if the work of the clerk's office is such as to make it impracticable for him to record the discharge immediately, he may require the service man to leave the discharge with him, or to bring it back at such a time as the clerk will be able to record it without having to retain it longer than the service man desires. If the clerk should feel inclined to compare a copy of the discharge which the service man has had prepared with the original and assures himself that such a copy is correct, I am of opinion that the clerk may obtain the information required to be recorded by section 4 of chapter 31 of the Acts of 1944 from such copy. From what I have written you will see that, in my opinion, the question you present is more a practical one than legal and is largely within the discretion of the clerk.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CLERKS OF COURT—No Authority To Collect Fee For Furnishing Copy Of Marriage Certificate To War Veterans.

April 17, 1946.

HONORABLE F. E. DILLARD, *Clerk*,
Circuit Court of Alleghany County,
Covington, Virginia.

My dear Mr. Dillard:

This will acknowledge receipt of your letter of April 12, stating that you have been requested to furnish the Soldiers Relief Commission, of Akron, Ohio, a certified copy of a marriage license to be used in connection with a war veteran's bonus claim. You indicate that such requests are frequently received by you, and you seek my opinion as to the proper fees to be charged for such

service. In this connection I would like to call your attention to chapter 172 of the Acts of the General Assembly of 1930, page 459. It provides:

"Be it enacted by the General Assembly of Virginia, That the court clerk of the several counties of this State, and the registrar of the bureau of vital statistics of this State, when requested so to do by any honorably discharged member of the military or naval forces of the United States, or their dependants, or by their authorized representative in their behalf, or by the commissioner of pensions of the United States, or by the director of the United States veterans' bureau, or regional manager of any regional office of the United States veterans' bureau, shall furnish without charge or fee therefor duly certified copies of any decree of divorce, marriage license, certificate of marriage, birth certificate, certificate of death, order appointing administrator or guardian, letters of administration or guardianship, bond of administrator or guardian, report of administrator or guardian, order discharging administrator or guardian, or other judgment, decree or document required by law or by any rule or regulation of the bureau of pensions or the United States veterans' bureau to be furnished as evidence to establish a claim on behalf of such honorably discharged member of the military or naval forces of the United States, or his dependents, for a pension, compensation, family allowance, bonus, or other money or moneys claimed to be due and payable by or through said bureau of pensions or United States veterans' bureau."

I believe this enactment would govern in this instance and you would not be authorized to make any charge for this service.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**CLERKS OF COURT—Fees Not Collectible From Public Treasury In
Misdemeanor Acquittals.**

March 22, 1946.

HONORABLE THOMAS R. MILLER, *Clerk*,
Hustings Court City of Richmond,
Richmond, Virginia.

My dear Mr. Miller:

I have previously explained to you my delay in replying to your letter of February 5, which reads as follows:

"It is respectfully requested that you give me your opinion in the following question. Is the clerk of a court of record, entitled to be paid the fees prescribed by law for the trial of misdemeanor cases in his court, out of the treasury of the Commonwealth, where the defendant fails to pay same, or where the defendant is acquitted.

"In support of such claim, your attention is respectfully called to section 3484 of the Code of Virginia, which prescribes the fees which a clerk is entitled to charge, and in conjunction therewith, section 3504, which provides for payment of such fees out of the treasury of the Commonwealth for the trial of misdemeanor cases, specifically allowing the clerk the *full* fee and other officers one-half the fees allowed by law.

"I have carefully gone over these and all related statutes, and am confident that the clerks are entitled to such payments out of the treasury, where same cannot be made out of the defendants, and in cases where the defendants may be acquitted, but am anxious to obtain your official opinion thereon."

Section 3504 of the Code reads in part as follows:

"Fees prescribed by law for services of attorneys for the Commonwealth, clerks of courts, and justices of the peace, and fees and mileage prescribed by law for sheriffs, deputy sheriffs, sergeants, deputy sergeants, constables, game wardens and all other law enforcement officers, whether regular or special, in all cases of felony, and in every prosecution for a misdemeanor, if not paid by the prosecutor, or in cases of conviction, by the defendant, and in case where there is no prosecutor and the defendant shall be acquitted, or convicted and unable to pay the costs, shall be paid out of the State treasury, unless now or hereafter otherwise provided by law, when certified as prescribed by section forty-nine hundred and sixty-one of the Code, subject, however, to the following restrictions and limitations:

"One-half of the fee prescribed by law to the officers heretofore mentioned, except the attorney for the Commonwealth, clerk of court and justice of the peace, who shall have the full fee; * * *."

If the quoted language stood alone, and in the absence of any administrative construction to the contrary, I should certainly be inclined to agree with the view expressed by you.

But I call your attention to the fact that immediately preceding section 3504 is the following subheading:

"Payment of Officers Out of the Treasury in
Criminal Cases; How Their Accounts
Verified and Certified."

Then immediately following section 3504 are a number of sections fixing fees of officers in *criminal cases*, including attorneys for the Commonwealth, *clerks of courts*, justices of the peace, sheriffs, sergeants, constables, and jailors. These are the fees, in my opinion, which section 3504 contemplates by the language "fees and mileage prescribed by law" as being payable out of the treasury under the conditions fixed by the section. The section dealing specifically with clerks of courts is 3506. It reads as follows:

"For each case of felony tried in his court, to be charged only once, the sum of two dollars and fifty cents. But this section shall not apply to the clerk of the Hustings Court of the City of Richmond."

You will observe that no fee is provided to be paid out of the treasury to a clerk of a court in misdemeanor cases, although a fee is provided in a felony case.

Furthermore, I am advised by the office of State Comptroller that no fees are paid out of the treasury to clerks of courts in misdemeanor cases, except under the old prohibition law, and that this construction of the pertinent sections, acquiesced in or at least accepted by the clerks, has been in effect for many years. This administrative construction is, of course, entitled to great weight. *Hunton v. Commonwealth*, 166 Va. 229.

After careful consideration and for the reasons stated I am of the opinion that the question contained in the first paragraph of your letter must be answered in the negative. If such a drastic change is to be made in the long continued construction of the pertinent statutes, involving, as it would, the payment of

thousands of dollars out of the treasury not heretofore paid, it should in my opinion be clearly authorized by amendatory legislation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—When Bond Issue May Be Made.

May 29, 1946.

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

My dear Mr. Woodward:

I have your letter of May 28, in which you inquire whether it would be permissible for the College to issue revenue bonds for self-liquidating projects, the plans and arrangements for the construction of which have not yet been perfected. Your idea is that it might be advisable to borrow the money at this time while interest rates are low, rather than wait until later when they may be higher, and in the meantime the College could invest the funds.

In my opinion, any such plan is entirely incompatible with the statute permitting the issuance of revenue bonds for a self-liquidating project, for the reason that such bonds are not marketable in actual practice until the plans and specifications for its construction have been completed and the availability of labor and material, and the cost thereof, have been established. It might very well be that the cost of construction will increase very greatly within the next two or three years, and the funds realized from the sale of the bonds would be inadequate to carry the project to completion.

The Act contemplates that these bonds will be sold to investment bankers or the public in one form or another, and the project would be given very careful study by the purchaser before the bid would be made. Any such purchaser would obviously satisfy himself that the proposed project is sound and can be carried out and completed in accordance with the proposal.

In such cases there should either be a bid by a responsible contractor, with surety bonds, for the construction of the project, or else very accurate and conservative estimates as to the cost of labor and material at the time of the beginning of construction.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Not Authorized To Sell Supplies To Employees At Cost.

March 14, 1946.

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

My dear Mr. Woodward:

This is in reply to your letter of March 12, from which I quote as follows:

"From time to time we have been confronted with the problem of wheth-

er or not we may sell to employees supplies purchased by the College at cost to the college plus approximately 10 per cent to cover the overhead cost of handling these supplies.

"Will you please advise if it will be in violation of the State law for us to sell such supplies as a matter of general policy or in exceptional cases to employees of the college?"

It is my opinion that such a practice as you suggest is clearly contrary to public policy. Not only would the College be improperly using its status as a State institution for the purpose of obtaining a special price for its employees, but it seems to me also that regularly licensed merchants in Fredericksburg and vicinity would have a just cause for complaint against this type of competition. Such a practice, in my opinion, should not be engaged in without clear legislative sanction and I can find no statute which could reasonably be construed as approving it.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Investment Of Student Loan Funds.

March 7, 1946.

MR. J. B. FOGLEMAN, *Treasurer*,
Virginia Polytechnic Institute,
Blacksburg 10, Virginia.

My dear Mr Fogleman:

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

"Recently our Board of Visitors suggested that with your approval we invest a part of our State Student Loan Fund in U. S. Bonds. Please, therefore, let me know if this is permissible and if any special requirement is necessary inform me also of this."

I have been able to find no statute which would authorize the Board of Visitors to invest your Student Loan Fund in any securities other than the obligations of the students to whom the loans are made. In the absence of such statutory authority, I am of opinion that no other investments may be made.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Authority To Lease Airport.

October 25, 1945.

MR. CHARLES J. DUKE, JR., *Bursar*,
College of William and Mary,
Williamsburg, Virginia.

My dear Mr. Duke:

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

"The College is contemplating a rental agreement with Aviation Service Incorporated of Newport News for the operation of its airport and the use of a combination waiting room and hangar located thereon.

"Two of the common stock holders of the Corporation happen to be members of the General Assembly. They are not officers of the Corporation and they hold a very small amount of the total common stock outstanding.

"Will you please inform us if, under these circumstances, there is any legal inhibition to our entering into a lease with Aviation Service Incorporated for the use of the airport and structures thereon."

I know of no prohibition, statutory or otherwise, which would prevent the College from making the agreement to which you refer under the circumstances described by you.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSION FOR THE BLIND—Recovery From Estates Of Recipients Of Assistance.

September 29, 1945.

HONORABLE L. L. WATTS, *Executive Secretary*,
Virginia Commission for the Blind,
3003 Parkwood Avenue,
Richmond 21, Virginia.

My dear Mr. Watts:

I have your letter of September 28, in which you ask if it is the duty of the Commonwealth Attorney of a county to represent the county in making recovery from estates of recipients of aid to the blind, which recovery is provided for in section 1944(46) of the Code (Michie, 1942).

I have heretofore expressed the opinion that this is not a duty of the Commonwealth Attorney, and that he or any other practicing attorney may be employed by the local Board of Public Welfare to render this service.

I am informed that the State Board of Public Welfare has adopted the same regulations in connection with recoveries from estates of recipients of aid to the aged and aid to dependent children and, if you feel so inclined, you might get in touch with the Board in connection with its practice in such cases.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSION OF FISHERIES—Authority To Purchase Land Where No Appropriation Has Been Made.

June 6, 1946.

HONORABLE CHARLES M. LANKFORD, JR.,
Commissioner of Fisheries,
Newport News, Virginia.

My dear Mr. Lankford:

I am in receipt of your letter of June 4, in which you ask the following question:

"Section 3146(6) provides that the Commissioner shall establish and equip a permanent office at some convenient place in the City of Newport News. My purpose in writing is to ask whether or not this section would give the Commissioner authority to purchase land in the City of Newport News and erect a building thereon for the Commissioner of Fisheries, same to be subject, of course, to the approval of the Governor. For your information we can make an advantageous purchase of property in Newport News at this time for such purpose, and I was instructed by the Commission of Fisheries to seek your opinion with reference to our authority relative to such purchase."

While the Commission of Fisheries under the section to which you refer unquestionably has authority to purchase real estate and erect an office building thereon where an appropriation for this purpose has been made by the General Assembly, it is my opinion that where there is no appropriation made for a capital expenditure of this character the authority may not be exercised. If the General Assembly had made such an appropriation which in the light of subsequent events proved to be inadequate, I am of opinion that the Governor could then authorize the agency involved to incur a deficit, but where no appropriation at all is made I am of opinion that the Governor does not have the authority to authorize the expenditure. It is my understanding that this is the practice that has been followed in the Budget Division of the Governor's Office in cases similar to the one you present.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

COMMONWEALTH ATTORNEYS—Fees: Appearance In Police Court.
July 18, 1945.

HONORABLE W. L. CARLETON,
Attorney for the Commonwealth,
Newport News, Virginia.

My dear Mr. Carleton:

I am in receipt of your letter of July 12, in which you inquire if section 4987-m of the Code, as amended by chapter 327 of the Acts of 1944, insofar as it relates to the fee of the Commonwealth Attorney, is applicable in criminal cases where the Commonwealth Attorney prosecutes such cases before the Police Justice of Newport News. The effect of the amendment is to reduce the Com-

monwealth Attorney's fee in prosecuting criminal cases from \$5, as prescribed by section 3305 of the Code, to \$2.50.

Section 4987-m prescribes the fees taxable and chargeable by Trial Justices, and the first sentence of the section prescribes that "the trial justice shall tax * * * the following fees only." The section makes no mention of police justices and, in my opinion, is not applicable to them.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH ATTORNEYS—Fees For Title Examination On Behalf Of County.

April 25, 1946.

HONORABLE S. PAGE HIGGINBOTHAM,
Commonwealth's Attorney,
Orange, Virginia.

My dear Mr. Higginbotham:

This will acknowledge receipt of your letter of April 16, the contents of which I shall quote:

"The County of Orange recently purchased a tract of land to be used as an airport. I examined the title to this property at the request of the Board of Supervisors and am of the opinion that I am entitled to receive reasonable compensation for this work. Please advise as to whether or not I am entitled to receive this compensation."

Section 2709 of the Code provides that when certain public officials desire to purchase real estate for public uses the title thereto shall be examined and approved in writing by a competent and discreet attorney at law who shall be designated by the Judge of the Circuit Court for the Circuit in which the real estate is located. The statute further provides for a reasonable fee to such attorney to be fixed by the court appointing him. Your letter does not indicate whether this procedure was followed in your case or not.

If compliance was had with the above statute, then, as a matter of course, you would be entitled to such compensation as the court might fix. I do not believe that your official position as Commonwealth's Attorney would prevent the court from designating you under section 2709.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH OF VIRGINIA—Duty To Make Repairs To Public Monuments.

March 23, 1946.

MR. D. V. CHAPMAN, JR., *Director*,
Division of Grounds and Buildings,
Room 312, Finance Building,
Richmond, Virginia.

My dear Mr. Chapman:

Your letter of March 13 addressed to Colonel Dodson, with reference to the iron fence around Lee's Monument on Monument Avenue in Richmond, has been referred to me.

By joint resolution of the General Assembly of Virginia, approved December 19, 1889, it is provided:

"Be it therefore resolved by the general assembly of Virginia, That the governor be, and he is hereby authorized and requested, in the name and in behalf of the commonwealth, to accept, at the hands of the Lee monument association, the gift of the monument or equestrian statue of General Robert E. Lee, including the pedestal and circle of ground upon which said statue is to be erected and to execute any appropriate conveyance of the same, in token of such acceptance, and of the guarantee of the state that it will hold said statue and pedestal and ground perpetually sacred to the monumental purpose to which they have been devoted."

A further enactment (Chapter 49 of the Acts of the General Assembly of Virginia, Extra Session 1902-3-4) provides:

"Be it enacted by the general assembly of Virginia, That the register of the land office be, and is hereby, directed to erect an iron or steel fence around the base of Lee monument at Richmond, and for this purpose the sum of five hundred dollars, or so much thereof as may be necessary, is hereby appropriated."

Inasmuch as the State has assumed ownership of this property and agreed to hold it sacred to the monumental purpose to which it has been devoted, it would certainly seem that the duty of making repairs is one that belongs to the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONSTITUTIONAL LAW—Extent Of Permissible Interference With Private Industry.

March 25, 1946.

HONORABLE WALTER L. HOPKINS,
Member House of Delegates,
Richmond, Virginia.

My dear Mr. Hopkins:

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

"I will appreciate it if you will give me an opinion at your earliest convenience whether or not House Bill No. 208, which was passed by the recent session of the General Assembly is constitutional.

"It has been suggested that it is unconstitutional on the grounds that it creates a subsidy for an individual or a class of individuals, that it is putting the State in competition with private licensed estimators, and that the permissive authority granted the State Forester under section 2 of the bill has no limitations.

"If possible, I will appreciate this opinion before the Governor signs the bill."

I have considered the bill to which you refer and must advise that I can find no provision in our constitution which is violated by this piece of legislation. It may be the administration of the bill will affect to some extent private business, but I know of no principle of constitutional law that would render the bill invalid on this account. The administration of various types of legislation frequently affects private business and at times results in the State competing with such business. But this is a matter of policy to be determined by the law-making body. Take the Department of Agriculture for example, this Department renders many services to the agricultural industry for some of which services a fee is charged and in the case of others no fee is charged.

There is nothing particularly unusual about the character of the legislation to which you refer, and in my opinion it does not conflict with our constitution.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONSTITUTIONAL LAW—Authority Of Municipality To Adopt Daylight Saving Time As Standard.

March 25, 1946.

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

HONORABLE ROBERT F. BALDWIN, JR.,
Member of House of Delegates,
116 Brook Avenue,
Norfolk, Virginia.

Gentlemen:

Before me for consideration is your request for an opinion on the following matter:

"In the absence of any express or implied authority in the charter of the City of Norfolk, does the City Council of said city have the authority to arbitrarily fix a different standard of time, such as daylight saving time, and require the observance of same by the residents of said City where there is no State statute on the subject?"

Of course you are familiar with the recent Act of the General Assembly designated as Chapter 82 of the Acts of 1946, approved March 2, 1946, which requires the observance of Standard Eastern Time generally throughout

the State. However, this Act does not go into effect until June 19, and I assume your question is directed to the power of the Council of the City of Norfolk to adopt a change in the standard of time to be observed in that City until the said Act becomes effective.

Section 262 of Title 15 of the United States Code Annotated provides for the observance of standard time within the zones created under said title in so far as same is applicable to the movement of common carriers engaged in interstate and foreign commerce; to its own officials and departments; and to all acts done by any person under Federal statutes, orders, rules, and regulations. *Massachusetts State Grange vs. Benton*, 272 U. S. 525. In the case cited the Court sustained the validity of a State statute providing for daylight saving time as applied to transactions other than those embraced within the Federal Act, although, as indicated in the opinion, a great degree of confusion would result to various towns, corporations, and other persons.

In my opinion, on account of the great degree of Federal authority in the City of Norfolk, the participants in which would be controlled by the Federal statute, there would be a very sharp conflict in the general activities in the municipality which would result from the adoption of a different standard of time. I have found only one case in which a municipality undertook to change the Federal standard time in the absence of specific charter provisions or other statutory authority, and in that case the municipal ordinance providing for daylight saving time was held to be void. *Smith v. Pittsburgh*, 30 Pa. Dist. Rep. 454.

In view of the far-reaching effect which a municipal ordinance of this kind would have in the City of Norfolk, there being neither any general statutory authority therefor, nor any provision in the charter of the City, it is my opinion that the City Council does not now possess the power to enact a valid ordinance adopting daylight saving time between now and the time the general State Act goes into effect on June 19.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONVICTS— Right To Sue For Tort.

August 20, 1945.

HONORABLE W. F. SMYTH, JR., *Superintendent*,
Virginia State Penitentiary,
Richmond 19, Virginia.

My dear Mr. Smyth:

This is in reply to your letter of August 14, 1945, in which you ask whether an inmate of the Penitentiary held upon a felony conviction, who is injured while working on the State convict road force through the alleged negligence of a driver of a privately owned automobile, may institute a civil action for damages while he is still an inmate of the Penitentiary.

It is my opinion that he can, and I quote pertinent portions of an opinion rendered to the Commissioner of Corrections on June 11, 1943, (see Opinions of the Attorney General, 1942-43, p. 50).

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

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

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

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

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CORONERS—Fees To Be Charged Where Deaths Result In Mine Explosions.

June 20, 1946.

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

My dear Mr. Goodman:

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

"The Board of Supervisors of Montgomery County, Virginia, have asked me to get an opinion as to whether or not it would be proper for them to pay the coroner of Montgomery County, a fee of \$5.00, for the viewing of each deceased person, or a total of \$45.00, for the viewing of nine deceased persons who were killed in an explosion at the McCoy Mines, at McCoy, Virginia.

"As you know, Section 4806, of the Code, sets out the law with reference to a coroner viewing the body of any sudden, violent, unnatural or suspicious death, or a death without medical attendance.

"Of course, the deaths were violent deaths, but it would seem that the wording of the statute seems to infer that a coroner's view is only necessary where there is a death under suspicious circumstances and not by an act of Providence such as a mine explosion that has killed several people."

I cannot agree with your construction of section 4806 of the Code that a coroner's view is only necessary where there is a death under suspicious circumstances. The section requires the coroner to view the body in case of "any sudden, violent, unnatural or suspicious death, or a death without medical attendance, * * *". If the coroner were only required to view the cases of death under suspicious circumstances, then the words, "sudden, violent, unnatur-

al" are given no meaning at all.

It is my opinion, therefore, that, if the Board of Supervisors of Montgomery County are of the opinion that the deaths to which you refer are included within the scope of section 4806 of the Code, it may allow to the coroner the fees provided by law for making the views.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Issuance Of Capias Pro Fine By Trial Justice. Costs Not Taxable In Absence Of Conviction.

March 25, 1946.

HONORABLE ALBERT G. PEERY,
Trial Justice,
Tazewell, Virginia.

My dear Mr. Peery:

I am in receipt of your letter of March 21, in which you ask first:

"What is the fee, if any, for the issuance of a capias pro fine by a trial justice?"

The statute fixing the fees which a trial justice may charge, that is section 4987-m of the Code does not provide for any fees for the issuance of a capias pro fine by a trial justice, and I am of opinion that none may be charged

Your next inquiry is:

"Is it proper in the case of a misdemeanor where there are extenuating circumstances which lead the trial justice to the conclusion that a fine should not be imposed, to dismiss the action with costs against the defendant?"

I know of no authority for taxing costs against a defendant in a misdemeanor case except where the defendant is convicted. So far as I have been able to find, there is no statute which authorizes a trial justice to dismiss an action with costs against the defendant.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Taxing Of And Distribution Of Commonwealth Attorney's Fees.

April 18, 1946.

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

My dear Mr. Ross:

This will acknowledge receipt of your letter of April 16, in which you state that a representative from the office of the State Auditor of Public Ac-

counts has informed you that one-half of the fees taxed and collected as costs for the appearance of the Commonwealth's Attorney should be paid to the County Treasurer and the other half to the State Treasurer. Your letter states that you are aware of section 4987-m of Michie's Code of 1942, but that same applies only to Trial Justices, and you seek my opinion as to whether any other statute governs this procedure.

Section 1 of Chapter 364 of the Acts of the General Assembly of 1934, page 733, provides in part as follows:

" * * * One-half of all fees to which attorneys for the Commonwealth are entitled on and after the first day of July, nineteen hundred and thirty-four, for the performance of official duties or functions, shall be paid by them or such official or officials as may collect the same, not later than the tenth day of the month following their receipt into the treasuries of their respective counties and cities, and the remaining one-half of all such fees shall be paid by such official as may collect the same into the State treasury, not later than the tenth day of the month following their receipt."

It appears to me that this provision is ample to cover your case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Payment Of Commonwealth Witness In A Civil Case.

May 1, 1946.

HONORABLE WILBUR J. GRIGGS, *Clerk*,
Circuit Court of City of Richmond,
Richmond 19, Virginia.

My dear Mr. Griggs:

I am in receipt of your letter of April 27, in which you ask how a witness for the Commonwealth in a civil case should be paid.

It is my opinion that such a witness should be paid out of the State Treasury in accordance with the allowances fixed by section 3529 of the Code, such payment to be made in accordance with the procedure prescribed by section 3530.

Section 3512 of the Code, to which you refer, deals with fees to a witness for the Commonwealth in criminal cases.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS—In Connection With Collecting Delinquent Taxes On Realty.

October 26, 1945.

MISS MABEL W. ADAIR,
Treasurer of Rockbridge County,
Lexington, Virginia.

My dear Miss Adair:

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

"In preparing the list of names with the amount of the base tax, penalty, interest and cost of advertising for the delinquent land sale to be published November 8, it has come to my attention that prior to July 1, 1945, it has been the practice of this office to add 12 cents to each tract of delinquent real estate. If and when the tax was collected this item of 12 cents was credited to the general county fund as a recovery of costs expended by the county, for recording delinquent and sales lists for lands sold to the Commonwealth, by the clerk of the court, pursuant to sections 2489 and 3484 (41 and 42), Michie's Code of Virginia, 1942.

"From a study of the aforementioned Code sections it is not specified that this cost should be taxed, or at any rate, by this office.

"I should like to have your opinion as to my continuing this practice, at the earliest possible date."

I assume that the item to which you refer as being added to each tract of delinquent real estate represents a reasonable estimate of a part of the costs to which the county is put in complying with the statutes relating to the sale of real estate delinquent for taxes, and upon this assumption I am of opinion that the practice is a proper one. Section 2489 of the Code expressly provides that the costs shall be included in the report of sales made by the Treasurer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—How Taxed In Interdiction Cases.

December 17, 1945.

HONORABLE V. W. NICHOLS, *Clerk.*
Circuit Court of Bedford County,
Bedford, Virginia.

My dear Mr. Nichols:

I am in receipt of your letter of December 10, from which I quote as follows:

"The Circuit Court of Bedford County today entered several orders of interdiction under section 4675 (35) of the Code at the instance of the Town of Bedford. You will please advise me whether or not the State pays the costs of said interdictions. I am unable to find anything in the statute showing who pays the costs in such proceedings, when the Court's order is silent as to the judgment for costs."

I know of no authority for the payment of costs by the Commonwealth where orders of interdiction are entered pursuant to section 4675 (35) of the Code (Michie, 1942). Interdiction proceedings are not criminal in their nature. Normally, I should say that where an order of interdiction is entered the costs should be paid by the defendant, as in a civil case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Lunacy Commissions; Collections By City Sergeants.

February 26, 1946.

MR. JAMES L. CARTER,
City Sergeant,
Martinsville, Virginia.

My dear Mr. Carter:

Replying to your letter of February 20, I beg to advise that section 1021 of the Code provides that the officer making the arrest and summoning the commission and witnesses in connection with proceedings before a lunacy commission "shall receive the same fees as are allowed for like services in a felony case." The section goes on to provide that the fees in such a case shall be paid by the county or city of which such person was a resident at the time of commitment. However, since chapter 386 of the Acts of 1942, placing sheriffs and sergeants on a salary basis, provides that these officers shall no longer collect any fees from the Commonwealth or from the county or city, I am of the opinion that you would not collect from your city the fees to which you would otherwise be entitled under section 1021 of the Code.

I regret that I do not know of any pamphlet listing the fees which may be collected by a city sergeant. For your information, however, I refer you to sections 3487 and 3508 of the Code, which set out most of these fees. I remind you, however, that these fees, when collected by a city sergeant who is on a salary basis, should be paid into the treasury of the city. The treasurer of the city in turn credits one-third of such fees to the general fund of the city and remits two-thirds thereof to the State treasurer along with other funds due the Commonwealth.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—When Writ Taxes And Costs To Be Paid.

May 31, 1946.

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

My dear Mr. Ashby:

I am in receipt of your letter of May 28, in which you ask "as to when the writ tax and advanced costs should be paid on a notice of motion."

As to the writ tax, your inquiry is answered by section 126 of the Tax Code, the statute imposing the tax, which provides in part that no clerk shall * * * docket * * * any notice mentioned in this section until the tax thereon shall be paid."

As to when advanced costs should be paid, so far as I have been able to find there is no statute controlling this matter. Generally speaking, costs should be paid as they accrue and the clerk may, of course, require them to be paid at that time. As a matter of fact, however, my information is that the clerks require the payment in advance of certain costs which they know from experience will accrue. This practice has been found convenient both to the clerk and to counsel, since it obviates the necessity of paying various items of costs in dribbles. My information is that in some jurisdictions the matter of advanced costs is fixed by a rule of the court. In the City of Richmond all the clerks of the courts of record have reached an agreement on the amount of advanced costs which will be collected in the various types of cases. As I have indicated, however, I know of no controlling statute on the question.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Writ Tax Chargeable In Gasoline Refund Suit.

June 5, 1946.

HONORABLE WILBUR J. GRIGGS, *Clerk*,
Circuit Court City of Richmond,
Richmond 19, Virginia.

My dear Mr. Griggs:

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

"On yesterday we had a petition for an appeal from a decision of the Commissioner of the Division of Motor Vehicles of the Commonwealth of Virginia, under the style of Cities Service Oil Company vs. C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles, filed under the provisions of section 2154 (228) Michie's Code of 1942, in which the petitioner is asking for the refund of \$7,811.10 gasoline tax erroneously paid by it to the Commonwealth of Virginia.

"A question has arisen as to whether or not the clerk should charge a writ tax on this proceeding under the provisions of section 126 of the Tax Code."

I have considered section 126 of the Tax Code, which imposes the writ tax, and am of opinion that the proceedings to which you refer is included in the language "or other action * * * commenced in a court of record * * *," and that, therefore, the writ tax should be charged.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Writ Tax Chargeable Where Suit Is Compromised.

HONORABLE H. ELMER KISER, *Clerk*,
Tazewell County Circuit Court,
Tazewell, Virginia.

June 20, 1946.

My dear Mr. Kiser:

This will acknowledge receipt of your letter of June 15, in which you ask my opinion as to whether or not you should collect a writ tax on claims compromised under section 5789 of the Code.

The tax statute, section 126 of the Tax Code, uses the very broad language "any original suit" and I believe the language of sufficient latitude to include the kind of cases you have mentioned. The Tax Commissioner, Honorable C. H. Morrisett, informs me that he has an administrative ruling to the effect that suits brought under section 5790a of Michie's Code of 1942 are subject to a writ tax and I cannot see how there is any difference in principle between these cases and yours. As you know, his administrative construction is entitled to great weight.

I am, therefore, of the opinion that damage cases compromised under section 5789 of the Code are subject to a writ tax on the amount agreed to by the parties involved and approved by the court.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COURTS—No Authority To Destroy Old Records.

JUDGE JAMES HOGE RICKS,
Juvenile and Domestic Relations Court,
Richmond, Virginia.

May 16, 1946.

My dear Judge Ricks:

I have given careful consideration to your letter of May 14, relative to your power to direct that old misdemeanor warrants covering cases in your Court be destroyed after they have been retained for five years.

I can appreciate the fact that the matter of storing these warrants may present a practical problem, but I can find no statute which specifically authorizes their destruction. Section 1951 of the Code provides that the records of your Court shall be under your control, and shall not be removed or examined by anyone without your consent except by persons authorized by law to examine them. This provision, however, would seem to relate to the control of your records from the standpoint of examination rather than to their preservation.

I believe that you will agree that Court records should not be destroyed without clear statutory authority, and I must advise that I have been unable to find any such authority applicable to your court. If you can point out to me any statute which, in your opinion, deals with the matter, I shall be very glad to give it consideration.

I need not point out to you that, if you consider the matter of sufficient importance, it could be presented to the General Assembly.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Disorderly Conduct On Buses.

February 8, 1946.

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

My dear Mr. Stone:

This will acknowledge your recent letter with enclosures, requesting my views as to the need for amending Section 4533 of the Code relative to disorderly conduct on public carriers by adding thereto a clause to make it cover busses.

Section 4533 as it now reads makes it a misdemeanor to be riotous or disorderly on "any railroad or street passenger railway." In my opinion this is an unnecessary statute, because such conduct in any public place is punishable in Virginia as a common law "breach of peace" and punishable as a misdemeanor. See Section 4782 of the Code, and *Byrd v. Commonwealth*, 158 Va. 897, 164 S. E. 400.

In *Lewis v. Commonwealth*, 184 Va. 69, 34 S. E. (2) 389, our Court held that there is no such offense as "disorderly conduct", *eo nomine*, at common law, and that Section 4533 of the Code made such conduct a misdemeanor only on trains and street railways—but it seems clear from the whole decision that if the warrant in the case had charged the defendant with a "breach of the peace", which is a common law offense, the charge would have been held to be a valid one.

It is my opinion, therefore, that there is no need for the statute at all, and, *a fortiori*, no need for amending it.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Fortune Telling By Gypsies.

July 26, 1945.

HONORABLE J. SLOAN KUYKENDALL,
Commonwealth's Attorney,
Frederick County,
Winchester, Virginia.

My dear Mr. Kuykendall:

I am in receipt of your letter of July 20, in which you state the following in part:

"There is now operating in our county a band of people who are telling fortunes for compensation. These people are itinerants and the Sheriff is anxious to get them out of the county. Before doing this, one of the party obtained a license from the Commissioner of Revenue of Frederick County pursuant to Section 179a of the Tax Code.

I direct your attention to Section 4460a of the Code which makes it unlawful for any company of gypsies or other strolling company of persons to receive compensation or reward for attempting to tell fortunes * * * .

"I respectfully request your opinion as to the proper construction to be placed upon these two provisions of the Code, and also your opinion as to whether the person to whom the license was issued in this particular case could be convicted under Section 4460a, notwithstanding a license has been obtained pursuant to the provisions of the Tax Code.

I concur in your view that, inasmuch as section 179a of the Tax Code expressly provides that such section is not intended to repeal section 4460a, these two sections should have to be construed in a manner so as to give effect to both, and therefore section 179a of the Tax Code should be construed as contemplating the issuance of a license for such purpose only to people who are not itinerants and who have a fixed place of abode. It is my opinion that these itinerants now operating in Frederick County can be prosecuted, notwithstanding a license has been obtained.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Jurisdiction To Commit A Juvenile Felon To Board Of Public Welfare.

April 5, 1946.

HONORABLE JUNIUS W. PULLEY,
Attorney for the Commonwealth,
Courtland, Virginia.

My dear Mr. Pulley:

This will acknowledge receipt of your letter of March 19, in which you state that there is now pending before the Circuit Court of Southampton County an indictment against a fifteen-year-old boy for arson, and you believe the evidence will disclose a felony of an aggravated nature. You ask my opinion as to whether or not the Circuit Court *ab initio* may commit this youth to the State Board of Public Welfare, or whether proceedings for that purpose must be instituted before the Trial Justice as Judge of the Juvenile and Domestic Relations Court.

Section 1905 of the Code gives Juvenile and Domestic Relations Courts exclusive original jurisdiction for the trial of cases involving delinquent, dependent and neglected children. The court has the further power by virtue of section 1910 of the Code to commit children to the State Board of Public Welfare. Appeals from the decision of the Judge of the Juvenile and Domestic Relations Court may be had to the Circuit Court of the County. (Section 1920 of the Code). I am, therefore, of the opinion that the power to commit a child to the State Board of Public Welfare is one which the court possesses only as an adjunct to its power to declare a child delinquent, dependent or neglected. This a Circuit Court can do only on appeal from a decision of the Juvenile and Domestic Relations Court.

Your letter indicates that you are quite fully aware that in accordance with *Michens v. Commonwealth*, 178 Va. 273, 16 S. E. 2d. 641, where it was held that, if the offense is aggravated or the child is extremely vicious or unruly, then the provisions with respect to the Juvenile and Domestic Relations Court do not apply and the case shall be proceeded in as an ordinary felony case before the Circuit Court. When that is done, I do not believe that as part of its punishment the Circuit Court can commit a child to the State Board of Public Welfare.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Obtaining Taxi Ride And Meal At A Restaurant Without Intent To Pay Therefor.

February 8, 1946.

MR. CALVIN W. BERRY,
Police Justice,
717 Masonic Temple,
Danville, Virginia.

My dear Mr. Berry:

This is in reply to your recent letter from which for convenience I quote as follows:

"Please give me your opinion as to the following:

"(1) Assume for the sake of argument that John Doe calls a taxicab, gets into same and directs the driver to take him to a certain destination; John Doe nor the driver make any statement as to the fare to be charged. Upon completion of the trip, the driver of the cab discharges his passenger, John Doe, and informs him that the fare is \$1.00. John Doe tells the driver that he does not have any money at all, and refuses to pay the driver.

"(2) Assume that John Doe goes into a restaurant, orders a meal, eats same, and informs that owner or manager, that he has no money with which to pay for the food, and refuses to pay for the meal.

"Would either (1) or (2) amount to a common law cheat, indictable as a misdemeanor?

"Would either (1) or (2) come within the spirit of Section 4459, Code 1942?"

Pursuant to Sections 2 and 3 of the Code of Virginia, the common law and statutory writs made in aid thereof prior to the fourth year of James I (1607) are in force in Virginia, with certain exceptions not applicable to this opinion.

Under the common law, and as enlarged by the Statute of 33 Henry VIII, c. 1 (1541-2), obtaining property by cheat or false pretense was a criminal offense only if accomplished by some "false token or counterfeit letter," and even then the thing procured must have been a chattel or other tangible personal property. "Mere words do not, under the common law, amount to a token." 36 C.J.S. 642, n. 69. It appears, therefore, that neither of the two cases you mention would be indictable under the principles of the common law in force in Virginia: (1) because the taxi-ride was not a chattel, nor was it procured by a false token, and (2) because the meal at the restaurant, while tangible property, was not procured by a false token.

By virtue of the statute of 30 George II, c. 24, Section 1 (1757) the requirement of a "false token" was eliminated and all that was necessary was a "false pretense", but that statute is too late to be a part of the law of Virginia. Hence, we must look to our own statutes, and particularly to Section 4459 of the Code (which is patterned after the statute of 30 George II above cited) and Section 4464.

Section 4459 provides, in part, as follows:

"If any person obtain, by false pretense or token, from any person, with intent to defraud money or other personal property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; * * *"

Under this section, while the representation may be oral, or, by the better authorities, conduct alone from which a representation of a present fact may be implied, nevertheless, the thing procured must be "money or other property which may be the subject of larceny."

The obtaining of services rendered is not embraced within the category of

the subjects of larceny either at common law or in Virginia. Therefore, in my opinion, the obtaining of a taxi-ride through deceit is not a criminal offense in Virginia.

With respect to obtaining a meal from a restaurant, where no active oral representation is made, the question of the existence of the necessary "false pretense" comes into issue. It might be forcibly argued that where a cash transaction is contemplated, the purchaser impliedly represents that he has the ready and necessary available cash with which to pay, and there is a line of authorities which so hold. However, Section 4464 of the Code of Virginia, which covers the exact case, makes it an offense, viz.:

"Whoever * * * obtains food from a restaurant or other eating house and without having an express agreement for credit procures food * * * without paying therefor and with intent to cheat or defraud the owner * * * out of the pay for same; * * *."

It seems clear that a person who, without funds, orders a meal intends to defraud the owner of the restaurant of the pay therefor and violates the above section.

Trusting that this answers your inquiry, and with best wishes, I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Abuse Of Consent To Use Automobile Is Not Larceny.

HONORABLE FRANK N. WATKINS,
Commonwealth's Attorney,
County of Prince Edward,
Farmville, Virginia.

July 6, 1945.

My dear Mr. Watkins:

This is in reply to your letter of July 5, from which I quote as follows:

"I would appreciate your opinion as to whether or not you think the defendant would be guilty under either Section 4480 or Section 2154 (94). The facts in the case are as follows:

An employee was loaned the car of his employer to only go to his home, a distance of some 5 miles. The employee drove to his home and then decided to drive to a town some 20 miles distant, which he did. This, of course, was without the consent, expressed or implied, of the employer."

I assume for the purpose of this opinion, that the car was thereafter returned by the employee to the employer at the place of original departure.

At common law, in order for a taking to be a larceny, the original acquisition of the property must have been a trespass, hence if consent of the owner was received, and such consent was not obtained by fraud or trick so as to nullify the consent *ab initio*, a subsequent conversion of the property by the receiver was not larceny, a fortiori a later conceived intent to put the property to an unauthorized use was not larceny.

Due to the common law rule that any taking, to constitute larceny, must

have been with the intent to permanently deprive the owner of his goods, statutes, such as those you mention in Virginia, make it a misdemeanor to use property of the owner without his consent even though there is an intent to restore the property. Such statutes, being criminal and in derogation of the common law, are to be strictly construed.

In the set of facts you have set forth, the original acquisition of possession of the car was lawful. Under common law reasoning the subsequent unauthorized use would not have made out an offense of larceny. The two sections of the Code of Virginia to which you refer read as follows :

"Any person who shall take, drive or use a motor vehicle, trailer or semi-trailer not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to temporarily deprive the owner thereof of his possession thereof, without intent to steal the same, shall be guilty of a misdemeanor * * *."
[§2124(94).]

"Any person who, without the consent of the owner, shall take, or cause to be taken, an automobile or motor vehicle, and operate or drive, or cause the same to be operated or driven for his own private use or purpose, shall be deemed guilty of a misdemeanor." (§4480.)

In my opinion, these statutes refer to the original acquisition of the property by the receiver, and if such original acquisition was with the consent of the owner the statutes are not applicable, and, as noted above, no offense would be committed at common law either, the result being that no offense under either theory has been committed. The subsequent unauthorized use would not under common law reasoning destroy the original consent given by the owner, and the statute, being silent as to this, should be construed in similar fashion.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Endorsing Of Indictments By Commonwealth Attorneys.

April 27, 1946.

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

My dear Mr. Marsh:

This is in reply to your letter of April 22 in which you ask my interpretation of the following dictum appearing in the opinion of the recent case of *White v. Commonwealth*, 184 Va. 902, 37 S. E. (2d) 14:

"No exception was taken to the fact that the indictment was signed by the Attorney for the Commonwealth, and therefore it is not an issue, but we wish to say that we do not think it a good practice and it should be avoided."

Mr. Doubles, who handled the oral agreement on behalf of the Commonwealth in this case, advises me that the question of the propriety of the signature of the Attorney for the Commonwealth appearing on the indictment arose

as the result of a question asked from the bench during the oral argument; and that during the discussion thereof the Court indicated that there was a danger that the grand jury, in its deliberation as to the return of a true bill, might give undue weight to the endorsement of the prosecuting official appearing on the indictment. This reasoning seems to some degree to be in accord with the sentence you quote from *Brown v. Commonwealth*, 86 Va. 446, 10 S. E. 745, to-wit: "If such signature were essential to the validity of the indictment, the Grand Jury would be completely under the control of the prosecuting attorney."

I know of no case in Virginia which holds, that the practice of signing the indictment constitutes reversible error, but, in view of the strong language used in the dictum in the recent *White Case*, it is my opinion that the practice should be discontinued.

I fully appreciate the fact that the practice is indulged in to facilitate the accuracy of the office work of the Attorney for the Commonwealth, but I would suggest that some other symbol be used which would be meaningless to the Grand Jury.

Very sincerely yours,

ABRAM P. STAPLES,

Attorney General.

CRIMINAL LAW—Right Of Commonwealth To Appeal.

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

May 10, 1946.

My dear Mr. White:

I am in receipt of your letter of May 6, in which you state that one L. G. Willis was charged with killing a deer out of season in the Trial Justice Court of your county and acquitted. You state that at the request of the Department of Game and Inland Fisheries you noted an appeal to the Circuit Court of Augusta County. Justification for such an appeal on the part of the Commonwealth is suggested on account of the provision in section 3305(48) of the Code (Michie, 1942). This section imposes penalties for violations of various Provisions of the hunting, trapping and inland fish laws, and declares such value against the person so convicted, * * * and the collecting officer shall pay such moneys representing the approximate replacement values aforesaid into the State treasury, whereupon the same shall be placed to the credit of the game protection fund." The theory is that the Commonwealth might have the right of appeal to the Circuit Court on account of the provision in section 4989 of the Code giving the Commonwealth such right of appeal "in any case involving the violation of a law relating to the State revenue tried by a justice * * *."

I concur in the doubt you express concerning the right of appeal to the Commonwealth in such a case. The revenue laws of a State are generally under-

stood to be those laws by which funds for public governmental purposes are raised, that is to say, tax laws. The most conspicuous examples are the various sections of the Tax Code imposing license taxes on the conduct of certain businesses and professions and making violations thereof misdemeanors. Where a person is acquitted of the charge of failing to comply with one of these license statutes the Commonwealth undoubtedly has the right of appeal. See *Commonwealth v. Bibee Grocery Company*, 153 Va. 935. But the provisions in section 3305(48) with reference to the replacement value of an animal unlawfully killed certainly cannot be said to be a tax law nor a law having the purpose of raising revenue for the support of the government. While it is true that one of its purposes is to provide funds for the replacement of an animal unlawfully killed, nevertheless, it is a part of the penalty imposed upon a violator of a hunting law.

A statute granting the right of appeal to the Commonwealth in a criminal case would, in my opinion, be strictly construed, and it is my opinion for the reasons I have stated that section 3305(48) is not "a law relating to the State revenue" within the meaning of section 4989 of the Code. If this is a law relating to the State revenue, then it seems to me that the statute imposing a fine as a punishment for the commission of any misdemeanor would be a law relating to the State revenue, since fines are, as you know, paid into the Literary Fund and used for public education.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Trial Without Warrant.

May 8, 1946.

HONORABLE W. T. MOOKLAR,
Trial Justice,
Mangohick, Virginia.

My dear Mr. Mooklar:

This is in reply to your letter of May 7, 1946, from which I quote as follows:

"Will you please give me your opinion whether or not a Trial Justice can try a criminal case on a ticket issued by a State Police, or must a warrant be issued on the charge, offence as set out in the summons of the State Police, say for some violation of the Motor Vehicle Law, and if so please give me the statute for such cases."

I know of no authority whereby a trial justice is authorized to try a criminal case, whether it be for a violation of the Motor Vehicle Law or some other offense, on a so-called "ticket" issued by a State Policeman. Every person as a prerequisite to trial for a misdemeanor has a right to demand that a warrant be sworn out charging him with a specific offense. Of course, if he submits voluntarily to the jurisdiction of the trial justice and raises no objection to the lack of issuance of a warrant, he may be tried without one, but the better practice would be for the trial justice to insist that the complaining witness swear out a warrant before going to trial.

The "ticket" to which you refer is no doubt the "summons" provided for in Section 2154 (167) of the Code (Motor Vehicle Law) which is for the con-

venience of an autoist apprehended on the highway who wishes to consent to appear before a trial justice at a later date than to be taken before one immediately. This "summons" or "ticket" is not a warrant, however, and when the police officer and the autoist appear on the day designated the trial justice should proceed as required under Sections 4827a and 4824 of the Code, and to issue a warrant under the conditions therein prescribed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voting: How Ballot To Be Returned.

MR. T. HOWARD BOYER, *Chairman*,
Roanoke City Electoral Board,
Roanoke, Virginia.

June 24, 1946.

My dear Mr. Boyer:

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

"It is provided under Section 208 of the Virginia Absent Voters Laws as amended by Acts of 1946, that the envelope containing the ballot 'shall be registered and mailed to the Electoral Board, or delivered personally by the voter to the Electoral Board.'

"In order to avoid any misunderstanding, I would like for you to give me your opinion as to whether the envelope can be delivered to our local registrar for delivery by her to the Secretary of our Board, or whether delivery must be made in person to the Secretary or some other member of the Electoral Board."

In my opinion the provisions which you quote from section 208 of the Code, as amended by Chapter 193 of the Acts of 1946, should be literally complied with, that is to say, the envelope containing the ballot "shall be registered and mailed to the Electoral Board or delivered personally by the voter to the Electoral Board." I do not think that delivery to the local registrar would constitute a compliance with the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voting: Registrar Who Is A Notary Public Not Authorized To Take Acknowledgments.

HONORABLE THOMAS B. STANLEY,
Member House of Delegates,
Stanleytown, Virginia.

June 27, 1946.

My dear Mr. Stanley:

I am in receipt of your letter of June 24, in which you state the following questions:

"1. If where the registrar is also a Notary Public could he notarize the application for the applicant?

"2. Could a Notary who is also a registrar acknowledge the voucher and coupon used by absentee voters?"

I had occasion a few years ago to express the opinion that it would be improper for a registrar who was also a notary public to act as a notary public in taking acknowledgments under the Absent Voters Law, and following that opinion I now advise that both of your questions must be answered in the negative. Nor do I think that the registrar could take these acknowledgments as registrar since section 208 of the Code provides, in effect, that such acknowledgments must be taken by a person authorized to take acknowledgments to deeds. A registrar is not authorized to take acknowledgments to deeds.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Ballot: Form Of.

July 10, 1945.

MR. WILLIAM J. HARPER, *Secretary*,
Loudoun County Electoral Board,
Leesburg, Virginia.

My dear Mr. Harper:

I am in receipt of your letter of July 7, in which you enclose a copy of the ballot which the electoral board of your county has caused to be printed for use in the coming primary.

While it is true, as you stated, that the ballot does not literally comply with the requirements of section 155 of the Code in that the box opposite the name of each candidate is not in the precise form specified by the section, in my opinion, however, the box which has been used is a substantial compliance with the section and I think that votes cast by using this ballot would be held to be valid. I do not see how it could reasonably be argued that any candidate would be prejudiced by the use of this ballot.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Amount And Kind Of Expenditures.

August 10, 1945.

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

My dear Mr. Marsh:

I am in receipt of your letter of August 9, in which you ask concerning the amount an independent candidate seeking election to the House of Delegates

of the State of Virginia may lawfully expend with reference to the conduct of his campaign.

So far as I know, there is no statute fixing a limit on the amount that may be expended by a candidate for the House of Delegates in a general election. However, sections 251 to 258 of the Code, dealing with pure elections, prescribe the nature of expenses that may be incurred, prohibit certain practices, and require certain reports. In my opinion, these sections are applicable to all candidates for the House of Delegates at a general election, whether independent or the nominees of a party.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Duty Of Clerk Of Court Regarding Certifying Names To Electoral Board.

August 17, 1945.

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

My dear Mr. Hening:

This is in reply to your letter of August 15, in which you request my opinion upon the question whether you should certify to the electoral board the name of a candidate who filed notice of candidacy for a local office, together with a petition of more than fifty qualified voters, you having been informed that such candidate failed to file a similar notice or petition with the Secretary of the Commonwealth.

It is my opinion that you should certify this candidate's name to the electoral board. Whether such name shall be printed on the official ballot, in my opinion, is for the electoral board to determine, and you, as clerk, have no responsibility in that matter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: How Ballots To Be Printed Where One Of Two Candidates For Two Similar Offices Dies:

October 19, 1945.

HONORABLE W. H. W. CASSELL,
Member of House of Delegates,
Portsmouth, Virginia.

My dear Mr. Cassell:

This is in reply to your letter of October 18, in which you state that you and Mr. C. H. Walton were duly certified as nominees of the Democratic Party as candidates for members of the House of Delegates from Portsmouth in the

coming general election, that city being entitled to two delegates. Within the time permitted by general law no Republican or Independent or any other party candidate qualified to have his name printed on the ballot for the general election, leaving you and Mr. Walton as the only candidates so qualified. On October 4, 1945, Mr. Walton died and since that time five persons have filed their notices of candidacy pursuant to section 3 of chapter 415 of the Acts of 1942. You request my opinion on the question of how the ballot should be printed in the light of the existing situation insofar as candidates for membership in the House of Delegates are concerned.

The said section 3 of chapter 415 of the Acts of 1942 reads as follows:

"Whenever any candidate of a political party who has been nominated in any primary election or convention, or by any other lawful means, dies or withdraws as a candidate at a time when it is too late under the present general statutes for a candidate for the office involved to qualify to have his name printed on the official ballot for the general election, it shall be permissible for any person who is otherwise qualified to file the required notice or petition for his candidacy, or both if required by general law, and, if same be filed with the proper official at least twenty days before the day on which the election is to be held, the electoral board or boards, having charge of the printing of the ballots for said election shall either (a) cause to be printed thereon the name of every person so qualifying as provided in this section, or (b) if ballots for said election have already been printed and contain the names of candidates for other offices to be voted on at said election, any such electoral board may in its discretion cause to be stricken therefrom the title of the office involved, and the names of all candidates for said office appearing thereon, and cause separate ballots to be printed for said office on which shall be printed the names of all candidates qualifying under the provisions of the section."

In answering your question it must be borne in mind that two offices are involved, since Portsmouth is entitled to two delegates. You, having been duly nominated as a candidate for one of the seats or offices, are not affected by the death of Mr. Walton. When this is considered, the application of the said section 3 quoted above is not difficult. If the ballots have not yet been printed, there should be a separation on same, so that your name should be printed in one group under the office "House of Delegates" with instructions to vote for one, and in another group under the heading "House of Delegates" there should be printed the names of those who qualified as candidates since the death of Mr. Walton, with instructions to vote for one. If the ballots have already been printed, the electoral board may in its discretion reprint the same in accordance with the foregoing, or it may strike the name of Mr. Walton from the original ballot and change the instructions thereon from "vote for two" to "vote for one" and print separate ballots for the one office for membership in the House of Delegates, placing thereon the names of those who have qualified as candidates since the death of Mr. Walton, with instructions to vote for one.

As I have stated, the situation is made clear when it is remembered that the two memberships in the House of Delegates to which Portsmouth is entitled represent two offices and that the only office which is affected by the death of Mr. Walton is one of these two offices.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Nominations For City Council When Party Nominee Dies Before Election.

May 13, 1946.

MR. J. N. COLOSANTO, *Secretary,*
Electoral Board,
Alexandria, Virginia.

My dear Mr. Colosanto:

I have your letter of May 10, in which you state that at the Democratic Primary held on April 2, 1946, three candidates for the City Council in the general election in June were nominated and qualified to have their names placed upon the ballot for said general election to be held on June 11, 1946. You further state that no other candidates qualified to have their names printed on the ballots for said June election other than these three, and that one of these candidates, who was a Democratic nominee, died on May 9.

You request my opinion upon the question whether or not the electoral board should print upon the said ballots in the June election the name of a candidate certified by the Chairman of the Democratic Party as the nominee in the place of the deceased candidate, in the event that such nomination should be made by the Democratic Committee without calling a convention or mass meeting. Under the provisions of the Act last referred to candidates are required to qualify at least twenty days before the date on which the election is to be held, which will be May 22.

The plan of the Democratic Party in Virginia does not contemplate that a committee of the party shall nominate candidates unless under emergency conditions it is necessary to do so in order to protect the interests of the party. If there is not sufficient time when such an emergency arises to permit the holding of a convention or a mass meeting, if the latter is deemed feasible, in my opinion, the party committee is empowered to nominate a candidate. This principle is recognized in an amendment to the Party Plan, which was adopted in the convention at Roanoke in 1944. That convention adopted a provision or rule that, in the event of a vacancy in the office elected by the voters of the entire State shall occur within forty days of the day of the general election, it shall be the duty of the Democratic State Central Committee to nominate a Democratic candidate for election to fill said vacancy.

Paragraph 3, under the title "General Provisions" of the Party Plan, provides as follows:

"In the event of a vacancy occurring after the nomination of a candidate and before the election * * *, then the committee having jurisdiction shall determine the manner in which such a vacancy shall be filled."

Paragraph 15, under the title "Democratic County and City Committees," authorizes city and county committees to provide for the nominations of candidates for city, county, and other local offices, by either mass meetings, conventions, or primaries, as the committees may see fit. Paragraph 13 of said title provides that ten days notice must be given of the time, place, and method, for the election of delegates to a county or city convention to nominate candidates. Paragraph 4 of said title provides as follows:

"Said county and city committees shall have full control of the party's interests in all primary and general elections within their respective counties and cities."

In view of the foregoing provisions of the Party Plan, it is my opinion that, if the Democratic Committee of the City of Alexandria is of the opinion that there is not sufficient time to hold a mass meeting before May 22, or that

under the particular conditions prevailing in the City of Alexandria such a mass meeting would not be a proper method of making such a nomination, then, under these circumstances, it would be the duty of the Committee itself to nominate the candidate, and certify such nomination to the electoral board so as to prevent the party from being without a nominated candidate for one of the councilmanic offices.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Amount Of Filing Fee; Calculation Of.

March 21, 1946.

HONORABLE S. OTIS BLAND,
House of Representatives,
Washington 25, D. C.,

My dear Mr. Bland:

This is in reply to your letter of March 20, which for purposes of reply I quote in full:

"As you know, section 24-a of the Act approved March 25, 1914, and appearing as section 249, page 85, of the Virginia Election Laws in effect June 27, 1942, provides that 'Every candidate for any office at any primary shall before he files his declaration of candidacy as provided in the foregoing section, pay a fee equal to two percentum of one year's salary attached to the office of which he is a candidate.'

"In compliance with this provision it has been the custom heretofore for candidates for re-election to file a check for \$200.00, being two percentum of \$10,000.00, but Public Law No. 85, a copy of which is herewith enclosed, the pertinent portions of which are marked with a red pencil, provides that there shall be paid to each Representative an expense allowance of \$2,500 per annum to assist in defraying expenses related to or resulting from the discharge of his official duties, to be paid in equal monthly installments.

"I have talked with some of the other Members of the Virginia Delegation, and it is our general opinion that we would still be required only to file a check for \$200.00, as the \$2,500 per annum additional is expressly provided 'to assist in defraying expenses', but in order to avoid any question I am writing you for your construction to ascertain if the checks should be for \$200.00 or \$250.00. Either is satisfactory to me. If there is any doubt as to what should be done, I should much prefer to send the check for \$250.00."

I quite agree with the conclusion reached by the Members of the Virginia Delegation in Congress. The Act to which you refer provides that the fee in question to be paid by a candidate for any office at a primary shall be "equal to two percentum of one year's salary attached to the office for which he is candidate." Public Law No. 85 mentioned by you provides an "expense allowance" for each Representative in Congress. In my opinion, this "expense allowance" does not constitute "salary" within the meaning of the Virginia statute, and it follows that only a fee of \$200 is required.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Actual Filing Of Candidacy With Secretary of Commonwealth Necessary.

April 15, 1946.

HONORABLE JESSE W. DILLON,
Secretary of the Commonwealth,
Richmond 12, Virginia.

My dear Mr. Dillon:

I have your letter of April 15, in which you request my opinion upon the question whether or not you are authorized to certify to the electoral board of the City of Norfolk that certain notices of candidacy and petitions accompanying same were filed in your office on or before April 9, 1946, under the following circumstances:

Certain persons have filed affidavits with you stating that the said notices and petitions were mailed to you from Norfolk on the 6th day of April, 1946, at one o'clock p. m. You state, however, that same were never received at your office.

Under these circumstances it is my opinion that you do not have authority to certify that same were filed with you when they actually were not filed. This office has repeatedly ruled that the actual filing is necessary, and that, if a candidate entrusts the delivery of his notice to the United States mails, he takes the risk of same not reaching their destination within the time required by statute.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: City Election (Alexandria): Dates For Completion Of Primary.

November 14, 1945.

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

My dear Mr. Bryan:

I am in receipt of your letter of November 9, which for purposes of reply I quote below in full:

"In view of the provisions of Chapter 2 of the Acts of the General Assembly, Extra Session, 1945, I would like to have your opinion as to their operation upon the dates of general elections and primaries for the selection of a city attorney and city collector in Alexandria, specifically upon the following points:

"According to the provisions of section 14 of the Charter of the City of Alexandria, (1932 Acts of Assembly, p. 493, as amended by 1938 Acts, p. 308) a city collector and a city attorney are to be elected at the regular municipal election on the second Tuesday in June, 1946, for a term of three years beginning on the first day of September next succeeding their election.

"First Query: During the effective period of Chapter 2 of the Acts of the General Assembly, Extra Session, 1945, in case a political party desires to nominate candidates for these offices by a direct primary, what is the last day such primary may be completed?

"Second Query: During the effective period of said Act, within what time must all candidates for city collector and city attorney, who are required to file notice of candidacy and petitions by Section 154 of the Code of Virginia, file such notices and petitions?"

"Third Query: During the effective period of said Act, is the election date and/or term of office of the city collector and city attorney as set forth in the charter in any way changed?"

It seems to me plain that sections 1 and 3 of chapter 2 of the Acts of the Extra Session of 1945 contemplate that members of the armed services shall be given an opportunity for absentee voting in all primaries and elections for the State officers mentioned therein and elective county and city officers. The difficulty of applying the Act to the situation at Alexandria described by you is that the Act assumes that all city officers except mayor and councilmen are elected at the November election instead of the June election. This is generally the case. See section 3012 of the Code. However your charter provides that a city collector and a city attorney are to be elected at the June election. Certainly the Act should not be construed to change the time for electing a city collector and a city attorney in Alexandria contrary to the expressed provisions of the charter, nor to change the terms of these officers, but the Act should be construed, if possible, to afford members of the armed service the opportunity for absentee voting provided therein. It is my view, therefore, that, in order to afford members of the armed services this opportunity, section 3 of the Act and especially the following language thereof: "and for mayor and members of councils in cities on or before the first Tuesday in March" should be construed as if it read "and for mayor and members of councils (and other city officers provided by law to be elected in June) on or before the first Tuesday in March." Placing this construction upon the section, your questions are easily answered as follows:

1. On or before the first Tuesday in March, 1946.
2. Within seven days after the first Tuesday in March, 1946.
3. No.

I realize that, in view of the provisions of the Alexandria charter to which you refer, the answers to the questions you present are not at all free from doubt, but when the broad general purpose of the Act is considered it does not seem to me that it should be so construed as to deprive members of the armed services from Alexandria of the opportunity for absentee voting which such members from other cities have merely because of the time fixed by Alexandria's charter for the election of these two officers. However, I suggest that, in view of this doubt, there is opportunity for clarifying legislation at the next session of the General Assembly which commences in January.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: City Election (Norfolk); Filing Of Notices Of Candidacy; Time And Place Of.

January 8, 1946.

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

My dear Mr. Prieur:

This is in reply to your letter of January 7, which I quote in full below:

"A municipal election will be held in this City on the second Tuesday of June of this year, for the election of three members of the City Council.

"Section 19 of the Norfolk City Charter (Acts of Assembly 1918, page 31) requires the candidates to be nominated by petition, such petition to be signed by at least two hundred and fifty qualified voters of the City and to be so signed not more than fifty days prior to the date of the election. Section 20 provides that any person whose name has been so submitted shall file on acceptance with me at least twenty days prior to the date of the election, and that the filing of such acceptance shall be equivalent to the filing of notice of candidacy under the General Election Laws of the State.

"At the 1945 Special Session of the General Assembly, Acts of Extra Session 1945, Chapter 2, Page 6, an Act was passed requiring, in Section 3 thereof, candidates for Councilmen to complete their nominations in the manner prescribed by law on or before the first Tuesday in March, and that the proper authorities of each political party shall certify the names of its candidates to the Chairman of the Electoral Board as required, and to the Secretary of the Commonwealth, within seven days after said day. The Act further provides, in Section 15 thereof, that the same shall have no effect upon the statutes and laws relating to elections other than those mentioned therein.

"In Norfolk we have no Primary Election for Councilmen and they are elected in the General Municipal Election held in June of every second year.

"It is not clear to me whether the above Act of 1945 applies only to Primary Elections but also to General Municipal Elections. I will appreciate your advising me whether the petitions for candidates for Councilmen in the June elections here should be filed with me as provided by the Norfolk City Charter or with the Electoral Board and the Secretary of the Commonwealth as provided by the above Act of 1945."

As you know, the primary purpose of Chapter 2 of the Acts of the Extra Session of 1945 was to provide facilities and opportunity for absentee voting by Virginia members of the armed forces. One of the means adopted for effectuating this purpose was to provide for the ballots to be printed earlier than they would have been printed but for the Act. The reason for this obviously was to allow more time for the transmission of the ballots to members of the armed forces in distant places and the return thereof. Under the provisions of the Norfolk Chapter, to which you refer in the second paragraph of your letter, the filing of the notice of candidacy does not have to be completed until twenty days before the election and, of course, the ballots would not be printed until after that time. In this situation obviously the ballots could not be sent to members of the armed forces in distant places and returned before the election.

Moreover, section 3 of the Act in terms provides that it shall be applicable to elections held for Mayor and members of Councils in cities, and that the name of the candidate for any State or local office shall be printed on any of-

ficial ballot unless the notice of candidacy is filed as provided in the section and within the time specified. You will note also that section 15 of the Act repeals all Acts or parts of Acts inconsistent therewith with respect to the elections mentioned therein during the effective period thereof.

In view of what I have written I see no escape from the conclusion that notices of candidacy for membership in the Norfolk City Council should be filed with the officers and within the time prescribed by Section 3 of Chapter 2 of the Acts of the Extra Session of 1945, anything in the Charter of the City of Norfolk to the contrary notwithstanding.

It is quite true, as you point out, that Section 15 of the Act provides that the same "shall have no effect upon the statutes and laws relating to elections other than those mentioned herein", but elections for membership in City Councils are expressly mentioned in the Act. The elections referred to in the sentence which I have quoted are probably special elections which are more often held at times other than the times for holding general elections.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: How Technical Defects In Notice Of Candidacy To Be Construed.

April 20, 1946.

MR. W. S. BANNER, *Chairman*,
Electoral Board of Russell County,
Lebanon, Virginia.

My dear Mr. Banner:

This will acknowledge receipt of your letter of April 13, enclosing an alleged notice of the candidacy signed by one F. K. Whited which he purports to file for the office of mayor of said county. You state that Mr. Whited wishes to run for mayor of the town of Honaker in said county, and you inquire as to whether or not this notice of candidacy is sufficient for that purpose.

As you well know, there is no such position as mayor of said county. In addition there is no election to be held in Russell County on Tuesday, June 11, 1946. I assume that you have independent knowledge that Mr. Whited lives in Honaker and that Honaker will hold its biennial town election on the date indicated in the notice of candidacy. Under such circumstances, I am of opinion that the notice should be construed liberally to effectuate its obvious purpose, and that the purely formal defects should be overlooked and that the petition is sufficient for the purpose of allowing Mr. Whited's name to appear on the ballot as a candidate for the office of the mayor of the town of Honaker.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ELECTIONS—Candidates: Duty Of Secretary Of Commonwealth To
- Certify Names Of Candidates; When Duty Exists.**

April 19, 1946.

MR. W. W. RIDGEWAY, *Secretary*,
Roanoke City Electoral Board,
Roanoke, Virginia.

My dear Mr. Ridgeway:

I have before me your request of April 15 for my opinion upon the following question:

The names of various candidates for Roanoke City Council in the June elections have been certified by the Democratic Party Chairman and the Clerk of the Corporation Court to your Electoral Board in the manner required by section 154 of the Code of Virginia as having qualified on or before April 9, the time required for such qualification by Chapter 2 of the Acts of the Extra Session of 1945, as amended by Chapter 1 of the Acts of 1946. The latter Act relates to absentee voting by members of the armed forces, and, in addition to the notice required to be filed with the Clerk or electoral Board by section 154, also requires the chairman of a political party to certify the names of its candidates to the Secretary of the Commonwealth, and each independent candidate to file with said officer his notice of candidacy and petition therefor signed by fifty qualified voters, on or before April 9, 1946. You further state that the Secretary of the Commonwealth has not certified to your Board the fact that notices of any candidates for Roanoke City Council, or the party chairman's certificate with respect to any such, were filed with that officer. The 1945 Act provides that the name of no candidate shall be printed on any official election ballot unless this requirement is complied with. You request my opinion upon the question whether, under these circumstances, the Board may place the names of these candidates on the ballots for said election.

Section 4 of said 1945 Act provides as follows:

"Immediately after the expiration of the time within which the names of candidates may be filed as provided in section three thereof, the Secretary of the Commonwealth shall certify the names of all qualified candidates to local electoral boards *when required by law*, and shall cause to be printed an adequate number of ballots * * *; provided, however, that the Secretary of the Commonwealth may obtain suitable ballots from the local electoral boards, in appropriate cases, where same are promptly available. * * *."

It will be noted that the Secretary must certify the names of candidates who qualified before him only "when required by law" to certify same. This obviously means when required by some other statute. Section 154 requires this officer to certify the names of only those candidates who are elected by the voters of the State at large or of a congressional district. The law makes no provision for the certification by the Secretary of the Commonwealth of the names of any other candidates. Therefore, the failure of this officer to certify the names of candidates for city council has no legal significance since he was under no duty to certify the names of such candidates who qualify in his office. In my opinion the local City Electoral Boards are entitled to assume that the candidates who qualified locally likewise qualified in the office of the Secretary of the Commonwealth, unless objection is made to the printing of the ballots on the ground of failure to so qualify in such office and proof of such failure is adduced. In the absence of such objection and

proof, I do not think the Board is under any legal duty or obligation to initiate an official inquiry into the matter of what transpired in the office of the Secretary of the Commonwealth, but may proceed forthwith with the printing of the ballots, placing thereon the name of the candidates certified as having qualified locally.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Name Of Unopposed Party Nominee In Primary Election Need Not Be Printed On Ballot.

July 30, 1945.

HONORABLE GRASTY CREWS,
Member 5th District Democratic Committee,
Masonic Building,
Danville, Virginia.

My dear Mr. Crews:

I have your letter of July 27, from which it appears that the names of various candidates for local offices in the city of Danville, who had been declared the nominees of the Democratic Party because of no opposition, were printed on the ballot at the request of the Democratic Chairman who certified their names to the electoral board. It seems that the name of Mr. P. Holt Lyon, one of the candidates so certified, was accidentally omitted from the ballot. You request my opinion as to the effect of the omission of such name therefrom.

This office has repeatedly held that, under the provisions of section 246 of the Code, where only one declaration of candidacy was filed for any office in a proposed party primary, the person whose name was so filed became automatically the nominee of the party for that office, and the primary which was contemplated for said office is not to be held. This same provision is repeated on page 8 of the Party Plan of the Democratic Party which was adopted on June 9, 1932, at Richmond. Section 246 also provides that "When, however, a primary is being held for other offices to be filled, any candidate who shall have been declared a nominee, due to absence of opposition, may have his name printed on the ballot by his request."

Inasmuch as the language quoted refers to a person whose name is so printed at his request as being already the nominee of the party, it would seem that his name is permitted to be printed on the ballot, not for the purpose of being voted for, but merely to inform members of the party who vote in the primary that such person has already been nominated. Should it actually happen in any particular case that the voters did vote for him, or that even a greater number should write in the name of some other candidate, I do not see how this could possibly affect the status of the person who has already been nominated because of no opposition. In my opinion, he would still remain the nominee of the party, and the votes cast for another would not have any legal effect.

I concur in the view you express, therefore, that the omission of the name of Mr. P. Holt Lyon, who had already been nominated by reason of no opposition candidate filing against him in the primary, could not possibly prejudice his status as the Democratic nominee. In my opinion, it is immaterial whether his name is placed on the ballot or not. In fact, unless he personally

requested that it be printed thereon, it would seem that the electoral board had no authority to place same on said ballot.

Cordially yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Last Day For Filing Notice In Special Election To Fill Vacancy In Office Of State Senator.

October 11, 1945.

MR. WILLIAM J. HARPER, *Secretary*,
Loudoun County Electoral Board,
Leesburg, Virginia.

My dear Mr. Harper:

In reply to your letter of October 9, I have today sent you a telegram stating that in my opinion October 8 was the last day on which notices of candidates in the special election to fill a vacancy in the State Senate from the Twenty-eighth Senatorial District could be filed.

It appears from your letter that the writ of election was dated October 3. Section 154 of the Code provides that, in a case where a special election is called less than thirty-five days before the date fixed for the election, a candidate desiring to file his notice of candidacy must file same "within five days after the issuance of any writ of election". The question presented by your letter, therefore, involves the method of counting the five days so as to determine which is the last day. The last sentence of paragraph 8 of section 4 of the Code provides as follows:

" * * * where a statute requires a notice to be given or any other act to be done within a certain time after any event or judgment, that time shall be allowed in addition to the day on which the event or judgment occurred."

In cases involving the filing of notices by candidates under section 154, this office has consistently held for many years that the date of the issuance of the writ of election is the date of the "event" referred to in the statutory provision last above quoted. This being true the day on which the writ is signed would not be counted as one of the five days, but the filing of the notice is permissible on the fifth day following the date of the writ. In other words, October 4 would be the first day, October 5 the second, October 6 the third, October 7 the fourth and October 8 the fifth day. It is my opinion, therefore, that a notice filed on October 8 is within the time required by section 154 of the Code in order to entitle the candidate to have his name printed upon the official ballot for the special election.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Nominations For U. S. Senate When Vacancy Occurs.

June 3, 1946.

SENATOR E. GLENN JORDAN,
Grace American Building,
Richmond 19, Virginia.

My dear Senator Jordan:

This is in reply to your letter of June 1, in which you request my opinion upon the question whether or not, under the provisions of the Democratic Party Plan and the election laws of this State, a Democratic candidate to fill the vacancy in the office of the United States Senator from Virginia can be nominated in the August primary.

The Democratic Party Plan as amended at the Virginia State Convention in 1944 provides that the Democratic candidate to fill a vacancy in an office elected by the voters of the entire State shall be nominated in the August primary, whenever the vacancy occurs under such circumstances that under State election laws candidates for the nomination may qualify so as to have their names printed on the official ballots for said primary. Said Plan also provides that, in the event the candidates for nomination cannot qualify to have their names printed on said primary ballots, the Democratic Executive Committee shall call a State Convention, and such convention shall nominate the party candidate.

Prior to the 1944 amendment the Party Plan had provided that, in the event of a vacancy under such circumstances, the State Democratic Central Committee should itself nominate the party candidate. The effect of the amendment was to require a convention to be held in such a case instead of requiring the nomination to be made by the Committee. If, therefore, the State law permits candidates for the Democratic nomination to qualify so as to have their names printed on the next August primary ballots, then the party nominee must be so selected; otherwise, the nomination must be made in a State Convention.

The answer to your question, then, turns upon whether the State election laws contain any provision whereby said candidates may so qualify.

Chapter 15, consisting of sections 221 to 250, inclusive, of the Code of Virginia provides for the holding of primaries, regulates the manner in which they are to be conducted, and prescribes the conditions which must be met in order for the names of candidates to be printed on the ballots. Section 226 contains, among others, the following provisions:

"This chapter shall not apply * * * to the nominations of candidates to fill vacancies, unless the candidates for nomination to fill vacancies are to be voted for on the date set by this chapter for regular primaries. Whenever, by reason of the death, resignation or removal of the incumbent, a vacancy shall occur less than sixty days before the date fixed by section two hundred and twenty-three for holding of a primary, but more than thirty days before such date, the properly constituted party authorities may permit the filing of declarations of candidacy for nomination in the said primary to such office. * * *"

The vacancy now to be filled occurred on May 28, 1946, the date of the lamented death of the late Senator Glass. This was at a time which does not fall within the above provisions of the statute because it was "not less than sixty days" before August 6, the date fixed by section 223 for the holding of the primary. The language quoted is clear and unambiguous. It leaves no room for interpretation. The candidates for nomination to fill the vacancy here involved cannot qualify under said provisions of section 226 because the exception therein contained is not applicable to a vacancy occurring more than

sixty days before the primary. Nor can such candidates qualify under section 229 because the time therein prescribed for filing declarations of candidacy expired on May 8.

You also inquire whether a special primary may be held at a different time for the nomination of candidate. The law makes no provision for a special primary. Section 222 of the Code provides: "All nominations made by a direct primary shall be in accordance with the provisions of this chapter". Section 221 states that the word "primary" shall be construed to mean "the primary elections provided for by this chapter". Section 223 provides for only one primary each year for statewide elections and fixes the time for holding same as the "first Tuesday in August". But even if it were permissible under the applicable statutes to hold a special primary, the Democratic Party Plan has forbidden it in this case by requiring its Executive Committee to call a convention to nominate its candidate when their names cannot be printed on the ballots for the August primary.

It follows, therefore, that I am of the opinion that the provisions of the Democratic Party Plan above set out imposes upon that party's Executive Committee the mandatory duty of calling a State Democratic Convention to nominate its candidate, and that only in this manner can such nomination be lawfully made.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Joint Elections: When Local Election Properly Joined With State Primary Election.

June 28, 1946.

HONORABLE WILMER L. O'FLAHERTY, *Secretary*,
City Electoral Board,
1133 Mutual Building,
Richmond, Virginia.

My dear Mr. O'Flaherty:

This is in reply to your letter of June 27, 1946, which is as follows:

"The question has arisen as to whether it would be lawful for the Richmond City Electoral Board to make the election machinery and facilities to be employed in the Democratic Primary election, to be held on August 6, 1946, available to the duly constituted authorities of the Democratic Party, so that the qualified Democratic voters of the City of Richmond may vote for delegates to the State Democratic Convention, to be held in September of this year, at the same time that they vote for the nomination of Democratic candidates for the United States Senate and House of Representatives.

"I would appreciate it if you would let me have your opinion as to this."

There is no provision contained in the election laws which either authorizes or forbids the use of facilities and personnel employed in a party primary for the election of officials of the same party. The answer to your question depends upon what is considered to be a sound public policy. The purpose of the August Democratic primary is to nominate the candidates of that party for the Senate and House of Representatives of the United States.

The election of delegates to the September Democratic Convention is an essential step in the nomination of a candidate for the second seat in the Senate and is closely related to the purpose of the primary. The same voters who are qualified to vote for the primary candidates will be likewise qualified to vote for the Convention delegates. To hold an election for the delegates at a different time would make it necessary for the voters to make two trips to the polls instead of one if same is held along with the primary. The Democratic party plan provides that party committeemen and delegates to party conventions may be elected at primary elections conducted under the State primary laws in the discretion of the local Democratic Committees. See the printed "Democratic Party Plans," sections 1 and 2, page 1, section 13, page 2, and section entitled "Proxies" page 8. The rules and regulations of each political party are given an established legal status by the provisions of section 227 of the Code of Virginia.

For many years it has been customary in Richmond to elect Democratic Committeemen at the primaries. Several years ago it was contemplated that delegates to the State Democratic Convention would be so elected, but this was made unnecessary because the number of candidates who qualified did not exceed the number to be elected. The same practice has been followed frequently in other cities for many years. The General Assembly must be taken to have acquiesced therein, because no statute has ever been enacted indicating its disapproval.

In my opinion it would be in the public interest and in accord with public policy, and therefore lawful, for an arrangement to be entered into between the City election officials and the Richmond City Democratic Committee whereby the election machinery and facilities for conducting the August primary may be utilized in holding, at the same time, the election for delegates to the September State Democratic Convention.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General

ELECTIONS—Poll Tax: Calculation Of Years For Which Tax Must Be Paid.

January 15, 1946.

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

My dear Mr. Burks:

I am in receipt of your letter of January 12, from which I quote as follows:

"Kindly advise by what date State poll taxes must have been paid and for what years in order to qualify to vote in the special election to be held in the Sixth Congressional District on January 22, 1946."

Section 83 of the Code provides in part that:

"At any such special election held before the second Tuesday in June in any year, any persons shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable

against him during the three years next preceding that in which such election is held, * * *."

In view of the quoted language, it is my opinion that as to those persons who were qualified to vote at the November election of 1945 it is only necessary that capitation taxes assessed or assessable against them for the years 1942, 1943 and 1944 shall have been paid. As to those persons who were not qualified to vote at the last November election, such as new residents and young persons becoming of age, it is my opinion that they must have paid six months prior to the second Tuesday in June, 1946, the capitation taxes assessed or assessable against them for the years 1943, 1944 and 1945.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

ELECTIONS—Poll Tax: New Resident; Liability For. Persons Just Becoming Of Age.

May 7, 1946.

HONORABLE WATKINS M. ABBITT,
Commonwealth's Attorney,
Appomattox, Virginia.

My dear Mr. Abbit:

I have your letter of May 3, in which you ask my opinion with reference to the voting qualifications of two separate individuals.

In the first case the party moved into this State in Appomattox County on August 1, 1945, having formerly lived in Michigan. Apparently from your letter he has failed to pay his 1945 capitation tax on or before May 4, and, unless he has done this, he cannot qualify for the August primary and the November election, as section 22 of the Tax Code was amended by Acts of 1942, page 337, so as to make the poll tax assessable against a new resident for any year during a part of which he lived in this State. Of course, this would have to be paid six months in advance.

With reference to Mrs. Herbet Jamerson who became of age March 3, 1946, I have repeatedly held that it is not necessary for her to pay any poll tax at all in order to register and vote during the year 1946. The Tax Code does not provide for the assessment of a tax against such a person becoming of age unless the twenty-first birthday occurred on the first day of January, which is the date the poll taxes are assessable against all persons except those recently moving into the State.

It was formerly customary for such a person to pay the tax for the next succeeding year, but in a proceeding in the United States District Court at Roanoke it was determined that such tax might never become assessable, in the event the person should die or move out of the State, and therefore, the State Constitution does not require the payment of a tax which is not assessable and may never become assessable.

Sincerely,

ABRAM P. STAPLES,
Attorney General

ELECTIONS—Poll Tax: Pardoned Convict Or Naturalized Alien To Pay Poll Taxes Same As Any Other Citizen.

May 24, 1946.

MR. C. L. BOOTH,
General Registrar,
Danville, Virginia.

My dear Mr. Booth:

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

"A resident of Danville, Virginia, was deprived of his citizenship. He holds a certificate signed by the Governor, dated January 4, 1946, restoring his citizenship. He has never registered or voted, and now he wants to register and vote.

"For what year or years should he pay poll tax, and when can he vote?

"A person who is naturalized in January, 1946, wants to register and vote, for what year or years does he pay poll tax and when can he vote?"

Section 22 of the Tax Code imposes the State poll tax on "every resident of the State not less than twenty-one years of age except those pensioned by this State for military services * * *." The sole test for liability to the State poll tax of those twenty-one years of age or over, therefore, is residence. It follows that under section 20 of the Constitution, in order to be eligible to register and vote, the persons you describe must have paid their State poll taxes as any other resident of Virginia, that is, such poll taxes as were assessed or assessable against them for the three years next preceding this year. Inasmuch as it is too late now to pay poll taxes to be eligible to vote in the elections and primaries to be held this year, the persons referred to will not be eligible to vote until next year.

Very sincerely yours,

ABRAM P. STAPLES,

Attorney General.

ELECTIONS—Poll Tax Lists: Names Of Persons Deceased Who Have Paid Not To Be Expunged From List.

August 8, 1945.

HONORABLE ROGER C. SULLIVAN,
City Treasurer,
Alexandria, Virginia.

My dear Mr. Sullivan:

I am in receipt of your letter of August 6, in which you ask if the treasurer should eliminate the names of deceased persons from the list of persons who have paid their State poll taxes which he is required to make up by section 109 of the Code.

Section 109 requires the treasurer of each county and city to file within the time specified with the clerk of the appropriate court "a list of all persons in his county, or city, who have paid * * * the State poll taxes required by the Constitution of this State during three years next preceding that in which such election is to be held, which list shall state the white and colored persons

separately, and shall be verified by oath of the treasurer." Neither this section nor any other statute that I have been able to find makes any exception to the quoted requirements. It is my opinion that the treasurer should place on the list the name of every person who has paid the specified poll taxes, and it follows, of course, that the treasurer should not eliminate from the list the name of any such person, whether he be living or dead.

While the list prescribed by section 109 of the Code is frequently referred to as a 'voters' list' this is not an accurate description of the list, for many whose names appear thereon are not eligible to vote. For example, a person may be a resident of a county or city who is not a citizen of the United States. Such a person is not eligible to vote, but he is subject to the State poll tax. Again, a person may be maintaining his physical place of abode in a county or city, but retaining his legal residence or domicile in another State. Such person, of course, would not be eligible to vote in Virginia, but he would be subject to the State poll tax. Also, the names of many persons appear on the treasurer's list who have not registered. Such persons, of course, are not eligible to vote until they have registered. Probably a reason why the statute does not impose upon the treasurer the duty of striking from the list the names of those who die after the payment of their poll taxes is that the question whether a person of a given name who dies is the same person with the same initials or christian name and the same surname as the one appearing on the treasurer's tax list is sometimes difficult of determination. The determination of this question would involve an investigation to ascertain the identification of the decedent as the same person whose name is on the list. A mistake in this identification would, of course, deprive a qualified voter of his right to vote since the list is made conclusive evidence of the facts stated therein for the purpose of voting. See section 111 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Residence: Where Boundaries Of Precinct Are Altered.

October 24, 1945.

HONORABLE CHESTER J. STAFFORD,
Attorney for the Commonwealth,
Pearisburg, Virginia.

My dear Mr. Stafford:

I am in receipt of your letter of October 20, in which you ask the following question:

"I have been asked if a person lives in a precinct and was a duly registered voter in this precinct, and the precinct boundaries were changed and he was placed in another precinct, but never moved his registration from the original precinct; in later years he returned to the precinct and has voted under his original registration. Is he qualified to do so? If not, by what procedure could he become eligible?"

I refer you to section 102 of the Code. I assume that the registrar of the old precinct performed the duty required of him by the section when the boundaries of the election district were changed. If this assumption is cor-

rect, then the voter you describe should vote in the new precinct of which he is a resident by reason of the change. I know of no way by which he may vote in the old precinct unless he re-establishes his residence in that precinct.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**ELECTIONS—Residence: Determination Of. War Veterans Legislation:
Acknowledgments, How Taken.**

July 13, 1945.

HONORABLE JAMES N. GARRETT,
Member of House of Delegates,
326 Western Union Building,
Norfolk 10, Virginia.

My dear Mr. Garrett:

I am in receipt of your letter of July 11, in which you ask a number of questions concerning the election laws. I shall attempt to answer your questions in the order in which they appear in your letter.

"1. Can a voter otherwise lawfully qualified vote in a precinct of the county from which he has removed to some other county precinct?"

A person should vote in the precinct of which he is a legal resident. Whether or not any a person is a resident of any particular precinct is a question which must be determined by the facts in each particular case. As you know, one of the main factors in determining the legal residence of any individual is the intention of such individual. A person does not necessarily lose his legal residence once established by physical absence therefrom, even though such absence may continue for a long period of time.

"2. Where a service man applied for a war voters ballot in his home precinct, can he make such application on a regular absentee ballot application form and vote a regular absentee ballot?"

This question must be answered in the affirmative if the service man has registered and paid the required capitation taxes. If, however, the service man has not registered or paid the required capitation taxes, then the answer to your question is found in the following provision of chapter 79 of the Acts of the Extra Session of 1945, which reads as follows:

"1(a). Whenever the registrar of any precinct is satisfied that a person requesting an absentee ballot in person, pursuant to the provisions of sections two hundred two—two hundred eighteen of the Code of Virginia, is in active service as a member of the armed forces of the United States in time of war and that such person is otherwise qualified to vote, such registrar shall furnish said person with an absentee ballot even though said person has not registered or paid any poll taxes, provided said person executes in the presence of such registrar an affidavit in form and content similar to the 'oath of voter' prescribed by section seven of chapter two of the Acts of The General Assembly of Virginia, Extra Session, nineteen hundred forty-five."

The oath required may be administered by the registrar since the quoted language provides that the applicant execute the oath in the presence of such registrar.

"3. Is a war ballot void when notarized by a notary public (or other officer designated by law to take acknowledgments) rather than by a commissioned officer?"

Section 7 of chapter 2 of the Acts of the Extra Session of 1945 requires that the oath of the voter on a war ballot must be administered and attested by a commissioned officer, and unquestionably this procedure should be followed if possible. Whether or not such a ballot should be counted where the oath is administered by a notary public or some other person authorized to administer oaths is a matter which must be decided by the judges of election. It may be and my personal view is that in such a case the judges of election would be justified in treating this as such a substantial compliance with the statute as to render the ballot valid.

"4. Where a service man received a war ballot from the wrong magisterial district of his county and votes this ballot, is it valid as to candidates whose names appear on all district ballots, though the Democratic Executive Committee listed on the ballot may be from another district?"

I do not think there is any doubt about the fact that such a ballot would be valid insofar as State and county officers are concerned. As to district officers, the question is not free from doubt. You will recall that the "oath of voter" required by chapter 2 of the Acts of the Extra Session of 1945 requires the voter to state the place of his residence and the name and number of his precinct if known. Where this information is contained in the oath, I should think the judges of election would require very compelling evidence to hold that a voter's residence is not where he says it is. If the judges are satisfied, however, that the voter has given his residence in the wrong district, I do not believe the ballot should be held valid as to district officers.

"5. Another question which I would like to ask you arises out of a situation in Norfolk county where a deputy clerk of court and a deputy commissioner of revenue were allowed possession of a large number of unsealed mail ballots to count and sort out for distribution to registrars without any member of the Electoral Board or representatives being present. Is this contrary to any statute and, if so, what is the section?"

Such action is quite plainly contrary to the provisions of section 158 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrar: Residence Qualifications.

April 26, 1946.

MR. GEORGE L. SAVEDGE, *Secretary,*
Electoral Board for Surry County,
Elberon, Virginia.

My dear Mr. Savedge:

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

"We have a district with three voting precincts. In one of those pre-

cincts it seems impossible to get a suitable person for registrar. Just across the line in one of the other precincts I can get a good man for the job. would that be permissible?"

Section 96 of the Code, dealing with the appointment of registrars, provides among other things that a registrar shall be a "resident of the election district in and for which he is appointed". It is my opinion that this provision of the statute must be complied with and I, therefore, know of no authority for the appointment of a registrar for an election district when such a registrar is not a resident of that district.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registrars: Tenure Of Office.

April 11, 1946.

HONORABLE JOHN B. BOATWRIGHT,
Member House of Delegates,
Buckingham, Virginia.

My dear Mr. Boatwright:

I have your letter of April 8, which I quote in full as follows:

"We have a little matter on which we would like to have your opinion; "Under Sec. 86 of the Code, the Electoral Board appoints registrars and they are required to serve two terms, unless relieved by the Court or Judge.

"Now the point on which we are bothered is this; is the Board bound, under this section to appoint a Registrar for more than one term? Can they appoint another person at the end of the incumbent's first term?

"This question is causing some good Democrats some trouble. I have no doubt your office has already passed on it and I would appreciate your opinion.

"As I see the law, with any examination of authority, the second section of the law applies to the Registrar and is a limitation on him, but not on the Board, in other words, he cannot resign at the end of his first term, but the Board is not bound to reappoint him."

I fully concur in your view. While there is an obligation imposed by the statute upon the registrar to serve two terms if he is elected for both terms, yet the fact that the four years of compulsory service is split into two separate terms seems to me to indicate clearly that it was the legislative intent that the electoral board might select some other more suitable person for the second of said terms should it deem the same advisable.

It is my opinion, therefore, that it is entirely within the judgment and discretion of the electoral board whether they should reelect or reappoint an incumbent at the end of his first term, or whether they should select some other person as registrar.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Last Day Therefor.

May 1, 1946.

HONORABLE WILMER L. O'FLAHERTY, *Secretary*,
City Electoral Board,
1133 Mutual Building,
Richmond, Virginia.

My dear Mr. O'Flaherty:

I am in receipt of your letter of April 25, in which you ask the following questions:

"Some question has arisen as to the last day on which persons may register with the Registrar of the City of Richmond for

- "1. General Election on June 11, 1946
- "2. Democratic Primary Election on August 6, 1946
- "3. General Election on November 5, 1946

"Would you be good enough to give me as Secretary of Richmond City Electoral Board a ruling as to the last day on which persons may register for each of these elections?"

Section 98 of the Code, dealing with the registration of voters, was amended at the 1946 session of the General Assembly. The section as amended does not go into effect until after the municipal elections to be held in June of this year and, therefore, the section as it now exists controls the closing of the registration books prior to the June elections. Pursuant to previous opinions of this office, therefore, registration books in Richmond should be closed for a period beginning the day after the third Tuesday in May and ending on the day after the day of the June election.

In connection with your second question, section 98 of the Code as amended by the Acts of 1946 will be applicable. The section as amended provides that:

"Each registrar in the counties, cities, and towns of this State shall annually, thirty days before the day fixed by law for every regular primary election and for every general election to be held therein * * * proceed to register the names of all qualified voters within his election district, precinct, town, city, or ward, as the case may be, who have not previously registered, and shall on said date complete the registration of voters for the succeeding primary or general election."

The day thirty days before the primary to be held on August 6, 1946, is Sunday, July 7. This being a holiday, I am of opinion that the last day for registration before the August primary is Saturday, July 6, and that the registration books should be closed after that day up to and including the day of the primary. It might be argued that Monday, July 8, would be the last day for registration, but this is incorrect since Monday, July 8, is only twenty-nine days before the primary.

Applying section 98 as amended to the November election, for the reasons stated in my answer to your second question I am of opinion that the last day for registration prior to the November election is Saturday, October 5, and that the registration books should be closed after that day up to and including the day of the November election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Last Day Therefor.

June 21, 1946.

MR. V. R. SHACKELFORD, JR., *Secretary*,
Orange County Electoral Board,
Orange, Virginia.

My dear Mr. Shackelford:

I am in receipt of your letter of June 20, in which you inquire as to the last day on which a person may register to be eligible to vote in the primary to be held on August 6 of this year.

Section 98 of the Code dealing with registration was amended at the last session of the General Assembly so as to provide that registration books shall be closed thirty days previous to a primary. In view of this provision, I am of opinion that the last day on which a person may register before the August primary is July 6.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Official Registration Days; Notice Of. War Veterans Registration.

June 29, 1946.

MRS. SUSIE WALLER NUSSEY:
Registrar,
Colonial Beach, Virginia.

My dear Mrs. Nussey:

This will acknowledge receipt of your letter of June 28, containing questions relative to the election laws. I shall attempt to state your questions and answer them separately.

"1. Do registrars have to 'sit' thirty days previous to the Primary election as in other elections?"

Section 98 of the Code, as amended and reenacted by chapter 89 of the Acts of the General Assembly of 1946 (effective June 19, 1946) provides: "Each registrar * * * shall annually, thirty days before the day fixed by law for every regular primary election and every general election * * * proceed to register the names of all qualified voters * * * who have not previously registered * * * who shall apply to be registered and shall on said day complete the registration of voters for the succeeding primary or general election". This means that for the senatorial and congressional primary to be held on Tuesday, August 6, 1946, registrars shall sit on Saturday, July 6, 1946, and complete the primary registration on that day.

"2. Do all ex-servicemen have to register now to vote in the coming Primary?"

All ex-service men have to register on or before July 6, 1946, in order to vote in the August 6 primary, unless they were discharged from the armed services at such time as the registration books were closed (after July 6), in

which cases the judges of the election are allowed to permit such persons to vote without previous registration.

"3. If registrars 'sit', then must they post the notices as usual?"

As to notices before the sitting, the statute above referred to provides: "he shall give notice of the date and place at which he will sit * * * for at least ten days before each sitting by posting written or printed notices thereof at ten or more public places in his jurisdiction, or by publication in the newspapers of general circulation therein."

I regret that I do not have a copy of this Act which I can send you, but the new law requires the Secretary of the Commonwealth to mail a copy of this Act as soon as practicable to each registrar in this State and you should receive one in a short while.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration Books: Right Of Citizens To Copy Therefrom.

December 28, 1945.

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

My dear Mr. Colosanto:

I am in receipt of your letter of December 27, from which I quote as follows:

"The Electoral Board has had several requests on behalf of certain citizens of the City of Alexandria to be permitted to make copies of our registration books. We have been refusing these requests because we felt that the law requires that the registration books be kept in the exclusive possession of the registrar at all times.

"In looking over the law, we find that in the case of *Clay v. Ballard*, cited in 87 Va. 787, the Court held that a citizen had this right, but looking further we find in *Keller v. Stone*, 96 Va. 667, the Court held that a citizen did not have the right to make copies of the registration books.

"We are being pressed at this time by one of the citizens to permit him to make such a copy. I have discussed the matter with Mr. Albert V. Bryan, our Commonwealth's Attorney here, and he suggested that I communicate with you asking that you give the Electoral Board of the City of Alexandria your valued opinion in this matter."

Section 104 of the Code provides that the "registration books shall at all times be open to public inspection." In the light of this statutory provision, I am of the opinion that a registrar should allow the inspection of his registration books and that he may allow them to be copied during regular business hours, provided such copying is done at such time as will not impede the registrar in the performance of his duties. I quite agree with you that the registration books should not be allowed to be taken away from the office of the registrar, and I also think that the registrar should exercise every

precaution to see that no opportunity is afforded for the mutilation or alteration of the books. I do not think that the opinion in *Keller v. Stone*, 96 Va. 667, should be construed as holding that the registration books may not be copied at all. The holding of the opinion it seems to me, is that mandamus did not lie under the facts and circumstances of that particular case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Special Elections To Fill Vacancies: When Writ Of Election May Be Issued.

September 18, 1945.

JUDGE JAMES L. ALMOND, JR.,
Hustings Court,
Roanoke, Virginia.

My dear Judge Almond:

Your letter of September 6 was received at my office during my absence on a short vacation. You request my opinion upon the two questions herein-after set out:

"1. In the event of a vacancy affecting one of the Virginia Districts in the Congress of the United States as to which the Governor has issued his writ for a special election to fill such vacancy, can the party authorities of such district call a convention for the purpose of nominating a candidate for such special election?"

The Democratic District Committee for the Sixth Congressional District has ample authority under the party plan to call a convention for the purpose of nominating a candidate for a special election. This practice was followed several years ago in the Second District when Governor Darden resigned as member of Congress. Winder Harris was nominated by a district convention to succeed him.

"2. If an incumbent Congressman announces that he will resign or tenders a resignation to take effect at a future date, can the Governor issue his writ for a special election to be held prior to the effective date of the resignation?"

The practice which I have recommended in connection with a case of this kind is for the Governor to issue a writ of election prior to the actual taking effect of the resignation, but for the election itself to be held on the day after such resignation takes effect. When Dave Satterfield recently resigned, the Governor accepted his resignation to take effect as of a certain date and the writ of election called for the election to be held on the day following. The fact that the vacancy does not actually exist does not impair the power of the party authorities to call the convention nor the authority of the Governor to issue the writ in my opinion. There may be some doubt whether the election could be held prior to the actual existence of the vacancy, and I, therefore, believe the above suggested procedure is safer.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Town Elections: Requirements For Candidates To Have Names Printed On Ballots.

April 17, 1946.

HONORABLE BERNARD MAHON,
Commonwealth's Attorney for Caroline County,
Bowling Green, Virginia.

My dear Mr. Mahon:

This will acknowledge receipt of your letter of April 15, containing the following inquiry:

"Please advise me what candidates for office in the town of Bowling Green should do to qualify and have their names printed on the official ballot."

Of course. I am not familiar with the charter of the town of Bowling Green as to what years town elections shall be held, but assuming that the charter calls for an election in 1946, this election must be held on the second Tuesday in June, which is June 11, 1946. All candidates who desire to have their names printed on the official ballot for that election must file their notice of candidacy with the Clerk of the Circuit Court of Caroline County not later than sixty days before the date of such election. See sections 154 and 168 of Michie's Code of 1942. The last filing date would, therefore, be Friday, April 12, 1946.

If no one has filed by the date line above indicated, it will be the duty of the Electoral Board to furnish the judges of election with blank ballots on which the names of candidates can be written or stamped by the voters on the day of election. The election is mandatory irrespective of whether or not any person has qualified to have his name on the ballot.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Town Elections: Eligibility Of Judges.

May 4, 1946.

MR. R. B. STORY, JR., *Chairman*,
Southampton County Electoral Board,
Courtland, Virginia.

My dear Mr. Story:

This will acknowledge receipt of your letter of May 3, the first three paragraphs of which I shall quote:

"The town of Franklin is holding a special election on May 14 to decide on whether or not they will issue bonds to finance the construction of certain public buildings.

"I wish you would advise me whether the County Electoral Board should appoint the judges and clerks for said election from the citizens of the town, or since Franklin Precinct includes both Franklin Town and

Franklin District, can the same judges and clerks that act in all elections act in this instance?

"I would also like to know if the judges and clerks also act as Commissioners of this election, or do the same commissioners who serve in the regular election act?"

Section 2995 of the Code provides for the appointment by the Electoral Board of the County, not less than fifteen days before any town election, of a registrar and three judges of election for each voting precinct in said town. While the law does not expressly require that the judges shall be actual residents of the town. I believe that it would be by far the better practice, inasmuch as the election is restricted to the electors of the town. If the regular judges for Franklin Precinct also live within the Town of Franklin, then the Electoral Board could very properly appoint the same persons to hold the special election.

The statute above referred to, section 2995, provides that the judges so appointed thereunder shall act as commissioners of the election.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Town Elections: Eligibility Of Voters.

June 12, 1946.

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

My dear Mr. Thoma:

I am in receipt of your letter of June 10, in which you ask several questions with reference to town elections.

Your first question is:

"Is a resident of the town who has previously registered in the county in which such town is situated entitled to register and vote in the town election up to and including the day of election held in said town?"

I have previously expressed the opinion that persons may register on town registration books up to and including the day of election.

Your next question is:

"Is a new voter just coming of age on the day of election held in said town of which he is a resident and who has not previously registered in the county in which the town is situated entitled to register and vote in said town election on the day the election is held?"

Section 2995 of the Code provides that town registrars shall register all voters who are residents of their respective towns, "and who shall have previously registered as voters in the county * * * in which said town is situated,

and none others". In view of this provision, your second question must be answered in the negative.

Your last question is:

"Is it necessary as a prerequisite to registering and voting in a town election of which the applicant is a resident that he shall have previously registered in the county in which the town is situated?"

In view of the above quotation from section 2995 of the Code, this question must be answered in the affirmative.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Town Elections: Registration Of Voters; Time Of.

HONORABLE STUART B. CAMPBELL,
Member of House of Delegates,
Wytheville, Virginia.

May 3, 1946.

My dear Mr. Campbell:

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

"A question has been presented to me as to the proper interpretation of Code sections 98 and 2995, with reference to the registration of voters in towns. The question presented is whether a registrar of a town may register voters for a municipal election at any time before the day of the election, provided such persons are residents of the town and have previously registered as voters in the county. I will be very much obliged if you will give me your opinion on this question."

Pursuant to section 98 of the Code as it now stands, registrars in cities and towns are required to complete their registration on the third Tuesday in May, which means that the registration books are closed after that date and up to and including the date of the June election. The section as amended in 1946 (the amended section not going into effect until after the June election) provides that registration in cities and towns shall be completed thirty days before the June election.

Section 2995 of the Code provides for the appointment of a town registrar "not less than fifteen days before any town election therein" and further provides that this town registrar before any election in the town shall "register all voters who are residents of * * * such town, and who shall have previously registered as voters in the county * * * and none others."

It might be said that there is a conflict between the provisions of the two sections to which I have referred, but when the nature of the town registration under section 2995 is considered I think that this conflict is more apparent than real. Section 98, of course, deals with new registrations, while section 2995 does not deal with new registrations since it provides that only those may register who have previously registered as voters in the county, that is, who have previously registered under section 98. Section 2995 is somewhat analogous to a transfer of regularly registered voters to a special registration

list for the purpose of determining who is eligible to vote in a town election. I do not believe, therefore, that it was intended for the special town registration books provided for in section 2995 to be closed under section 98. It is my opinion that the registration contemplated in section 2995 may be continued up to and including the day of the town election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Veterans Legislation: In General.

October 29, 1945.

HONORABLE RYLAND G. CRAFT,
Member House of Delegates,
Gate City, Virginia.

Dear Mr. Craft:

I have your telegram of October 29, requesting my opinion upon certain questions relating to service men voting in the 1945 November election. You also request copies of an opinion which you have heard that I rendered clarifying the situation. The only opinion published in the papers related to voting *in person* by discharged members of the armed forces, in which I expressed the view that members discharged prior to October 8 must be registered, while those discharged after that time may vote in person without registering. In neither case is the payment of any poll tax required.

With respect to the absentee voting my opinion respecting the questions you ask is as follows:

1. VETERANS WHO ARE REGISTERED. Such veterans may vote by mail through the registrar's office without the payment of any capitation tax, and the vote shall be counted by the judges of election if they are satisfied the voter is a discharged veteran. Chapter 79, Acts Extra Session 1945, p. 78, Cls. 2 and 3. The usual absent voters statute would apply to such voting by these veterans.

2. VETERANS WHO ARE NOT REGISTERED.

(a) *Veterans not registered who were discharged prior to closing of registration books on October 8, 1945.*

Unless these veterans voted through the registrar's office, (Id. Cl. 1-a) or the Secretary of the Commonwealth's office *prior to discharge*, they are not now eligible to vote at all, either in person or by mail.

(b) *Veterans not registered but discharged after October 8.*

Unless these veterans voted by mail prior to discharge they cannot vote *by mail* now.

Such veterans, however, may vote *in person* without the payment of any poll tax and without registering. Clause 4 of said Act.

Under Clause 1-a of said Act persons in active service who are not registered were and are now permitted to obtain and vote absentee ballots, but must request same *in person* from the registrar. No poll tax payment is required.

REPORT OF THE ATTORNEY GENERAL

You are mistaken in your view that the State pays the poll taxes of service men or women. The new constitutional amendment cancels and annuls the tax for the years in question. There is no tax in existence against them. This applies to all members of the armed forces in this war regardless of the year or date of discharge.

Very truly yours,

ABRAM P. STAPLES,
Attorney General

**ELECTIONS—War Veterans Legislation: Poll Taxes For 1942, 1943,
and 1944 Of Veterans Cancelled.**

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

May 29, 1946.

My dear Mr. Marsh:

I am in receipt of your letter of May 28, in which you state that in your opinion a person who was inducted into the armed forces in the month of January, 1944 (you do not state when he was discharged) must pay his 1943 poll tax to be eligible to register and to vote in elections to be held this year, and you ask for my opinion on this question.

Section 2 of Article XVII of the Constitution of Virginia provides that "all poll taxes for the years 1942, 1943 and 1944 assessed or assessable against any person who is, or was at any time during the existing World War Two has been, a member of the armed forces of the United States in active service, are hereby cancelled and annulled."

In view of this constitutional provision, I am of opinion that the person to whom you refer, who was inducted into the armed forces in January, 1944, is relieved of his 1943 poll tax and does not have to pay the same to be eligible to register to vote in elections to be held this year.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General

**ELECTIONS—War Veterans Legislation: Procedure To Be Followed By
Members Of Armed Services In Applying For Ballot.**

HONORABLE JOE W. PARSONS, *Clerk*,
Circuit Court of Grayson County,
Independence, Virginia.

August 8, 1945.

My dear Mr. Parsons:

I am in receipt of your letter of August 3, in which you ask several question with regard to the war voters' legislation adopted at the special session of the General Assembly held this year.

You first ask if the requirements as to time of making application for absent voters' ballots prescribed by section 203 of the Code are applicable to applications made for ballots to the Secretary of the Commonwealth under the War Voters' Act.

In my opinion, your question must be answered in the negative, since the War Voters' Act does not prescribe any time limit within which applications for ballots may be made thereunder. Where a service man, however, applies to the local registrar for a ballot, it is my opinion that the requirements of section 203 as to the time of making application should be complied with.

You also ask the following question:

"Chapter 79 of the Extra Session of General Assembly of 1945 provides that a member of the armed forces can apply for a ballot pursuant to provisions of section 202, to his registrar. Is it necessary, under this chapter, when a member of the armed forces applies for a ballot to make the affidavit as required by section 203 and also make the oath before the registrar, as prescribed by section 7, chapter 2, of the Acts of the General Assembly of 1945? In other words, do they have to make the affidavit that they will be absent, as required by section 203, and the affidavit required by section 1(a) before the registrar? If this is true, they would first have to make an application and swear to same before a notary or other officer and then make an additional oath before the registrar, as provided by section 1(a), chapter 79, of the Extra Session of 1945 of the General Assembly."

Section 1 (a) of chapter 79 of the Acts of the Extra Session of 1945 reads as follows:

"Whenever the registrar of any precinct is satisfied that a person requesting an absentee ballot in person, pursuant to the provisions of section two hundred two-two hundred eighteen of the Code of Virginia, is in active service as a member of the armed forces of the United States in time of war and that such person is otherwise qualified to vote, such registrar shall furnish said person with an absentee ballot even though said person has not registered or paid any poll taxes, provided said person executes in the presence of such registrar an affidavit in form and content similar to the 'oath of voter' prescribed by section seven of chapter two of the Acts of the General Assembly of Virginia, extra session, nineteen hundred forty-five."

Since the quoted section provides for an oath to be executed by a service man in making application for an absentee ballot, such oath to be made in the presence of the registrar, it is my opinion that this oath is in lieu of the oath prescribed by section 203 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—War Veterans Legislation: How Registration Of Veterans To Be Effected.

March 19, 1946.

HONORABLE E. B. PENDLETON, JR.,
Treasurer of Louisa County,
Louisa, Virginia.

My dear Mr. Pendleton:

I have your letter of March 16, in which you state your understanding of the proper interpretation of Article XVII, paragraph 2, of the Constitution of Virginia as amended by the Constitutional Convention of 1945 to be as follows:

"All citizens of Virginia serving in the Armed Forces are forgiven the payment of capitation taxes while in active service and for three years prior to their discharge regardless of the length of time in the service and provided their discharge is honorable. Any person recently released from the Armed Forces does not owe any back capitation tax which might effect his right to vote. If such person was discharged in 1945, and otherwise qualified, he or she may vote without payment of capitation tax for the year in which discharged.

"In order to vote, every citizen, regardless of Armed Force status, must register with the registrar at the home precinct and must be 21 years of age or over. The only exception is when a serviceman is released from active duty too late to register for an election. In this instance he may vote."

In my opinion, the foregoing is a correct interpretation of the provisions of the Constitution as supplemented by Chapter 79 of the Acts of the Extra Session of 1945.

You next request my opinion upon the question whether it is the duty of the treasurer's office to place upon the list of persons whose capitation taxes have been paid, as required by law in order to entitle them to vote, the names of such members of the armed forces.

In my opinion, the names of such persons should not be placed upon the treasurer's list. Chapter 79 of the Acts of the Extra Session of 1945, a copy of which I am herewith enclosing, places upon the election judges the responsibility of determining the voting qualifications of such members of the armed forces. If their names should be placed upon the list of persons whose poll taxes have been paid, it might result in some misunderstanding or confusion with the State Auditor of Public Accounts, and the treasurer would have the burden of showing that the names on the list were persons whose taxes were not actually paid but were members of the armed forces.

It might be quite difficult to prove to the satisfaction of the Auditor that such persons were members of the armed forces. For this reason, I think the treasurer should advise persons who make application to have their names placed upon the list that same is not necessary, but that they may apply to the judges of election and vote. Of course, inasmuch as no capitation tax is required to be paid by any such member of the armed forces, they may register upon satisfying the registrar that by reason of their service they are exempt from the payment of the poll tax.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ESCHEATS—How Money Escheated To Commonwealth To Be Paid.

August 20, 1945.

MR. SEMMES CHAPMAN,
Special Commissioner,
Norfolk, Virginia.

My dear Mr. Chapman:

I am in receipt of your letter of August 17, concerning the final report as Special Commissioner in a chancery suit wherein the interest of one Luke A. Wright who died intestate at Norfolk more than twenty years ago, was sold for partition on December 16, 1944. You state that you would like to deposit this money with the Treasurer of Virginia rather than leave it to the credit of the court.

You probably are referring to sections 6311-6314 of Michie's Code which provide that money under the control of a court for five years can be paid to the Treasurer after certain formalities have been followed. Since the sale occurred on December 16, 1944, the necessary five years have not elapsed. The interest of the decedent in the realty will not escheat to the Commonwealth unless the provisions for an escheat under section 493, et seq. of Michie's Code have been followed. However, section 5283 of Michie's Code provides that the proceeds of any sale in a partition suit, with certain exceptions, shall be deemed personalty and, therefore, unless these certain exceptions apply, the ordinary rules of distribution of personal property would take effect.

Section 5273 of the Code provides for the ordinary distribution of the personal estate of a person dying intestate, and section 5275 of the Code provides further:

"To the Commonwealth shall accrue all the personal estate of every decedent, of which there is no other distributee."

It would therefore, appear that the Commonwealth of Virginia is a distributee of the personal estate you hold in your hands as administrator, provided there are no others with a better claim. It would seem that the settling of your accounts, payments to distributees and other matters in the administration of this estate should be conducted just as in any other estate, under the direction and supervision of the court in which you qualify.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FOREST FIRES—Appropriation For; Time For Use Of.

July 27, 1945.

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

My dear Mr. Dean:

This is in reply to your letter of July 19, in which you request my opinion upon the question which you set out in your letter as follows:

"During the fiscal year ended June 30, 1945, but after June 30, 1944, Scott County, along with others, was organized for forest fire control. The question now arises 'can a part of the \$15,000.00 available the second year be used as operation expenses in Scott County during the fiscal year ending June 30, 1946?'"

"It would appear that it was the intent of the Act that a part of the second year fund should be so used since there was no increase granted in the general fund for the 'Protection and Development of Forest Resources' as listed under Item 267."

I have carefully considered the provisions of the Appropriation Act referred to, and concur in your view that part of the \$15,000 appropriated for the second year's work may be used as operating expenses in Scott County during the present fiscal year.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Automobile Engaged In Transportation Of Illegal Ardent Spirits.

April 25, 1946

R. L. JACKSON, Esq.,
Acting Commonwealth's Attorney,
Madison, Virginia.

My dear Mr. Jackson:

This will acknowledge receipt of your letter of April 19, in which you state that recently an automobile transporting 17 pints of legal whiskey purchased outside of Virginia was seized in Madison County. The owner of the car was in the automobile, but was not driving. The driver, the other passenger, claimed sole ownership of the 17 pints of whiskey. You ask my opinion as to whether or not the automobile and the whiskey should be confiscated.

Considering, first, the automobile, it seems to me that the matter is adequately covered by the confiscation statute, section 4675 (38-a) of Michie's Code of 1942. Subsection (f) allows a person claiming to be the owner to intervene in the matter and be made a party defendant. Subsection (h) further provides that, if the claimant was the actual bona fide owner of said vehicles at the time of seizure, that he was ignorant of such illegal use thereof, and that such illegal use was without his connivance or consent, express or implied, the court shall relieve said vehicle from forfeiture and restore it to its innocent owner. If such facts can be shown by the owner in this case, he will be entitled to have his automobile restored to him. See *Stone v. Commonwealth*, 182 Va. 54 (1943).

As far as the 17 pints of whiskey are concerned, you state that the passenger claims ownership of the same. Under such circumstances, all the whiskey in excess of 1 gallon will be contraband and as such subject to confiscation also. See section 4675 (49-a) of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Automobiles Seized For Violation Of A. B. C. Act;
Status Of Title Where Release Bond Is Given.

June 20, 1946.

HONORABLE STANLEY A. OWENS,
Attorney for the Commonwealth,
Manassas, Virginia.

My dear Mr. Owens:

This will acknowledge receipt of your letter of June 7, in which you state that three automobiles were seized in your county under the Alcoholic Beverage Control law for illegal transportation of alcoholic beverages during March and April and that bonds were given in each case. You further state that on June 3 the circuit court dismissed the information which you had filed and vacated the bonds because you did not file the information within ten days after being advised of the seizure. Your inquiry is whether or not these bonds will be subject to confiscation in new information cases.

Since the bonds have been vacated by order of the court, I do not see how they can be the basis of a new action. Further, since the bonds were given pursuant to the informations which you had filed and the informations have been dismissed, the bonds, though not vacated, would not support an action. See *Cason v. Commonwealth*, 181 Va. 297 (1943).

You further state "I am wondering, therefore, if you desire yourself to file such informations within twelve months from the date of their seizures."

My policy has been, where the information was not filed within the time required by the statute by the Commonwealth's Attorney, to leave further proceedings to the discretion of the local Commonwealth's Attorney. In other words, if you consider the case one in which further proceedings should be had, you can forward the papers to me and I will be glad to sign them and allow you to proceed in that manner.

Your last inquiry is "could you advise me whether the respective owners of these automobiles can give good title to them after they were seized and the fact of such seizures immediately communicated to the Commissioner of Motor Vehicles which was done in these cases?"

In cases where the Commissioner has been notified of the seizure and the car remains in the possession of the officers, I do not believe good titles can be given until final disposition of the cases. However, where the parties elect to give a bond and obtain possession before the hearing of the information, the statute provides that the condition of the bond is for the performance of the final judgment of the court on the trial of such information, and further that, if a judgment of forfeiture be entered, a judgment may be entered against the obligors on the bond for the penalty thereof to be discharged by the payment of the appraised value of the property so seized and costs. In cases where such a bond is given, it is my opinion that the bond takes the place of the automobile and that, after the clerk notifies the Commissioner of Motor Vehicles that such a bond has been given, good title to the car might thereafter be passed, irrespective of the outcome of the court proceedings on the information.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Authority Of Game Commission To Lease Or Convey Land.

June 26, 1946.

MR. T. E. CLARKE,
Executive Director,
Commissioner of Game and Inland Fisheries,
Richmond 13, Virginia.

My dear Mr. Clarke:

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

"Reference is made to the attached letter requesting a site for a radio station antenna on Fort Lewis Mountain refuge which is the property of this Department.

"I should like to know whether or not this Department could lease 1,000 square feet at the site mentioned in the attached correspondence to the Blue Ridge Broadcasting Corporation."

The correspondence enclosed with your letter indicates that the Blue Ridge Broadcasting Corporation desires to secure a permanent lease from the Commission of Game and Inland Fisheries. I know of no authority which the Commission has to convey such an interest in its real estate.

You have further suggested that possibly the Commission could grant "a permanent lease subject to ratification by the General Assembly." Not having the power to grant such an interest in real estate as an original proposition, it is my opinion that such a conveyance would not be valid. However, if it would serve the purpose of the corporation, I see no reason why the commission may not grant it a permit to erect its radio station antenna on the Commission's property and then the Commission could, if it so desired, ask the General Assembly at its next session for authority to make such a conveyance to the Blue Ridge Broadcasting Corporation as the Commission desires.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Shooting Fish; Unlawful.

January 30, 1946.

HONORABLE S. W. COLEMAN, JR.,
Trial Justice,
Gate City, Virginia.

My dear Judge Coleman:

I have your letter of January 26, in which you request the opinion of this office as to whether Chapter 183 of the Acts of 1942 has the effect of making it lawful to shoot fish in the streams of Scott County so long as such fish are not found on the shoals.

Section 39 of the Game, Inland Fish and Dog Code, codified as Virginia Code (Michie, 1942) section 3305 (40), in general terms prohibits the taking of fish in inland streams by any means other than hook and line or rod and reel, unless and until otherwise authorized by regulation of the Commission

of Game and Inland Fisheries. Chapter 183 of the Acts of 1942 expressly prohibits shooting fish "while in shoals" in any stream in Scott County.

At the time the 1942 Act was passed, the Commission had not promulgated any regulation making it lawful to shoot fish at any time or in any inland stream, though it might have done so. It would seem, therefore, that the effect of the 1942 Act, by making statutory a specific prohibition relating to the shooting of fish on shoals in the streams of Scott County, was to limit to this extent the general power of the Commission to legalize the taking of fish otherwise than by hook and line.

It is the opinion of this office, therefore, that Chapter 183 of the Acts of 1942 should not be construed to make lawful the shooting of fish in any streams or under any circumstances, but that it simply had the effect of making statutory, as to fish in shoals in streams of Scott County, a general prohibition which was theretofore subject to unlimited modification under the rule-making power of the Commission of Game and Inland Fisheries.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Authority Of Game Commission To Issue Regulation Prohibiting Fishing In Wise County.

April 19, 1946.

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

My dear Mr. Hart:

From the correspondence which you have forwarded to me it appears that the Trial Justice of Wise County, Virginia, has some doubts as to the applicability of certain fishing regulations of the Commission to his county.

I shall attempt to set forth below the issue as I see it:

Chapter 77 of the Acts of the General Assembly of 1936 provides:

"1. Be it enacted by the General Assembly of Virginia, That it shall be unlawful to fish in the streams of Wise County except during the open season when bass and trout may be taken. Any violation of this act shall constitute a misdemeanor, punishable by a fine of not less than five dollars."

The above enactment was expressly repealed by Chapter 145 of the Acts of the General Assembly of 1944, page 184, which is as follows:

"Be it enacted by the General Assembly of Virginia:

"1. That Chapter seventy-seven of the Acts of Assembly of nineteen hundred thirty-six, approved February twenty-sixth, nineteen hundred thirty-six, fixing open season for fishing in Wise County, is hereby repealed."

Subsequently on March 30, 1945, the Commission of Game and Inland Fisheries adopted the following regulation:

"It shall be unlawful to angle in the waters of Wise county except during the open season for taking bass and trout. Provided, however, this shall not apply to the Clinch River."

The Trial Justice of Wise County seems to be of the opinion that, since the legislative enactment on this subject has been expressly repealed, the Commission of Game and Inland Fisheries is without authority to prohibit the same or similar Acts by an appropriate regulation.

Section 33 of the Game, Inland Fish, and Dog Code of Virginia is as follows:

"Power to regulate taking wild birds, wild animals and Fish.—Having a due regard for the distribution, abundance, economic value and breeding habits of wild birds, wild animals, and fish in inland waters, the commission is hereby vested with the necessary power and authority to determine when, to what extent, if at all, and by what means it is desirable to restrict, extend, or prohibit in any degree the provisions of law obtaining in any county in this State for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any wild bird, wild animal, or fish from inland waters and may upon its own motion or upon written petition of one hundred licensed resident land owners of any county propose regulations for such purpose. The full text of any regulations proposed shall be published ten days before the same may be acted upon and shall name the time and place that the matters mentioned therein will be taken up, at which time any interested citizen shall be heard. Such publication shall be made in a newspaper published in the county, and, if there be none such, in a newspaper in the adjoining county or section or in such other manner as may be convenient. If the commission is satisfied that the proposed regulation, or any part thereof, is advisable, such regulation, or any part thereof may be adopted and, if so, it shall be published in the manner directed for proposing the same and shall name the date when it is to become effective. It shall be a misdemeanor to violate such regulation, or any part thereof, and any person convicted of such violation shall be fined not less than ten nor more than one hundred dollars and may be sentenced to thirty days in jail, either or both. A copy of any regulation adopted by the commission shall be mailed to the clerk of the circuit court, who shall make record thereof and cause the same to be posted in front of the courthouse of said county." Acts of the General Assembly of 1930, page 646.

The powers granted to the Commission by the above statute would seem to me ample to sustain the validity of the regulation which has been questioned by the Trial Justice of Wise County, and that is my opinion on the matter, assuming, of course, that the regulation was adopted in accordance with the procedural steps outlined in section 33.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Unused Stamps; Sale By Commission.

July 27, 1945.

HONORABLE M. D. HART,
Executive Secretary,
Commission of Game and Inland Fisheries,
Richmond 13, Virginia.

My dear Mr. Hart:

I am in receipt of you letter of July 25, which I quote below:

"Please note the attached from Mr. L. W. Gibbon, which is self-explanatory.

"The stamps he mentioned are the unused stamps returned to this office at the end of the fiscal year by the Clerks and after these reports are checked are disposed of as other office waste papers.

"We would like to have your opinion, if as an *administrative act*, we would be justified in selling these out of date, unused stamps to stamp collectors thereby saving some money which otherwise would be lost."

So far as I can find there is no statute dealing with this question. Upon consideration, however, I know of no legal objection to the Commission selling these unused stamps after they have become invalid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH, AND DOG CODE—Prosecutions For Violation Of Dog Code.

March 18, 1946.

HONORABLE J. TINSLEY COLEMAN, JR.,
Commonwealth's Attorney for Nelson County,
Lovingston, Virginia.

My dear Mr Coleman:

Before me for consideration is your letter of March 16, stating in effect that the Game Warden of Nelson County has issued warrants of arrest for violation of Chapter 35 of the Acts of Assembly of 1944, and you desire my opinion as to whether or not the alleged violations of said Act may be prosecuted under the general game, inland fish and dog laws (section 3305(82) Michie's Code of 1942) or whether the sole penalty is the one mentioned in the Act itself.

As you know, Chapter 35 of the Acts of 1944 and its predecessors attempt to deal only with situations in certain named counties. The Act also states:

"Any person owning or keeping any such dog within the counties of Nansemond, Rappahannock, Russell, Southampton, Tazewell, Culpeper or Nelson without having paid the special license tax thereon and secured a metal tag for it, as prescribed by this section, shall be required to forthwith procure such special license for it, or, at his option, permit

the game warden to kill the dog, which the game warden shall forthwith do if the license tax be not paid; and the game warden shall kill any such dog, of unknown ownership, found running at large, on which the special license has not been paid."

Since this section allows the owner or keeper to exercise his option as to whether or not he shall pay the license tax or allow the dog to be killed by the game warden, it is my opinion that persons keeping or possessing such dogs without said license are not subject to the general penal provisions of the game, inland fish and dog law which requires a fine, procuring of the license and killing of the dog if the license and fine are not paid immediately.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

**GENERAL ASSEMBLY—Use Of Senate And House Chambers When
Assembly Is Not In Session.**

May 21, 1946.

HONORABLE D. V. CHAPMAN, JR., *Director*,
Division of Grounds and Buildings,
Room 312 Finance Building,
Richmond, Virginia.

My dear Mr. Chapman:

This will acknowledge receipt of your letters of May 16 and 17, in which you inquire as to authority of the Governor in allowing the chambers of the House of Delegates and the State Senate to be used by various persons while those respective legislative bodies are not in session. It appears that the Virginia inter-collegiate Council has sent a representative to the Governor with a view to using said chambers for a meeting of the Virginia Student Legislative Assembly.

Section 410 of Michie's Code of 1942 provides:

"The Director of the Division of Grounds and Buildings, under the direction and control of the Governor, is to have control of the Capitol Square, the expense of keeping the same in order to be paid by him out of the fund appropriated for that purpose, to keep the keys of the Capitol and, subject to the right of the several departments, divisions and agencies to use in the performance of their duties such rooms as are or may hereafter be assigned to them, to take charge of all the rooms in the Capitol, the State Library building and the State Office building, but he shall not take charge of the executive chambers, the office of the Secretary of the Commonwealth, Division of Purchase and Printing the old and new Senate Chambers, the old and new halls of the House of Delegates, the offices of the Clerks of the Senate and House of Delegates, the committee rooms, the enrolling office, the general library and the offices and court room of the Court of Appeals. * * *"

While it does not appear that control of these halls during the interim between legislative sessions has been given to any particular person, my conclusion from the above statute is that the matter was to rest with the clerks

of the respective legislative bodies. Any request for the use of these halls should be made to these officials.

It would seem to me that a quotation from the above statute would be sufficient to answer your second inquiry as to the use and control of the remainder of the Capitol Building. On this same subject section 402 of the Code provides:

"The Register of the Land Office shall be Superintendent of Grounds and Public Buildings, and as such shall have under his care the capitol, the library building, the public grounds, and all other public property at the seat of government not placed in the charge of others, and shall protect the same from depredations and injury: * * *

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**HAMPTON ROADS SANITATION DISTRICT—Validity Of \$6,500,000
Bond Issue.**

May 15, 1946.

HONORABLE CHARLES B. BORLAND, *Chairman,*
Hampton Roads Sanitation District Commission,
Norfolk 10, Virginia.

My dear Mr. Borland:

At your request, I have reviewed the proceedings of your Commission relating to the issuance of \$6,500,000 principal amount of Revenue Bonds (herein called the "Bonds") of Hampton Roads Sanitation District Commission (herein called the "Commission") a body corporate and politic organized and existing under and by virtue of the laws of the Commonwealth of Virginia.

The Bonds are authorized under and pursuant to the sanitation districts law of nineteen hundred and thirty-eight of the Commonwealth of Virginia (Acts of Assembly, Virginia, 1938, Chapter 335, approved March 31, 1938) and the acts amendatory thereof and supplemental thereto (hereinafter called the "Act"), and by virtue of a favorable vote of a majority of the qualified voters of the Hampton Roads Sanitation District voting in an election on the issuance of bonds held July 21, 1942, and under and pursuant to a resolution of the board of the Commission adopted April 15, 1946 and entitled "Resolution authorizing the issuance of \$6,500,000 Revenue Bonds of Hampton Roads Sanitation District, and providing for the application of the proceeds thereof and for the rights of the holders thereof" (herein called the "Resolution").

The Bonds consist of \$4,000,000 principal amount of Serial Revenue Bonds (herein called "Serial Bonds") and \$2,500,000 principal amount of Sinking Fund Revenue Bonds (herein called "Sinking Funds Bonds") divided into three series of Sinking Fund Bonds, one designated "Series A" and limited to the principal (herein called "Serial Bonds") and \$2,500,000 principal amount of Sinking Fund principal amount of \$750,000 and the third designated "Series C" and limited to the principal amount of \$1,000,000.

The Serial Bonds mature on September 1 of the following years in the following respective amounts, are numbered from 1 to 4000, inclusive, in

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order of maturity, and the Serial Bonds of the several maturities bear interest at the respective rates per annum set forth below:

Year	Amount	Numbers (inclusive)	Interest Rate
1949	\$120,000	1- 120	4%
1950	120,000	121- 240	3 1/2%
1951	125,000	241- 365	3%
1952	125,000	366- 490	2 3/4%
1953	130,000	491- 620	2 1/2%
1954	130,000	621- 750	2 1/2%
1955	135,000	751- 885	2 1/4%
1956	135,000	886-1020	2 1/4%
1957	140,000	1021-1160	2 1/4%
1958	140,000	1161-1300	2 1/4%
1959	145,000	1301-1445	2 1/4%
1960	150,000	1446-1595	2%
1961	150,000	1596-1745	2%
1962	155,000	1746-1900	2%
1963	155,000	1901-2055	2%
1964	160,000	2056-2215	2%
1965	165,000	2216-2380	2%
1966	165,000	2381-2545	2%
1967	170,000	2546-2715	2%
1968	175,000	2716-2890	2%
1969	175,000	2891-3065	2%
1970	180,000	3066-3245	2%
1971	185,000	3246-3430	2%
1972	185,000	3431-3615	2%
1973	190,000	3616-3805	2%
1974	195,000	3806-4000	2%

The Sinking Fund Bonds mature on September 1, 1974. The Sinking Fund Bonds of Series A bear numbers from 1 to 750, inclusive, and bear interest at the rate of one and three-quarters per centum (1 3/4%) per annum. The Sinking Fund Bonds of Series B bear numbers from 1 to 750, inclusive, and bear interest at the rate of one and seven-eighths per centum (1 7/8%) per annum. The Sinking Fund Bonds of Series C bear numbers from 1 to 1000, inclusive, and bear interest at the rate of two per centum (2%) per annum.

The Bonds are dated March 1, 1946 and are of the denomination of \$1,000 each, and interest on the Bonds is payable semi-annually on the first days of March and September in each year until the Commission's obligation with respect to the payment of the principal sum thereof shall be discharged. Both principal of and interest on the Bonds are payable at the principal office in the Borough of Manhattan, City and State of New York, of The Chase National Bank of the City of New York, or its successor as paying agent, in any coin or currency of the United States of America which, on the respective dates of payment thereof, shall be legal tender for the payment of public and private debts. The Bonds are in the forms of coupon bonds payable to bearer, registerable as to principal only or as to both principal and interest and, if registered as to both principal and interest, convertible at the expense of the holder into coupon bonds.

The Bonds are subject to redemption, prior to maturity, on September 1, 1949 (but not prior thereto) or any interest payment date thereafter, as a whole or in part, by operation of the sinking fund provided for in the Resolution or at the election of the Commission otherwise than by operation of

the said sinking fund in order and at various redemption prices as specified therein.

The Bonds are authorized and issued by the Commission for the principal purpose of financing the construction and acquisition of sewerage facilities, to be located in the Hampton Roads Sanitation District and consisting of trunk sewers, pumping stations, two sewage treatment plants, and appurtenant structures (herein and in the Resolution referred to as the "Project"), which are more fully described and provided for in the Resolution and which, together with all such other sewerage facilities in the District as the Commission may construct or acquire for its purposes, are hereinafter referred to as the "System".

The United States of America, acting by and through the Federal Works Administrator, has entered into an agreement (herein and in the Resolution referred to as "FWA Contract") dated October 13, 1945, with the Commission, relating to the construction, operation and disposition of other sewerage facilities, located or to be located in or about the Hampton Roads Sanitation District and consisting of trunk sewers, pumping stations, one sewage treatment plant, and appurtenant structures (herein referred to as the "Government Project"). By the FWA Contract and subject to all the terms and conditions thereof, the United States has agreed at its expense to complete the construction of the Government Project to the extent permitted by a cost limitation of \$2,750,000 with respect to a part thereof, and, after completion thereof, to convey the same by quitclaim deed to the Commission.

The obligation of the United States to make such conveyance under the FWA Contract is subject to the principal condition that construction shall have previously been completed of certain sewerage facilities (herein and in the FWA Contract referred to as the "Commission's Facilities") described in the FWA Contract and to be located in the Hampton Roads Sanitation District. With reference to this condition, the Commission has agreed in the FWA Contract to proceed with and complete the construction of the Commission's facilities by not later than June 30, 1948, and covenants in the Resolution to complete the construction of the part of the Project described in the Resolution as the Primary Construction Program by June 30, 1948, and the Federal Works Administrator has stated that the said Primary Construction Program includes all of the Commission's Facilities required under the FWA Contract to be completed as a condition to such conveyance of the Government Project.

The FWA Contract requires payment by the Commission to the United States of a sum not exceeding \$2,750,00 in consideration of such conveyance of the Government Project. Under the terms of the FWA Contract as affected by the determinations made in the Resolution, such sum is to be payable, without interest, in installments of \$50,000 on June 30 in each of the years 1950 to 1974, inclusive, and \$150,000 on June 30 in each year thereafter. The FWA Contract pledges to the payment of such installments the net revenues (after provision for all reasonable operations, maintenance and replacement expenses as therein defined) to be derived from various parts of the System, but, by express provision in the FWA Contract, such pledge is stated to be in all things junior and subordinate to any pledge effected or other provision made by or in any bonds or other obligations of the Commission executed or issued in accordance with the FWA Contract or any resolutions making provision for the security of such bonds or obligations.

In my opinion, Hampton Roads Sanitation District Commission is a body corporate and politic, constituting a political subdivision of the Commonwealth of Virginia and a Governmental instrumentality to provide for the public health and welfare, validly organized and existing under the Act and duly created by or pursuant to the Act of Assembly of the Commonwealth of Virginia, approved April 1, 1940, known, designated and cited as Chapter 407 of the Acts of Assembly, Virginia, 1940, and both of said acts are valid

enactments, and the Commission has good right and lawful authority to acquire and construct the Project subject to usual and ordinary governmental authorizations and restrictions and to maintain and operate the System and to charge and collect fees, rents and charges (herein called "Service Charges") for the use and services of the System and to perform all of its obligations under the Resolution in those respects.

In my opinion, the Commission had and has the right and power, under the Act, to adopt the Resolution and to authorize the Bonds, and the Resolution has been duly adopted by the board of the Commission, is presently in full force and effect and is valid and binding upon the Commission in accordance with its terms as a part of its contract with the several holders of the Bonds, and no other authorization for the Resolution is required.

In my opinion, the Bonds are authorized by the Act and have been duly and validly authorized and issued by the Commission and no other authorization is required therefor, and the Bonds are valid and legally enforceable and binding direct and general obligations of the Commission in accordance with their terms and, subject to the provisions for registration, are negotiable instruments.

I further advise you that in my opinion:

1. The holders of the Bonds are and will be entitled to the benefits of the provisions contained in the Act and in the Resolution with respect to and for the protection of the Bonds and with respect to the rights and remedies of the holders thereof, and such provisions are valid and binding upon your Commission.

2. The Commission has power and is obligated, in the manner and to the extent set forth in the Act and Resolution, to charge and collect Service Charges for the use and services of the System sufficient to provide revenues to pay, as the same shall become due, the principal and interest on the Bonds and to make the other payments and establish or maintain the reserves required by the Resolution for the security of the Bonds.

3. The Bonds are secured by pledge as hereinbelow stated, and the lien of such pledge on the revenues subject thereto is in all things superior to any lien thereon effected by the FWA Contract. All of the revenues to be derived by the Commission from or for the use and services of the System, are pledged under the Resolution to the payment and security of the Bonds subject to a lien for the payment of the compensation and expenses of any statutory trustee hereafter appointed pursuant to the Act and the Co-Trustee and Paving Agent appointed pursuant to the Resolution and to the withdrawal therefrom of amounts for maintenance, repair and operation of the System or completion of the construction of the Primary Construction Program, and subject also to the release from the lien of such pledge of amounts for application to the expense or cost of extensions, equipment, improvements or betterments with respect to the System and to payments required under FWA Contract, which release may be effected only after and subordinate to provision from such revenues for the reserves required by the Resolution for the security of the Bonds.

4. The FWA Contract is a valid contract between the Commission and the United States of America.

5. The property of the Commission within Hampton Roads Sanitation District is and will be exempt from taxation under the laws of the Commonwealth of Virginia, and the revenues of the Commission derived therefrom will not be subject to income taxation under said laws.

6. Interest on the Bonds and the revenues of the Commission are exempt from Federal income taxes under present statute.

7. The Bonds are exempted securities within the meaning of Section 3 (a) (2) of the Securities Act of 1933, as amended, and to the extent provided in said act.

8. The Bonds are exempted securities within the meaning of the Trust

Indenture Act of 1939, and the Resolution is not required to be qualified under the provisions of said act.

9. The Bonds and the Resolution conform as to form and tenor with the terms of the Bonds and of the Resolution as summarized in the Official Statement of the Commission, dated April 30, 1946, with respect to the Bonds.

10. The statements made in such Official Statement with respect to the Act and legal matters affecting the Commission and the Bonds are correct and omit no statement which, in my opinion, should be included or referred to therein.

11. The provisions of the Act with respect to the enforcement of Service Charges are valid and in the event of delinquency in payment by any person of such service charges with respect to real estate occupied by said person it will be the duty of the City of Norfolk and Newport News or any other public body supplying water to said person for use upon such real estate, unless said person shall sooner cease to dispose of wastes emanating from such real estate through the facilities of the Commission, upon notice and other proceedings and subject to application to the State Health Commissioner as provided in the Act, to cease supplying water to said person as occupant of such real estate, but such Service Charges do not constitute a lien upon any such real estate.

12. Service Charges which may be fixed upon an appeal under Section 7 (f) of the Act shall be fixed in accordance with the provisions of the Act applicable to the Commission, including the provisions of Section 7 (c) that the schedule of such Service Charges shall comply with the terms of the contract of the Commission with the holders of the Bonds.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

INEBRIATE PERSONS—When Subject To Commitment To State Farm.

April 25, 1946.

HONORABLE RIPLEY S. WALKER,
Commonwealth's Attorney.
Woodstock, Virginia.

My dear Mr. Walker:

This will acknowledge receipt of your letter of April 15, in which you ask my opinion as to whether or not there is any authority to allow you as Commonwealth's Attorney to insist upon commitment to the State Farm of persons convicted of drunkenness on various occasions, but who have not been declared inebriates by a proper commission.

The only punishment prescribed by statute for public drunkenness is a fine of not less than one dollar nor more than ten dollars. See Code section 4568.

You will also notice that counties, cities and towns are given authority to pass parallel ordinances, and there is no restriction on what the punishment might be.

Chapter 202-a of Michie's Code of 1942 establishes a State Farm for Defective Misdemeanants, including inebriates. However, the only authority I can find for committing a person there is in subsection 8, where a person previously has been convicted of a misdemeanor three or more times and is

then under sentence to serve or is serving a jail sentence. These conditions do not obtain in your case, as the person cannot be under a jail sentence.

I am, therefore, of the opinion that commitment to the State Farm cannot be made simply as a result of a conviction of drunkenness under section 4568.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INFANTS AND INSANE PERSONS—When Proper For Check To Be Made Payable To Guardian Ad Litem.

June 11, 1946.

HONORABLE L. L. WATTS, *Executive Secretary*,
Virginia Commission for the Blind,
3003 Parkwood Avenue,
Richmond 21, Virginia.

My dear Mr. Watts:

This will acknowledge receipt of your letter of June 7, the first paragraph of which I shall quote:

"The question has arisen as to the legality of a guardian ad litem being made the payee of Aid to the Blind assistance Checks. Our understanding of a guardian ad litem is that he represents the client in court litigations, but has no jurisdiction over the person and his finances."

As the name implies, a guardian ad litem is appointed by the court or its clerk to represent an infant or insane defendant in a particular suit or controversy. If there is no suit or controversy pending in court, it naturally follows that there would not be a guardian ad litem. I am, therefore, of the opinion that a guardian ad litem should not be made the payee of an Aid to the Blind assistance check unless such check is delivered in connection with some pending suit or controversy.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Counties And Towns Not To Consolidate Jails.

June 11, 1946.

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

My dear Major Youell:

I am in receipt of your letter of June 6, from which I quote as follows:

"As you know, section 13 of chapter 217 of 1942 Acts of Assembly provide for counties and cities to enter into agreements for the joint use, maintenance and operation of jails and jail farms.

"I would like to be advised as to whether or not a county might enter into an agreement with a town for the confinement in the lockup owned and operated by the town of prisoners committed to the county jail.

"This question has arisen since one of the counties of the State desires to close its jail, which is very unsatisfactory from many standpoints, and commit prisoners held on felony charges to the jail of another county and to confine prisoners held on misdemeanor charges in the lockup of a town in the county."

Section 13 of chapter 207 of the Acts of 1942, as amended by chapter 220 of the Acts of 1944, provides that any two or more counties may effect an agreement for the joint use, maintenance and operation of the jail or jail farm of either of such counties. The section does not authorize the making of such an agreement between a town and a county and, in the absence of such authority, I am of opinion that it does not exist.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JAILS AND PRISONERS—Hospital And Guard Expense Where Prisoner Is Confined To Hospital; How Paid.

May 29, 1946.

HONORABLE H. L. KENT, *Clerk.*
Board of Supervisors,
Marion, Virginia.

My dear Mr. Kent:

I refer to your letter of May 11, with reference to the payment by the Commonwealth of hospital expenses for one Elliott Thomas, who was charged with murder, and the compensation of two persons who were employed to guard this man while he was in the hospital. It appears from your letter and enclosures that this man was never in jail, but was taken by the sheriff to the hospital directly from the scene of the crime, since he was suffering from multiple fractures of the skull. It further appears that the guards were employed at the instance of the Attorney for the Commonwealth upon advice of the hospital authorities and were never appointed as deputy sheriffs. It further appears that the claim for the hospital expenses and the guards was approved by the Judge of the Circuit Court of Smyth County as a proper charge against the Commonwealth under section 4960 of the Code and also that the claim was audited by the office of the Auditor of Public Accounts.

Under the facts set out above, it is my opinion that the claim referred to is a proper charge to be paid out of the State treasury under section 4960 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Criminal Jurisdiction Of State In Blue Ridge Parkway.

May 16, 1946.

MAJOR C. W. WOODSON, JR., *Superintendent*.
Department of State Police,
Richmond, Virginia.

My dear Major Woodson:

This is in reply to your letter of May 14th, in which you request my opinion as to whether a member of your department have criminal jurisdiction in the Blue Ridge Parkway.

The deeds by which the land for the Blue Ridge Parkway was conveyed to the United States provided that the conveyances were made upon express condition that the respective governmental, legislative, executive, and judicial powers and jurisdiction of the Commonwealth of Virginia should be such as is defined and provided for by Section 4 Chapter 3, Acts of Assembly of Virginia of 1936, and by Section 19a of the Code of Virginia as amended by Chapter 382 Acts of Assembly of 1936.

By both of these statutory provisions the Commonwealth of Virginia ceded to the United States the power and jurisdiction to regulate traffic over all highways maintained by the United States on the land acquired by it for the Parkway, and also ceded to the United States the power and jurisdiction to protect the lands and all property thereon belonging to the United States from damage, depredation, or destruction. Section 19a of the Code of Virginia as amended contains the following provision:

"The Commonwealth of Virginia hereby further reserves unto herself over all such lands exclusive governmental, judicial, executive and legislative powers, and jurisdiction in all civil and original matters, except in so far as same may be in conflict with the jurisdiction and powers herein ceded to the United States."

Substantially the same provision is also contained in Section 4 Chapter 3 of the Acts of Assembly of 1936.

It is my opinion, therefore, that the Department of State Police has the same criminal jurisdiction in the Blue Ridge Parkway as it has throughout the State generally, except with respect to the regulation of traffic, jurisdiction over which was expressly ceded to the United States.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Chamberlain Hotel Site At Old Point Comfort.

June 24, 1946.

SENATOR L. U. NOLAND,
Richmond, Virginia.

My dear Senator Noland:

I acknowledge your inquiry requesting my opinion as to whether any additional legislation from the Commonwealth of Virginia is necessary in order to safeguard and protect the interest of the United States of America against any possible reverter of the property known as the "hotel site" upon which

the Chamberlain Hotel is located on the United States Government reservation at Old Point Comfort, Virginia.

Chapter 16 of the Acts of the General Assembly of Virginia, approved February 17, 1922, reads as follows:

"Whereas, the United States of America will grant no site or right to any corporation or individual for the construction or operation of a hotel upon any portion of said land until the consent of the Commonwealth of Virginia has been obtained therefor, in order to avoid any possibility of the land so granted for a hotel site reverting to or revesting in the Commonwealth of Virginia, therefore

"Be it enacted by the General Assembly of Virginia, that the consent of the State of Virginia is hereby given to such individual or company, their successors and assigns, as may be granted a site and privilege by the Secretary of War of the United States to construct, maintain, and operate a hotel at Fort Monroe, Virginia, for the term of fifty years from the date of such grant, together with the privilege of renewing the same, in case such renewal be granted by the Secretary of War for a further period of fifty years, from the expiration thereof, hereby abridging and suspending for the period of such grant the aforesaid provision of the Deed from the Commonwealth of Virginia to the United States by which such site may, might or could revert to or revest in the Commonwealth of Virginia, because of the same being used for other purpose than fortification or national defense; provided, however, that all the property located on the site hereby granted shall be liable for such taxes, state and local, as other property in the County of Elizabeth City is liable to, during the term of the aforesaid grant or extension thereof.

The foregoing Act has never been repealed or amended and is still in full force, virtue and effect.

Pursuant to the foregoing Act, the Secretary of War executed a lease by which there was granted to Old Point Comfort Hotel Corporation, under date of April 26, 1926, the privilege of constructing, maintaining, and operating, a hotel at Fort Monroe, Virginia, upon a certain site known as the "hotel site". The rights and privileges granted to the lessee corporation were acquired by Old Point Comfort Corporation, which was the owner of the lease, and the rights and privileges incident thereto, at the time that the said lease and rights were acquired in condemnation proceedings by the United States of America for the use of the Secretary of the Navy.

The Secretary of the Navy and the Secretary of War have decided that they no longer desire to use the hotel, or the rights and properties incident thereto, and have declared the said lease, rights and properties surplus and have transferred the same to the War Assets Administration for disposition. The War Assets Administration now desires to convey the leasehold estate, together with the rights and privileges incidental thereto and property thereunto appertaining, to certain persons in the State of Virginia who were formerly connected with the corporation which owned the same at the time of the condemnation proceedings.

You request my opinion upon the question whether or not the fact that the said leaseholder estate was acquired by the United States for use by the Secretary of the Navy would subject the property to any danger of reversion to the Commonwealth of Virginia of the lands covered by said lease, or the reversion of same in the Commonwealth by reason of the provisions of the Act hereinabove quoted.

In my opinion, the temporary acquisition by the United States for the use of the Navy of the leasehold referred to, and its incidental properties.

did not have the effect of extinguishing the existence of said leasehold, and that the same is still within the protected provisions of said Chapter 16 of the Acts of 1922, hereinabove quoted.

It is my opinion that the above Act of the General Assembly of Virginia adequately expresses the consent of the Commonwealth of Virginia to the lease of the hotel property at Old Point Comfort, Virginia, for a period of fifty years with the privilege of renewal for an additional period of fifty years in the discretion of the Secretary of War.

Accordingly, it is the opinion of this office that in the event the United States of America, acting through any of its proper agencies, now conveys the said leasehold estate to the hotel property constructed thereon to a person or persons for the unexpired portion of the grant from the Secretary of War for fifty years from April 26, 1926, and for the additional period of fifty years in the discretion of the Secretary of War, that the hotel property will not revert to nor revest in the Commonwealth of Virginia during said periods.

The Commonwealth of Virginia having expressed its legislative consent to the property embraced in said lease being used and occupied as a privately owned hotel for the periods mentioned, it is my fixed conclusion that during said periods it is my opinion that the Commonwealth of Virginia is not in a position to object to the ownership of the leasehold tenancy of the Chamberlain Hotel by said privately owned interests.

In my opinion no further legislation from the Commonwealth of Virginia is required. The present legislation amply precludes any reverter of the Hotel site to the Commonwealth of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JURISDICTION—Authority Of State Health Department Respecting
George Washington National Forest.**

June 27, 1946.

DR. I. C. RIGGIN, *Commissioner*,
Department of Health,
Richmond 19, Virginia.

My dear Dr. Riffin:

This will acknowledge receipt of your letter of June 18, in which you ask as to the authority of the State Health Department to regulate summer camps within the George Washington National Forest.

The Summer Camp Act is chapter 303, the Acts of 1940 (section 1607g-k) Michie's Code of 1942, and provides that it shall be unlawful to operate a summer camp after July 15, 1940, without first obtaining a permit from the State Health Commissioner. Before such a permit is issued the Commissioner shall cause investigations to be made to ascertain sanitary conditions at the camp. The Act further provides for revocation of the permit if on inspection the sanitary facilities are inadequate with right of appeal upon refusal or revocation of a permit to the appropriate circuit court of the city or county involved.

The George Washington National Forest is a Federal enclave and jurisdictional conditions involved necessitate an examination of pertinent State and Federal statutes. Section 19a of the Virginia Code (carried as 19c of Michie's Code of 1942) provides that the conditional consent of the Com-

monwealth is given to the acquisition by the United States by purchase leave or eminent domain of any lands in Virginia for the reservation of the forest or national resources. The Act further provides:

"Over all lands heretofore or hereafter acquired by the United States for the purpose mentioned in this section, the Commonwealth of Virginia hereby cedes to the United States the power and jurisdiction to regulate traffic over all highways maintained by the United States thereon, to protect the said lands and all property thereon belonging to the United States from damage, depredation or destruction and to operate and administer the said lands and said property thereon for the purpose for which same shall be acquired by the United States. *The Commonwealth of Virginia hereby reserves to herself all other powers * * *.*" (Underlining supplied.)

The Federal statute on this subject, found in 16 US CA 480, is as follows:

"The jurisdiction both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

This statute was recently before the Supreme Court of the United States involving an attempt by Arkansas to tax certain activities inside national forests within the exterior limits of the State. See *Wilson v. Cook*, decided March 4, 1946. There the Court said:

"By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants 'be absolved from their duties as citizens of the State.' [citing cases.]

"Our conclusion, based on the construction of the interrelated state and federal statutes, is that the state has territorial jurisdiction to lay the tax upon activities carried on within the forest reserve purchased by the United States."

Construing these statutes together, I am of the opinion that chapter 303 of the Acts of 1940 is applicable to persons as defined in the Act in the George Washington National Forest.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**JUVENILE AND DOMESTIC RELATIONS—Child Labor Law;
Vending Of Newspapers.**

October 11, 1945.

JUDGE JAMES HOGE RICKS,
Juvenile and Domestic Relations Court,
1115 East Clay Street,
Richmond 19, Virginia.

My dear Judge Ricks:

I have your letter of October 2, from which I quote as follows:

"I have a case pending before me brought against a man who is a local agent for a newspaper.

"He has been brought into court on a charge of violating the Child Labor Law. He has been selling newspapers to boys over twelve who have no badges and to others under twelve years of age, who in turn sell the papers on the street or deliver them to their own customers.

"The warrant charges that he did unlawfully 'allow or permit John Doe, a minor, under the age of twelve years, to sell newspapers other than as prescribed by law.'

"I am inclined to think this is a violation of section 15 of the Child Labor Law, but I am writing to ask your opinion on this point."

It would seem to me quite doubtful whether, under the provisions of section 1808-o of Michie's Code (section 15 of the Child Labor Law), the defendant can be convicted of permitting or suffering the sale of newspapers by the boys in question. In fact, said defendant perhaps would have no effective means of preventing the sale if the boys should buy the papers from some other source. Section 1808-q of Michie's Code provides a punishment for any person who "employs, procures, or, having under his control, permits a child to be employed * * * in violation of any of the provisions of this act, shall be guilty of a misdemeanor * * * ." It would seem to be largely a question of fact whether or not the person who sells the papers to the children employs them, or procures them to be employed in selling the papers in violation of the section above referred to. It would seem that the last mentioned section would restrict the provision with reference to permitting children to work to those persons who have the children under control, such as parents or guardians. Whether the selling of the papers to the children is one step in a joint enterprise between the agent and the children, as shown by the evidence, would seem to me to determine the question of guilt if the warrant should be amended or new warrant issued to embrace the broader charge.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**MARRIAGE AND DIVORCE—License Where One Party Is Not Citizen
Of United States.**

HONORABLE R. W. BICKERS, *Clerk*,
Circuit Court of Greene County,
Standardsville, Virginia.

My dear Mr. Bickers:

This is in reply to your letter of January 15, in which you ask the following question:

"I would like to have your opinion on the following matter: Do I have the right to issue marriage license to a lady who is from England and is going to marry a man from this County? I understand that she is now on her way here. I do not know if she has applied for citizenship paper or not, but if she has or has not do I have the right to issue license? Or how long do they have to wait?"

I know of no statutory restrictions imposed in connection with the granting of marriage license where one of the parties is not a citizen of this country. In my opinion, in the case you put you should be governed by the general statutes relating to the issuance of marriage licenses just as if both parties were citizens of this country.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MINING—Railroad Tunnel Is Not A Mine.

May 20, 1946.

HONORABLE JOHN HOPKINS HALL,
Commissioner of Labor and Industry,
Richmond, Virginia.

My dear Mr. Hall:

This will acknowledge receipt of your letter of May 14, in which you seek my opinion as to the coverage of the Mine Safety Act. You state that the C. C. & P. Railroad is constructing an extension in Dickenson County which requires tunneling through a mountain, and the question has arisen as to whether or not this work is subject to safety inspection by your Division of Mines.

The statute to which you refer is Chapter 150 of the Acts of the General Assembly of 1940. Subsection (a) of section 1887-p provides:

"(a) All the provisions of this chapter intended to safeguard life and property shall extend to the operation of quarries, i. e., all open cut or underground excavations, whether it be for coal or other minerals such as rock, sand, clay, etc., in so far as such laws are applicable thereto. * * * *"

I am in agreement with the general contention that safety statutes such as this should be given a liberal construction and extend all safe-guard possible to those persons who labor under such hazardous conditions, but I do not believe that it was the intention of the statute to consider construction excavation and tunneling such as this within the definition of a mine. This seems to follow from a reading of the subsection quoted above. I am, therefore, of the opinion that this particular operation is not within the coverage of the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE CODE—Operator's And Chauffeur's Licenses.

HONORABLE H. M HEUSER,
Trial Justice,
Wytheville, Virginia.

May 29, 1946.

My dear Mr. Heuser:

This is in reply to your letter of May 27, in which you ask the following questions:

- "1. Who must have an operator's license?
- "2. Who must have a chauffeur's license?
- "3. Who must have both of these licenses?"

The pertinent statutory provisions are as follows:

Section 2154 (172) of Michie's Code of 1942 provides in part that:

"No person except those expressly exempted under sections three, four, seven and thirteen (d) of this act shall drive any motor vehicle upon a highway in this State unless such person upon application has been licensed as an operator or chauffeur by the division as hereinafter provided."

An "operator" is defined as "every person, other than a chauffeur, in actual physical control of the motor vehicle on a highway." Section 2154 (170) of Michie's Code of 1942.

A "chauffeur" is defined as "every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property." Section 2154 (170a) of Michie's Code of 1942.

Section 2154 (182) of Michie's Code of 1942 provides that:

"Any person licensed as a chauffeur under this act shall not be required to procure an operator's license, but no person shall drive any motor vehicle as a chauffeur unless licensed as a chauffeur."

Applying these statutory provisions:

Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons or property must secure a chauffeur's license, and when such chauffeur's license is secured such person may operate any motor vehicle, privately owned or otherwise, without being required to secure an operator's license;

Every person operating a motor vehicle other than as a chauffeur as above defined must secure an operator's license, but need not secure a chauffeur's license;

At no time is it necessary for a person to have both a chauffeur's license and an operator's license. If the person having an operator's license desires to operate a motor vehicle as a chauffeur, he must secure a chauffeur's license, but he then no longer needs an operator's license.

Summarized, those exempted from securing an operator's or chauffeur's license are (1) persons operating road machinery, farm tractors and implements of husbandry; (2) persons serving in the army, navy, or marine corps operating an official motor vehicle when furnished with a driver's permit issued by the service with which they are connected, section 2154(172) of

Michie's Code of 1942; (3) non-residents holding valid operator's license issued by their home state, section 2154(173) of Michie's Code of 1942; (4) persons holding instruction permits issued by the Division of Motor Vehicles, section 2154(176) of Michie's Code of 1942; and (5) persons holding a temporary driver's permit issued by the Division of Motor Vehicles, section 2154 (182d) of Michie's Code of 1942.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**MOTOR VEHICLE CODE—Authority Of State Police To Investigate
Violation Of Weight Load By Trucks.**

June 6, 1946.

MR. WILLIAM C. SEIBERT, *Director*,
Transportation Division,
State Corporation Commission,
Richmond 19, Virginia.

My dear Mr. Seibert:

I am in receipt of your letter of May 24, in which you state that Captain Thomas of the State Police desires my views on two questions:
The first question is:

"In the first case, a trooper of the State Police force stops a North Carolina tractor-trailer unit, and the trooper has reason to believe the vehicles are over the weight limit permitted on the Virginia highways. The trooper does not have any scales. He stops the vehicle and asks to see the manifest so that he might determine from the records of the shipments if the vehicle is within the limit permitted. The driver indicates a sealed pouch and states that he is not able to open the pouch. The question is: Can the trooper require the driver to open the pouch or open the pouch himself?"

Your attention is invited to sub-section (b) of Section 9 of the Motor Vehicle Code, 2154(56) Michie's Code, which reads as follows:

"Any peace officer, who shall be in uniform or who shall exhibit his badge or other sign of authority, shall have the right to stop any motor vehicle, trailer or semi-trailer, upon request or signal, for the purpose of inspecting the said motor vehicle, trailer or semi-trailer as to its equipment and operation, its manufacturer's serial or engine number, its contents or load, if such motor vehicle, trailer or semi-trailer is a property carrying vehicle, and for the purpose of securing of such other information as may be necessary."

Also to Section 116 of the Motor Vehicle Code, 2154(163) Michie's Code, which reads in part as follows:

"An officer authorized to enforce the law under this act, having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of loadmeters or scales. Should the said officer find that the weight of any vehicle and its load is greater

than that permitted by this act, or that the weight of the load carried in or on such vehicle is greater than that for which said vehicle is licensed to carry under the provisions of this act, he may require the driver to unload at the nearest place where the property unloaded may be stored or transferred to another vehicle, such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor permitted by this act."

It is my opinion that the quoted statutes contemplate that the weight of a vehicle on the highways should be determined by means of loadmeters or scales. It is true that section 2154 (56) permits a peace officer in uniform to inspect a motor vehicle as to certain matters, including "its contents or load" but I do not think that this authority is broad enough to authorize the peace officer to break the seal of a pouch to examine the manifest without the consent of the driver. The officer has been given full authority to ascertain the weight of the load by the use of loadmeters or scales and I do not think that the statute intends that the officer may determine the weight of the load by breaking the seal of a pouch to examine the manifest.

Your second question is:

"The second case also involves loaded vehicles. A motor vehicle is informed by other motor vehicles that a weighing party is on a highway. The vehicle then goes into a service station and there stops with the idea that he will remain until the weighing party leaves the road and then proceed. A trooper has a weighing machine and locates the vehicle in the service station area. The question is: Can the trooper go on the property of the service station operator, which, of course, is open to the general public, and weigh the vehicle?"

If the peace officer knows that the vehicle he desires to weigh has actually been upon the highway immediately preceding its entrance to the service station property, I am of opinion that he may go upon the property of the service station operator and weigh the vehicle which happens to be at the service station and that the operator of the vehicle may not validly object to this action. However, I doubt very much whether the peace officer can do this, if the service station operator objects. Section 2154(56) of Michie's Code authorizes a peace officer to inspect a motor vehicle in public garages or repair shops for certain purposes, but this authority does not include weighing.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NEPOTISM—Definition Of Brother-in-law.

April 12, 1946.

HONORABLE DANIEL WEYMOUTH,
Attorney for the Commonwealth,
Northumberland County,
Heathsville, Virginia.

My dear Mr. Weymouth:

Before me for consideration is your letter of April 9, requesting my opinion as to whether or not section 660 of Michie's Code of 1942 would prohibit the

employment by your local school board of a mechanic who is the husband of a sister of the wife of one of your local school board trustees.

As you indicate, the above Code section prohibits the employment by any school board of a brother-in-law of any member of the school board, and your inquiry as to whether or not the mechanic is legally a brother-in-law of the school board member.

It has heretofore been my policy to construe this statute strictly against rendering persons ineligible for such employment. The term "brother-in-law" is defined as follows in Webster's New International Dictionary, Second Edition (1935): "The brother of one's husband or wife, also the husband of one's sister; *sometimes inaccurately, the husband of one's wife's (or husband's) sister.*"

Cases construing various statutes including this term reached varying conclusions. See Words and Phrases, Volume 5, page 847. However, it is my opinion that the dictionary definition above quoted is the proper one and the mechanic in your case would not be a brother-in-law to the school board trustee.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES PUBLIC—Authority To Carry Concealed Weapon.

April 20, 1946.

MR. G. E. SAMS,
Box 1234,
Danville, Virginia.

My dear Mr. Sams:

Receipt is hereby acknowledged of your letter of April 19, requesting my opinion as to whether or not under the laws of this State you as a Notary Public are authorized to carry a concealed weapon.

Section 4789 of the Code of Virginia provides that Notaries Public while in the performance of their duties of their office shall be conservators of the peace.

Section 4534 of the Code expressly exempts conservators of the peace from the criminal sanctions imposed thereunder for the carrying of concealed weapons.

I am, therefore, of opinion that while in the performance of your official duties as Notary Public you are entitled to carry a concealed weapon.

In the fairly recent case of *Hall v. Commonwealth*, 179 Va. 652, 657 (1942) our Supreme Court said:

"We think it is plain that it was never intended that all the Notaries Public in the State could go about at all times armed."

However, an instruction practically identical with what I have said above in regard to carrying a weapon while in the performance of the duties of your office was granted and approved in the case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

NOTARIES PUBLIC—Why Extra Fees May Be Charged.

HONORABLE W. E. DUKE,
Notary Public,
1 Court Square Building,
Charlottesville, Virginia.

March 19, 1946.

My dear Mr. Duke:

I have your letter of March 16, in which you state that by reason of your being a notary public you were appointed to act also as special commissioner of a court of a foreign State to take depositions in this State. You request my opinion upon the question whether your compensation for services rendered as such special commissioner would be restricted to that prescribed by statute for services rendered solely in the capacity of a notary public.

In my opinion the mere fact that you are a notary, or that you may certify the depositions in that official capacity, would not in any way affect the amount which it would be proper for you to receive for the services rendered by you in the capacity of special commissioner of the foreign court. In other words, in this case you will be acting in two separate capacities. In one of these the compensation for services rendered is not prescribed by statute and your compensation for such services may be fixed without regard to the limitations on the other. A notary frequently acts also as the court reporter in taking depositions and is paid for his work in each capacity separately.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Power Of Parolee To Make Contract And Sue And Be Sued.

HONORABLE WILLIAM S. MEACHAM,
Director of Parole,
Corrections Building,
Richmond, Virginia.

May 2, 1946.

My dear Mr. Meacham:

This will acknowledge receipt of your letter of April 24. You ask my opinion as to whether or not a parolee may enter into a contract in his own name and be sued or whether a committee must be appointed by a court to represent him under section 4999 of the Virginia Code.

In my opinion, a parolee may enter into a contract in his own name and sue and be sued without the necessity of a committee being appointed to represent him in these matters. In *Haynes v. Peterson*, 125 Va. 730, 735 (1919) this was said:

"There is no statute or decision in this State that denies to a convict the right to contract, acquire, hold and dispose of property * * * *."

You will further notice that the statute providing for the appointment of a committee, Code section 4998, first requires that the person have real

or personal property and, second, that said committee shall have charge of said estate until the convict is discharged from confinement. It would thus seem that the end of confinement would terminate the powers of the committee. Section 4999 further provides:

"No action or suit on any such claim or demand shall be instituted by or against such convict after judgment of conviction, and *while he is incarcerated.*" (Italics ours).

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PHOTOGRAPHY—License; Extent Of..

October 25, 1945.

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

My dear Mr. Butler:

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

"Will you please give me your opinion as to whether or not any person, firm or corporation, who has been licensed by the Board of Photographic Examiners of the State of Virginia, may engage in the practice of photography in any place in the State of Virginia other than that named in the license.

"Section 4359(96c) apparently prohibits this, but section 4359(98) and section 193 of the Tax Code apparently provide for privileged licenses.

"It will deeply appreciate your opinion as to the requirements for a person to practice photography in any town or county in Virginia."

The section to which you refer does not prohibit a person from practicing photography in any place other than that named in the license. The section simply provides that a person may not practice photography in any place other than that named in the license unless he gives the Board of Photographic Examiners a written notice of his intention to so practice at such other place.

The license required of a photographer by section 4359 (96) is not a revenue license, but a regulatory license, and is not to be confused with the revenue license required by section 193 of the Tax Code. The revenue license required by the latter section should be taken out for every separate place of business where the photographer operates. See section 131 of the Tax Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC ASSISTANCE ACTS—Eligibility: Meaning Of “Residence” In Case Of A Soldier Serving Outside State.

January 30, 1946.

MISS MAY O. HANKINS,
Commissioner of Public Welfare,
Travelers Building,
Richmond, Virginia.

My dear Miss Hankins:

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

“Your opinion as to the interpretation of the word “residence” in connection with its usage in section 1904-25 will be greatly appreciated. The current problem arises out of the fact that many children of bonafide Virginia residents were born out of the State at the place where their fathers were in military service.

* * * * *

“ * * Specifically, if a man is out of the State or out of his locality and while serving in the armed forces establishes a temporary home and children are born while they are so residing, do the parents and the child have a residence in Virginia that would permit them to receive assistance under the Virginia Public Assistance Act?”

Among the conditions prescribed by section 1904 (25) of the Code (Michie, 1942) for eligibility of a dependent child for aid to dependent children is that such child shall have resided in this State one year immediately preceding the application for aid and that such child be living in this State at the time of application for aid with his father, mother, or other designated relatives.

Unquestionably a person who becomes a member of the armed forces while he is a resident of this State, and returns to Virginia after his discharge to resume his residence, at no time loses his legal residence in Virginia, and the legal residence of his child, even though born out of the State, follows that of the parent. Thus, although the parent and child have not been physically residing in Virginia while the parent was in the armed forces, both the parent and the child have at all times been legal residents of Virginia, and it may be said that the absence from Virginia was not occasioned by a voluntary choice of the parent, but by virtue of orders of superior authority.

While I do not think that it would be proper to go so far as to say that legal residence alone controls eligibility to aid to dependent children, I do think when the unusual circumstances of the case you put are considered and especially in the light of the rule that the Public Assistance Act should be liberally construed to accomplish its beneficent purposes, it must be held that children of discharged members of the armed forces in the situation described by you are eligible for aid to dependent children. It must be remembered that the opinion I am herein expressing is confined to cases where the parent was a resident of Virginia at the time he became a member of the armed forces, and that the parent and child are residents of Virginia and physically residing therein when the application for relief is made.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—City Treasurers; Authority Of.

February 20, 1946.

MR. W. F. BUTTERWORTH,
City Treasurer,
Hopewell, Virginia.

My dear Mr. Butterworth:

I am in receipt of your letter of February 14, in which you ask a number of questions relative to your duties as a city treasurer in connection with depositories for public funds. Most of your questions relate to the construction of section 350 of the Tax Code of Virginia. This section, however, relates entirely to how public funds shall be deposited, paid out and disbursed by *county* treasurers and is not applicable in any respect to city treasurers.

So far as I have been able to find, there is no statute prescribing what depositories shall be used by a city treasurer for State Funds which he collects, nor do I find any statute providing how depositories which may be used by a treasurer for State funds shall secure the payment of such funds. As you probably know, section 374 of the Tax Code provides that each county and city treasurer shall monthly, or oftener if called upon by the State Comptroller, make up a statement of all State revenue collected by him and at the same time pay into the State treasury the amount due.

As to what should be done in connection with the revenue of your city collected by you, this is controlled by your city charter and ordinances enacted pursuant thereto, and I suggest that you consult your city attorney on this point.

Very sincerely yours,

ABRAM P. STAPLES,

Attorney General.

PUBLIC FUNDS—Constitutionality Of Statute To Provide Insurance For State Employee.

September 12, 1945.

MR. JOHN B. BOATWRIGHT, JR.,
Recording Secretary,
Virginia Advisory Legislative Council,
State Capitol,
Richmond 19, Virginia.

My dear Mr. Boatwright:

This is in reply to your letter of September 6, from which I quote as follows:

"The Virginia Advisory Legislative Council was directed by S. J. R. No. 15 passed in the regular session of the General Assembly, 1944, to make a study and report upon insurance protection for persons in State employ. A copy of this resolution is attached.

"Doubt has arisen as to whether or not the State can constitutionally appropriate funds which together with contributions from employees would be used to obtain such insurance coverage for State employees. The Chairman of the Committee making this study, Honorable Edward

O. McCue, Jr., of Charlottesville, has requested me to write you and obtain your opinion as to whether or not the State is permitted under the Constitution to make appropriations to take out such insurance with private companies."

I can find no provision of our State Constitution which prohibits such an appropriation, nor do I believe that the general principles of constitutional law forbid the expenditure of public funds for the purpose you describe. It is fundamental, of course, that appropriations of public funds must be for public purposes. The general principles applicable to the use of public funds are well discussed in 42 American Jurisprudence, Public Funds, Section 57. There it is said that whether an enterprise for the advancement of which it is proposed to use public funds has a public purpose is dependent upon the facts of the particular case. However, if the purpose of an expenditure of public funds is legitimate, it will not necessarily be defeated because it involves payments to individuals. The Legislature has wide discretion in determining the purposes for which public funds may be expended. In this connection the text goes on to say:

" * * * What is for the public good and what are public purposes for which appropriations may be made are questions which the legislature must in the first instance decide. In this matter Congress or a state legislature is not limited by necessity alone. In determining the question, it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive or violative of a constitutional provision. The means and methods of promoting a public purpose by legislative enactments are ordinarily for legislative determination. The legislature is the sole judge of the wisdom, expediency, and necessity for expending the state's money, the amount to be expended, and the inauguration of the policy of government under which it is spent, unless the Constitution restricts or prevents such action. When the legislature has declared the use a public one, its judgment will be respected by the courts, unless the use is palpably without reasonable foundation. If it does not clearly appear from the act of appropriation that it is for a purely private purpose, the court cannot so decide. If any doubt exists as to whether it is for a public or a private purpose, the court must uphold the legislative act."

Applying the principles above set out, if the General Assembly is of opinion that, if it should appropriate money to assist in obtaining insurance protection for State employees of the character you describe, it would result in procuring a better class of employees and preventing frequent changes in personnel and thus advance the public welfare, I should not think that a court would interfere with its judgment.

37 American Jurisprudence, Municipal Corporations, Section 124, contains the statement that:

"A municipal corporation, having power to increase the wages of its employees, may take out group insurance for their benefit, the expenditure being viewed by the courts as for a public purpose."

It would appear that such a doctrine would be equally applicable to the State. See also Annotations in 16 A. L. R. 1089 and 27 A. L. R. 1267.

On the whole my conclusion is that the General Assembly may constitutionally appropriate funds which together with contributions from employees would be used to obtain group health, accident and hospitalization insurance coverage for State employees. Of course, you will understand that in this communication I am dealing only with general principles and I do not wish

to be understood to be expressing the view that any and every type of legislation dealing with this subject would be valid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**PUBLIC NUISANCES—State Police May Abate Use Of Poisonous Snakes
In Public Gatherings.**

July 27, 1945.

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

My dear Governor Darden:

I have before me your request for my opinion upon the matter hereinafter set forth. It seems that certain persons in Lee County, Virginia, have publicly announced their intention of bringing a number of live and poisonous reptiles, such as copperhead and rattle snakes, to a religious meeting and releasing same there, or otherwise exposing persons present to the danger of being bitten by them. You request my advice as to what action, if any, State and county law enforcement officers, such as members of the State police force and county sheriffs, are authorized to take to prevent said persons from carrying out their announced intentions.

It is a well-settled rule of law that dangerous animals, such as mad dogs or poisonous reptiles constitute a public nuisance when they are permitted to run at large or are used in any manner which will expose persons to danger of injury therefrom. It is equally well-settled that it is the duty of police and other law enforcement officers to suppress or abate such a nuisance.

In line with the foregoing rule of law, it is my opinion that the State police officers, and the county sheriff and his deputies, are fully authorized and empowered by law to seize or kill any snakes released at any such public gathering, or brought to any such gathering for the purpose of being released or used in accordance with the public announcement above referred to.

Sincerely yours,

ABRAM P. STAPLES.

**PUBLIC OFFICIALS—Interest In Public Contracts; Printing Of Required
Advertisements.**

March 15, 1946.

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

My dear Mr. Moses:

This is in reply to your letter of March 14, from which I quote as follows:

"Previous correspondence has told you of the fact that in addition to being commissioner of the revenue of Pittsylvania county I am also

publisher and owner of the Pittsylvania Star, a weekly newspaper printed at Chatham with wide circulation in the county.

"It has been the practice of my predecessors to advertise in the local papers prior to January 31 of each year that all wholesale and retail merchants must procure their annual license prior to that date. I also wish to advertise that one of my deputies will be in various localities of the county to assist in preparation of State income tax returns.

"Assuming that such advertising is legitimate office expense and approved by the State Compensation Board, may such advertisements be published in the Star and I reimbursed for the same?"

Assuming, as you state, that the advertisements you mention are legitimate office expenses of your office as commissioner of the revenue, approved by the State Compensation Board, I am of opinion that you may carry such advertisements in the newspaper owned by you and be compensated for the same.

Your next question is:

"A further question arises as to printing for county schools. During late spring I am frequently approached by representatives of county schools as to printing commencement programs, programs for plays, etc., connected with the closing of school and school activities. It is my understanding that the funds to defray these expenses are raised by the various classes of the school, through dramatic presentations and public subscriptions and that no part of this money is appropriated by the school board or any public authority. Could I legally contract to do such printing for the public schools?"

If the funds from which the cost of the printing is paid are not public school funds, I am of opinion that you are not prohibited from doing the printing mentioned.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**PUBLIC OFFICES—Compatibility: Member Of County Finance Board
Not To Serve On County School Board.**

HONORABLE R. D. STONER, *Clerk*,
Circuit Court of Botetourt County,
Fincastle, Virginia.

December 3, 1945.

My dear Mr. Stoner:

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

"May I request your opinion as to whether the citizen member of the Finance Board of a county, who later was appointed a member of the School Board of the same county, can continue to serve as the citizen member of the Finance Board?"

Section 644(1) of the Code provides that no state or county officer shall be chosen or allowed to act as a member of a County School Board. There are

certain exceptions, but there is none covering the citizen member of a County Finance Board, and I am, therefore, of opinion that this section prohibits the citizen member of the County Finance Board from acting as a member of the County School Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**PUBLIC OFFICES—Compatibility Of Offices: Trustee Of County Library
Not To Serve As Librarian.**

September 12, 1945.

HONORABLE JOHN WARREN COOKE,
Member of House of Delegates,
Mathews, Virginia.

My dear Mr. Cooke:

I am in receipt of your letter of September 7, in which you ask if a member of the board of trustees of a county free library system may act as librarian temporarily to fill a vacancy while the board is securing a new librarian.

I doubt whether there is anything in section 365 of the Code, to which you refer, which would prohibit a member of the board of trustees from acting as temporary librarian and receiving compensation therefor. However, I am inclined to agree with you that a member of the board of trustees is prohibited from acting as librarian. I refer you to section 4706 of the Code, which, among other things, makes it unlawful for a trustee of any public trust or fund to be interested in a contract for furnishing supplies or performing any work for such trust or fund. The board of trustees of a county library has control of the expenditures of all money credited to the county free library fund. Therefore, it seems to me that for a member of such board of trustees to make an agreement with the board to perform work for it as librarian comes within the prohibition of section 4706 of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**PUBLIC OFFICES—Compatibility Of Offices: Registrar Eligible For Ap-
pointment As Clerk Of Court.**

August 2, 1945.

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

My dear Mr. Marsh:

I am in receipt of your letter of August 1, which I quote below in full:

"Chapter 306, page 449, of the 1944 Acts of the Assembly, provides for the appointment of general registrars for certain counties of this State.

Among other things, this Act states that 'the general registrar shall be appointed for a term of two years, beginning on the first day of May next following his appointment, and shall not hold any elective office at any time during his term of office of general registrar.' The term of the general registrar of this county commenced on May 1, 1945, and this office is held by one of the deputy clerks of this county

"As you probably have heard by now, Mr. John M. Whalen, Clerk of the Court of this county, died on July 30, 1945, and this vacancy has not yet been filled. One of the applicants for appointment to this office is the deputy clerk and general registrar above mentioned.

"Some question has been raised as to whether or not he would be eligible for appointment to this office, it being an elective office, and the appointment would necessarily have to be made during his two year term of office as general registrar. I will appreciate it very much if you will let me have the benefit of your opinion in connection with this case."

Your inquiry, I take it, relates solely to the eligibility of the general registrar for appointment to the office of clerk during his two-year term as general registrar, and not to the question of whether both offices may be held by the same person at the same time. It does not appear necessary, therefore, to define "elective offices" as that term is used in the statute. Unquestionably I think the general registrar is eligible for appointment since, if the prohibition against *holding* both offices is applicable, the general registrar may be released from that office by resignation before qualifying as clerk. And, if it should be considered that the requirement of section 86 of the Code that a registrar shall be compelled to serve at least two terms includes the general registrar provided for in the statute to which you refer, he may be "excused" therefrom by the judge who makes the appointment of the clerk.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—County Superintendent: Expenses; How Paid.

August 10, 1945.

ROSS GIBSON, ESQ.,
Acting Commonwealth Attorney for Spotsylvania County,
Fredericksburg, Virginia.

My dear Mr. Gibson:

I am in receipt of your letter of August 7, with regard to the mileage allowance of a superintendent of public welfare using her own automobile.

It is my understanding that the board of supervisors of a county makes an appropriation to provide for the payment of public assistance, including the cost of administration, in accordance with a budget submitted, and that this appropriation is paid out on warrants of the local board of public welfare and not on warrants of the board of supervisors. The county is reimbursed for a prescribed percentage of the administrative expenses out of State funds and funds made available by appropriations from the Federal government. This reimbursement is made by the State Department of Public Welfare. See section 1904 (61) of Michie's Code of 1942. It does not appear to be a function of the board of supervisors under the Public Assistance Act to pass on allowances for expenses, this being a matter for determination by the local board, subject to the

regulations of the State Department. I am informed that the State Department has established a policy in connection with allowances for use of personally owned automobiles and that ordinarily the limit is five cents per mile. Whether an exception has been made in the case of the superintendent of public welfare of Spotsylvania county, I am not advised. I, therefore, suggest that you communicate with the State Board of Public Welfare in Richmond.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Liens Against Estate Of Deceased Recipient Of Benefits.

April 1, 1946.

MRS. MABLE R. CURLIS, *Superintendent*,
Department of Public Welfare,
James City County,
Toano, Virginia.

My dear Mrs. Curlis:

This is in reply to your inquiry of March 25 as follows:

"When a person dies and there is a claim by the State on his estate due to the fact he has received Old Age Assistance from a Department of Public Welfare for a period of time, would not his burial expense and medical care have to be paid before a Department of Public Welfare can present their claim?"

The first paragraph of section 1904 (18) of Michie's Code provides that: "On the death of any recipient of assistance, the total amount paid as such assistance under this chapter shall be allowed as a claim against the estate of such recipient, prior to all other claims except prior liens and except funeral expenses not in excess of one hundred dollars, and except hospital bills, doctors' bills and medical expenses not in excess of one hundred and fifty dollars."

From the above it will be seen that, except for \$100 for funeral expenses and \$150 for medical, hospital and doctors' bills, the amount paid for assistance has a prior claim.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—How To Be Recorded Where Signature To Deed Is

May 3, 1946.

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

My dear Mr. Walker:

This is in reply to your letter of April 30, from which I quote as follows:

"A deed is presented for recordation in which a part of the signature

of one of the grantors is made in such a manner that it is impossible to make out any of the letters of the alphabet therein. In recording this deed is it proper or improper for the recording official to record this part of said signature as the certificate of acknowledgment shows it was intended to be, although it is not actually so written in said signature?"

I am of the opinion that you would be justified as clerk in recording as a grantor in the deed the name as the certificate acknowledgment indicates where the deed itself also shows the name of the individual in question as one of the grantors. I do not imagine that it is particularly unusual for the signature of a grantor in a deed to be illegible and I, therefore, think that the clerk would be justified in relying on the recitations in the deed itself and the certificate of acknowledgment to determine the proper interpretation of the illegible signature.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Tax On Deeds Conveying Several Tracts; Partition Deeds.

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

January 24, 1946.

My dear Mr. Walker:

I am in receipt of your letter of January 19 in which you ask two questions involving the recordation tax imposed by section 121 of the Tax Code of Virginia. Your first question is:

"A man owns two tracts of land and he and his wife own a third tract jointly. They execute a deed to themselves for all three tracts of land, with rights of survivorship as at common law, under authority of the provisions of Section 5147a of the 1945 Supplement to Michie's Code. When the deed is presented for recordation, what tax, if any, should be collected thereon?"

In my opinion, the recordation tax to be imposed on the above case should be based upon the actual value of the three tracts of land included in the deed. You will observe that the first paragraph of section 121 provides that the tax shall be based on the "consideration of the deed or the actual value of the property conveyed, whichever is greater." In this case, of course, the actual value of the property conveyed is the greater.

You next ask:

"Section 121 of the Tax Code provides that the recordation tax shall be 50 cents on any deed of partition.

"(a) Is the partition restricted to the execution of one deed or can each interested party receive a deed for his part from all other interested parties and yet for the purposes of recordation have all of said deeds considered as one, whether or not said deeds state the intent and consideration therefor? and; (b) If a partition can be affected by the execution of two or more deeds instead of the customary one, and said deeds fail to disclose that a partition is being made, but simply convey undivided interests, for

a nominal consideration, what tax and transfer fee should be collected upon the recordation of each deed, whether presented all at one time or separately?"

Where section 121 of the Tax Code provides that the tax "on any deed or partition among joint tenants, tenants in common or co-partners, shall be fifty cents," it is, in my opinion, referring to an instrument which is a deed or partition in fact. Where the partition is accomplished not by a deed of partition but by the execution of separate deeds, it is my opinion that each deed when it is offered for recordation shall be taxed, the tax to be computed on the consideration or actual value of the property conveyed, whichever is greater.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Trust Receipts; Manner Of Filing And Indexing.

July 16, 1945.

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

My dear Mr. Lee:

I am in receipt of your letter of July 12, from which I quote as follows:

"The Commercial Credit Corporation has sent to Honorable T. W. Carper, Clerk of the Circuit Court of Franklin County, Virginia, a statement of trust receipt financing in the form set forth in section 13, chapter 368, Acts of Assembly, 1944, beginning at page 541 and found on page 549. This law recites that it shall be the duty of the filing officer to mark each statement filed with a consecutive file number and with date and hour of filing, and to keep such statement in a separate file; and to note and index the filing in a suitable index, indexed according to name of trustee and containing a notation of the trustee's chief place of business as given in the statement.

"Mr. Carper desires to know what is a 'suitable index' as defined in such act, and upon what index book it should be so indexed. Is it necessary to have a separate index book or can it be placed on the miscellaneous docket index or any other index book? Mr. Carper also wants to know if this writing is to be spread on any book, and if so, what book?"

Section 13 of the Act to which you refer requires the clerk of the court with whom the statement provided for by the section is filed "to mark each statement filed with a consecutive file number, and with the date and hour of filing, and to keep such statement in a separate file; and to note and index the filing in a suitable index, * * * ." In my opinion, this language does not contemplate that this statement shall be spread on any book in the clerk's office, but that it shall be kept in a separate file along with similar statements and with the notations thereon as provided in the quoted language; nor do I think that a separate index is necessary, but that the miscellaneous lien docket index may be used. You will observe that the section provides that the statement shall be filed in the clerk's office where *miscellaneous liens* are recorded.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RETIREMENT SYSTEM—School Teachers' Contribution To Be Deducted From Salary.

March 21, 1946.

HONORABLE B. B. ROANE, *Clerk*,
Board of Supervisors of Gloucester County,
Gloucester, Virginia.

My dear Mr. Roane:

I am in receipt through you of copy of a resolution of the Board of Supervisors of Gloucester County adopted February 28, 1946, which resolution reads as follows:

"RESOLVED: That this Board hereby requests the opinion of the Attorney General of Virginia, as to whether or not the County School Board has the legal right to pay the retirement fund of the Superintendent of Schools and Clerk of School Board out of the General School Funds to the Virginia Retirement System. See report of Auditor of Public Accounts for year ending June 30, 1945."

I had occasion to express an opinion on this question under date of August 5, 1943, to the Attorney for the Commonwealth of Chesterfield County, and I quote below from such opinion:

"It seems to me that sections 13 and 19 of chapter 325 of the Acts of 1942, establishing a contributory retirement system for certain State employees and for public school teachers, clearly contemplates that each teacher's contribution shall be deducted from his or her salary for each and every payroll period. Section 13, for example, provides that:

"The Board shall certify * * * to the employer in the case of teachers, the proportion so computed of the earnable compensation of each member, and the * * * employer * * * shall cause to be deducted from the salary of each member on each and every payroll for each and every payroll period the proportion of the member's earnable compensation so certified * * *."

"Section 19 then provides that:

"* * * the employer (the school board) * * * shall, at the end of each payroll period, transmit to the State Treasurer its warrant for the payment of an amount equal to the aggregate amount of the deductions made for such payroll period from the salaries of all employees * * *."

I may add that the superintendent of schools in a county and the Clerk of the School Board are included in the definition of "teacher" as prescribed by section 1 of the Virginia Retirement Act.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SANITARY DISTRICTS—Must Be Created To Serve Eventually All Residents Of Proposed District.

July 30, 1945.

HONORABLE STANLEY A. OWENS,
Attorney for the Commonwealth,
Manassas, Virginia.

My dear Mr. Owens:

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

"We have under consideration in Prince William County the establishment of a sanitary district to enable people within the district to secure water and sewerage facilities.

"The question has arisen whether each and every property owner within such district might have a legal right to demand and receive water and service irrespective of his proximity to the mains. In other words, would the management of the district be required on application to supply a person so remote from the mains as to make it absolutely unsound economically?

"Another question which will confront us eventually is can we levy a tax against all the property in the district, whether it is served or not?"

I should say that the question you raise is at this stage more practical than legal. I presume that when the boundaries of the proposed district are fixed careful consideration will be given to them in order to determine whether service can be rendered within a reasonable time to all the property owners who desire it. Once the district is established it is unquestionably true that the authorities in charge cannot take the position that any one or more property owners can never expect to receive the benefits of the facilities furnished by the district. On the other hand, I do not think that all the property owners in the district could reasonably expect to receive the benefits of the facilities immediately after the district has been established. Manifestly some of the property owners can, on account of the location of their homes, receive the benefits of the facilities sooner than others. The plan of the district should certainly be worked out, I think, so as to eventually provide the services to all the property owners who desire it as soon as the funds of the district will permit. Whether or not any particular property owner has received equality of treatment will be, of course, dependent upon the facts existing in each particular case.

Replying to your inquiry concerning the taxation of property in the district, I am of opinion that pursuant to section 1560-o of the Code (Michie 1942) an ad valorem tax may be levied upon all property in the district subject to local taxation.

As I have also said above, the boundaries of the district should be fixed so that all the property in the district may eventually receive the benefits of the facilities.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Authority To Appoint An Acting Superintendent Of Schools.

June 27, 1946.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
State Board of Education,
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of June 27, from which I quote as follows:
"In connection with the appointment of an Acting Superintendent of Schools for the City of Charlottesville for the interim between the date of my resignation and the appointment and assumption of duties by my successor Mr. H. W. Walsh, an attorney on the Charlottesville City School Board, stated that in his opinion it was doubtful if there was any legal authority for the appointment of an Acting Superintendent of Schools, since there appeared to be no statute in the Virginia School Code providing for such a position. He also stated that there was no regulation of the State Board of Education in regard to this matter.

"At the last meeting of the State Board of Education the attention of the Board was called to the matter of a regulation regarding the qualifications and appointment of Acting Superintendents and the Superintendent of Public Instruction was requested to draft such a regulation for the consideration of the Board at a later meeting. I would appreciate it if you would give me an opinion as to whether or not there is legal authority for the appointment of Acting Superintendent of Schools in Virginia."

I quite agree with Mr. Walsh that there is no statute providing for the appointment of "Acting Superintendent of Schools." Section 649 of the Code simply provides that "any vacancy in the office of Division Superintendent shall be filled by the School Board or Boards of the Division."

Section 609 of the Code authorizes the State Board of Education to make needful rules and regulations not inconsistent with law for the management and conduct of the schools and I should think that the Board would have the authority to authorize the School Board to make such a designation in accordance with the terms prescribed by the regulation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Bond Issue Versus Pay-As-You-Go Program.

June 6, 1946.

HONORABLE ALLEN K. RANDOLPH,
Member House of Delegates,
Keene, Virginia.

My dear Mr. Randolph:

I have your letter of June 6, which I quote in full as follows:

"The voters of Albemarle County will decide at the polls on Tuesday, June 11, whether or not to authorize the County School Board to issue

bonds and borrow a sum not exceeding \$2,000,000 to be used in developing an improved consolidated public school system for the County.

"Some of those who are opposed to the issuance of bonds for this purpose offer in its stead a "pay-as-we-go" program, and declare that this can be financed by:—

"(1) Having the Board of Supervisors set aside funds, and if necessary levy additional taxes, to accumulate a sufficient sum to pay for the necessary capital expenditure at some future date.

"(Staunton case cited)
"or

"(2) That the Board of supervisors can set aside any part of or all of the monies whether for school or general purposes which Albemarle County receives from the Commonwealth of Virginia and so establish a fund to be used at a future date for capital expenditures necessary in improving the public school system, even if such action necessitates the levying of additional taxes to off-set this loss of operating revenue.

"(Princess Anne County Case)

"The legality of the above proposals is of vital importance to the voters in reaching an intelligent decision. Will you, therefore, be kind enough to give us your opinion on these two proposals?"

The pay-as-you-go program contemplates the appropriation by the board of supervisors annually of certain moneys to be set aside and accumulated in a fund for the purpose of financing the construction of school buildings amounting to about \$2,000,000. The plan contemplates these appropriations over a long period of years.

While the present board of supervisors might formulate a plan along the lines proposed and might make an initial appropriation to be set aside for the purposes indicated, this board would not have any power to legally establish the plan in the sense that it would impose any obligation upon the board of supervisors in future years to continue to make appropriations therefor. The board of supervisors in any subsequent year would have the right and power to refuse to appropriate any moneys, and it would be within their rights and authority to thus discontinue the plan.

The net effect of the action of the present board in initiating the plan and making the initial appropriation would be to make a continuing proposal to the boards which will meet in future years to take like action. However, the present board of supervisors has no power to bind any future board, or even the same board composed of the present membership to take similar action in any future year.

It cannot be said, therefore, that any such plan can be legally established in the sense that there would be any assurance that it would be carried out to completion.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—District School Bond Issue; How To Be Liquidated When Whole County Uses The School.

December 12, 1945.

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
Richmond, Virginia.

My dear Dr. Newman:

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

"In 1932 Poquoson District of York County voted a bond issue of \$25,000.00 and also borrowed an additional \$25,000.00 from the Literary Fund and used such funds in the construction of a high school building for the above mentioned district. Later on the County Board of Education decided to have only one high school in the county, namely, the one that had been built in the Poquoson District and is transporting all high school children in other districts in the county to the Poquoson High School.

"The Literary loan of \$25,000.00 has been paid off, but the \$25,000.00 invested in bonds is still outstanding.

"The School Board feels that it is not fair for the one district to take care of the above mentioned capital outlay and is interested in a county-wide levy to take care of the remaining \$25,000.00 indebtedness on the Poquoson High School, which is the obligation outstanding as a result of the original district bond issue.

"We have been requested to ask you for an opinion as to whether it will be legal for the Board of Supervisors to lay a county-wide levy to retire the \$25,000.00 indebtedness. In other words, can the Poquoson District be relieved of this debt and the debt assumed on a county basis."

I know of no method by which Poquoson District can be relieved of its primary liability for this debt. However, as you point out, the school board seems to have adopted as a county school what formerly was a district school. In such a case, it is my opinion that the district may be compensated for use of the school by the entire county, and, to accomplish this, I am further of the opinion that an appropriation can be made out of any funds available, which appropriation could be applied on the district debt. If there are no funds available out of which such an appropriation can be made, it is my view that the general county levy could be fixed at such an amount as to make funds available for this appropriation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Compulsory Attendance.

December 5, 1945.

HONORABLE CHARLES H. WILSON,
Attorney for the Commonwealth,
Nottoway, Virginia.

My dear Mr. Wilson:

Your letter of December 4, regarding the constitutionality of the Virginia compulsory school attendance law, has been received in the absence of the Attorney General.

So far as I know, the constitutionality of the Virginia law has not been passed on in a reported case. However, the constitutionality of statutes similar to Virginia's has been frequently upheld and indeed their constitutionality is generally beyond dispute. I refer you to 47 American Jurisprudence, Schools, Sections 156 and 157, and also to Annotation in 39 A. L. R. 477 and 53 A. L. R. 832. It should be noted that the Virginia statute (section 683 of the Code) does not require the attendance only upon the public schools, but the Act is complied with where a parent sends his child to a private denominational or parochial school or has his child taught by a tutor or teacher of qualifications prescribed by the State Board of Education.

Very sincerely yours,

W. W. MARTIN
Assistant Attorney General.

**SCHOOLS AND SCHOOL BOARDS—Eligibility; Residence Of Members
In Town Within Magisterial District.**

March 4, 1946.

HONORABLE ALTON I. CROWELL,
Attorney for the Commonwealth,
Pulaski, Virginia.

My dear Mr. Crowell:

This is in reply to your letter of February 26, in which you ask the following question:

"I have been requested by the Chairman of the Pulaski County School Trustee Electoral Board to obtain your opinion relative to the eligibility of a resident of Pulaski Magisterial District who is also a resident of the Town of Pulaski School District for appointment to the County School Board to represent the Pulaski Magisterial District. The Town of Pulaski is entirely within the Pulaski Magisterial District."

I direct your attention to chapter 416 of the Acts of 1932. This Act is applicable to Roanoke, Pittsylvania and Pulaski Counties, and the second section thereof reads as follows:

"2. For the purpose of representation only, each magisterial district and each incorporated town having a population of one thousand or more, according to the latest United States census, in each of said counties shall constitute a school district, and the county school board shall be composed of one member from each such district in the county, to be appointed or elected as provided by law, provided that the member from a magisterial district shall not be a resident of any town which is, by this section, constituted a school district."

Section 8 of the Act provides that its provision shall not become effective in either of the counties until approved by two-thirds of the members of the County School Board and the Board of Supervisors.

If the Act, therefore, has become effective in Pulaski County, it would seem that your question is clearly answered by section 2 quoted above.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Non Attendance Of Member; Compensation.

April 5, 1946.

HONORABLE H. E. GRIFFIN,
Treasurer of Buckingham County,
Buckingham, Virginia.

My dear Mr. Griffin:

This will acknowledge receipt of your letter of March 29, asking my opinion on the following:

"Has the School Board of any county the right to withhold the salary of any member on account of illness of said member?"
Prior to 1944 section 653-a-1 of Michie's Code of 1942 provided:

"The county school board may in its discretion provide for a per diem not exceeding five dollars per day and mileage not to exceed five cents per mile for each mile of travel on each day of such attendance by most direct route in going to and returning from the place of meeting for each member for each day he is in attendance upon meetings of the board, not to exceed thirty days in any one year, such per diem to be paid as other school expenses are paid."

This would seem to indicate that a member of the School Board was entitled to his per diem and mileage only in case of personal attendance upon the meeting of the School Board for that day. His absence, for whatever reason, would disqualify him from receiving it.

However, this statute was amended by Chapter 32 of the Acts of 1944 and instead of the above provision the following was inserted:

"The county school board may in its discretion pay each of its members an annual salary not exceeding one hundred eighty dollars, payable in equal monthly installments, and mileage to each member for each day he is in attendance upon meetings of the board, not to exceed five cents per mile for each mile of travel by the most direct route in going to and returning from the place of meeting. Such salary and mileage shall be paid as other school expenses are paid."

This puts the compensation of the School Board members on an annual basis, and I believe that as long as a person actually holds the office he is entitled to receive the compensation, whether he attends the meetings or not. This would continue so long as the member does not resign or until the office is vacated by some other procedure.

With respect to the mileage allowance, I am of the opinion that it can be claimed only for travel actually performed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Loans For Replacement Of Obsolete Equipment.

March 14, 1946.

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
Richmond, Virginia.

My dear Dr. Newman:

This is in reply to your letter of March 13, from which I quote below:

"Section 675 of the Code states:

"In order to purchase new school buses when same become available to replace *obsolete or worn-out equipment*, school boards are empowered, with the approval of the tax levying body and subject to other provisions of this section not inconsistent herewith, to borrow such sum or sums as are needed for that purpose; such loans shall be evidenced by notes or bonds negotiable or non-negotiable as the board determines, shall bear interest at a rate not exceeding six per centum per annum and shall be repaid within not less than five years of their date."

"As a result of certain transportation surveys made by the staff of the State Department of Education at the request of county boards of education it is very evident that more buses are needed in certain counties in order to adequately take care of the transportation situation. The new plan of distributing State school moneys, also, provides more funds for additional transportation.

"The question has been raised in one county because of the wording underscored above as to whether it is legal for the school board, with the permission of the board of supervisors, to borrow money for the purchase of buses when the buses to be purchased are not to replace obsolete or worn-out equipment, but are additional buses to provide adequate transportation for school children."

The section to which you refer authorizes the contracting of a loan for a definite purpose, namely, "to replace obsolete or worn-out equipment." I do not see how the statute can be extended so as to authorize the contracting of a loan for the purchase of equipment in addition to that which is obsolete and worn-out, and it is, therefore, my opinion that, in view of the very specific statutory provision, your question must be answered in the negative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Procedure Necessary To Sell Personal Property Not In Use.

February 20, 1946.

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
State Office Building,
Richmond, Virginia.

My dear Dr. Newman:

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

"We are in receipt of any inquiry from one of the division superintendents in which he requests that we secure from you an opinion as to whether it is possible under section 678 of the Code of Virginia for the school board to sell personal property without advertising the same for sale.

"As you no doubt realize the school board has from time to time well worn and in some cases obsolete school buses which in normal times they have been trading in on new buses, but under present conditions there is really no trade-in or exchange plan available and it does not seem that the formality of advertising and selling at public auction is sensible in trying to dispose of this worn out equipment. Other items, such as old furnaces and other odds and ends have to be disposed of by school boards at times and the question raised by the division in question covers all such items.

"I shall appreciate it very much if you will inform us as to whether there is any legal way to dispense with this apparent delay and inconvenience in the disposal of personal property that has really little value."

Section 678 of the Code, to which you refer, expressly provides that the school board shall have the same power to sell or exchange and convey "the real and *personal* school property of the county as the board of supervisors has with reference to the power of sale, exchange and conveyance of other county property under section 2723 of the Code * * *." The section then goes on to provide that property not exceeding \$500 in value may be sold by the school board after advertising for ten days. Section 2723 of the Code provides that the boards of supervisors shall have power to sell county property, but that no such property shall be sold without the ratification and approval of such sale and exchange by an order of the circuit court of the county or its judge in vacation.

Construing these two statutes together, it is my opinion that the school board of a county may only sell the personal school property by one of the two methods mentioned in the preceding paragraph. It may be, as you suggest, troublesome to comply with these statutory provisions where personal property of small value is involved, but, since section 678 of the Code expressly includes personal property, I can see no escape from the conclusion I have reached.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Method Of Allocating And Levying Tax Among Several School Districts In A County.

March 14, 1946.

DR. WALTER S. NEWMAN,
Assistant Superintendent of Public Instruction,
Richmond, Virginia.

My dear Dr. Newman:

This is in reply to your letter of March 13, from which I quote as follows:

"Ever since the passage of the so-called unit act which, as I understand it, made it mandatory that the school affairs of a county should be managed as if the county constituted but one school district, the Sussex County Board of Supervisors has continued to levy district taxes for opera-

tion and the superintendent of schools has been setting up six or seven separate district accounts and paying for the operation and maintenance of the schools in each district from these separate accounts. The school board has likewise been dividing State moneys among the several school districts.

"This has been a very cumbersome and time consuming system. Under the law passed by the 1946 session of the General Assembly, State moneys are to be distributed to the cities and counties on the basis of an equal amount per child in average daily attendance and on the basis of transportation needs in the several counties of the State. In Sussex County, naturally children are transported across district lines, and it seems to be almost impossible to make a fair distribution between the several districts in the county of the State funds allotted for transportation.

"We have been requested by the division superintendent and school board to ask you for an interpretation of section 653-a-2 of the Code as it relates to the following matters.

"Is it legal under this section for the school board to draw up a county-wide budget and submit this to the board of supervisors and have that body determine how the necessary finances are to be raised—whether they are to be raised by district levies or by a county-wide levy?

"Also, will the superintendent and school board have carried out their responsibility if expenditures are properly made and accounted for within the total amount of money allotted the school board from district and county funds, but detailed accounts of expenditures from district funds for operation are not kept?"

The first sentence of section 653-a-2 of the Code reads in part as follows:

"For the purpose of representation each magisterial district shall, except where otherwise provided by law, constitute a separate school district, but for all other school purposes, taxation, management, control, and operation, the county shall be the unit, and the school affairs of such county managed as if the county constituted but one school district; * * *."

It is my opinion that the quoted language, construed with section 657 of the Code relating to the county school budget, contemplates that a county-wide school budget shall be submitted to the board of supervisors. It is entirely true that section 653-a-2 contains the proviso that nothing in the section shall be construed to prohibit the board of supervisors in Sussex county from continuing to levy a district tax for the operation of schools, but this does not mean that the board of supervisors has to levy such a district tax. Under section 698 of the Code the board of supervisors may levy a county tax for this purpose or it may, if it so elects, make an appropriation for the operation of schools in lieu of levying a school tax.

I do not think that I should attempt to express an opinion concerning the circumstances under which the superintendent and the school board will have carried out their responsibilities. Generally speaking, however, I should say that where the board of supervisors has provided the funds in accordance with the estimates shown in the school budget and these funds have been accounted for and expended by the school board as set out in the budget, then the school board in this respect will have complied with its duties.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Taxing Of Costs Is Not A Part Of Punishment.

August 20, 1945.

HONORABLE W. F. SMYTH, JR., *Superintendent*,
Virginia State Penitentiary,
Richmond 19, Virginia.

My dear Mr. Smyth:

This is in reply to your letter of August 14, 1945, in which you set out the following facts: A person was convicted of second degree murder and sentenced to serve twelve years in the Penitentiary and costs taxed at \$181.20. After service of five years of the sentence he was granted a conditional pardon. You then ask whether this service in the Penitentiary exonerates him from payment of the \$181.20 costs.

In my opinion he is not exonerated from payment of the costs. The Supreme Court of Appeals of Virginia has held on numerous occasions that payment of the costs of the prosecution is no part of the punishment of a felony, but is a debt owed by the defendant which is collectible by civil process, or in event it is not paid, by labor at one of the penal institutions of the State. Section 2095 of the Code.

Section 2094 of the Code, to which you refer, has no application to felons committed to the Penitentiary, but to persons committed to jail.

The conditional pardon granted to the felon does not operate to exonerate the payment of the costs, for the reasons aforesaid, viz., it is a debt, and not a part of the criminal punishment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Good Behavior Credit: As Applicable To Persons Confined In Jails.

April 19, 1946.

MR. O. L. SHEETZ,
Sheriff of Shenandoah County,
Woodstock, Virginia.

My dear Mr. Sheetz:

This will acknowledge receipt of your letter of April 16, inquiring as to what good conduct allowance, if any, prisoners in jail are entitled to receive. You further ask if there is any good conduct allowance to persons imprisoned for nonpayment of fines and/or costs.

Section 5017 of the Code was amended and re-enacted by Chapter 44 of the Acts of the General Assembly of 1944, pages 44-45. This section provides:

"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 and every person convicted of a misdemeanor and confined in any part of the State prison system shall, for every twenty days he is or has been held in confinement after sentence, either in jail awaiting removal to the State prison system or in any part of the State prison system to which he has been or is sent to serve the sentence im-

posed upon him, without violating any jail or prison rule or regulation, be allowed a credit of ten days upon his total term of confinement to which he has been or is sentenced in addition to the time he actually serves or has served. * * *

You will see that insofar as same applies to jail prisoners convicted of misdemeanors such persons are entitled to an allowance of ten days for every twenty days they are held in confinement. The statute does not allow one-third off for good behavior, but ten days credit only after the full twenty days has been served.

As to persons confined for non-payment of fines and/or costs, if they are held to labor in the State convict road force, or in a chain gang, or State Farm, or State Industrial Farm for Women, they are entitled to the same good conduct allowance as is provided for in section 5017. See section 2095 of the Code. If a person is merely held in the county or local jail for non-payment of fine and costs, I have been unable to find that any provision is made for a good conduct allowance under such circumstances.

You will notice that the allowances under these statutes followed only where the prisoner has not violated any jail or prison rule or regulation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SENTENCE AND PUNISHMENT—Application Of Good Behavior
Credits Where Jail Sentence And Fine Are Imposed.**

April 18, 1946.

HONORABLE LITTLETON H. MEARS,
Commonwealth's Attorney for Northampton County,
Eastville, Virginia.

My dear Mr. Mears:

This will acknowledge receipt of your letter of April 13, in which you state that one James V. Upshur was convicted in the Circuit Court of Northampton County of the unlawful manufacture of ardent spirits and sentenced to serve ten months in jail and to pay a fine of \$300. This conviction was sustained by the Supreme Court of Appeals, whereupon Upshur went to jail on June 22, 1938, and there remained until December 24, 1938, when he was released at the direction of the Judge of the Circuit Court.

Your question is whether or not the defendant has served out his fine and, if so, whether there is any way of having the judgment marked satisfied on the judgment lien docket. It also appears that the final judgment of conviction ordered the defendant to work out his term of imprisonment on the State convict road force, including any unpaid fine and costs if such existed at the expiration of his jail sentence. This latter part of the judgment of conviction was apparently ignored and all the defendant's confinement was spent in the county jail.

You will notice particularly that the final judgment does not call for confinement as a result of the unpaid fine and costs unless such fine and costs are not paid at the expiration of the jail sentence. Your letter states that the defendant was actually confined 187 days, although his sentence was for a period of ten months. Under the law as it then existed defendant was entitled to a good conduct allowance of ten days for each month of his con-

finement. See sections 2094 and 5017 of the Code. Construing these in the light most favorable to the accused, it does not appear to me that at the time of his release by the Circuit Court he had fully served the ten-month period of confinement.

I am, therefore, of the opinion that Upshur was never confined for non-payment of fine and costs, and that the judgment for \$300 was not affected by any action of the court. The credit provisions of section 2095 are extended only to those held for nonpayment of fine and costs and Upshur was never in this category.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Credit To Be Given Where Fine And Costs Are Worked Out On Road Force.

December 28, 1945.

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

My dear Mr. Powell:

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

"Where a fine and costs is imposed upon a person along with a jail sentence, I docket the judgment for the fine and costs in accordance with the statute. Where these men serve time on the road for the jail sentence and the fine and costs, are they not entitled to a credit on the judgment for the time served for fine and cost under section 2095 of the Code?"

"Since I have been here I have received very few credits to be-made on the judgment lien docket on these judgments, and I am wondering whether or not these credits should not be certified to the Clerks of Courts by the person in whose custody the prisoner is at the time of his release."

I agree with you that under the circumstances stated these men are entitled under section 2095 of the Code to credit on the judgment for fine and costs for such time as they work on the roads for the non-payment of such fine and costs.

You will also observe from section 2095 that upon discharge from custody the person in whose custody the prisoner is "shall certify the fact that the prisoner has served his or her sentence for the non-payment of fine and costs, or costs, to the clerk of the court in the office of which the judgment is docketed."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—May Keep Fee Allowed When Appointed Committee.

June 14, 1946.

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

My dear Mr. Gilmer:

I am in receipt of your letter of June 12, from which I quote as follows:

"Enclosed is a letter from A. H. Overbey, Sheriff of Pittsylvania County, in which he requests that his fees as Committee for Annie V. Atkinson be refunded to him by the State of Virginia. He said he paid these fees into the treasury because he thought he was acting in his capacity as Sheriff of Pittsylvania County and, in fact, he was acting individually.

"A certified copy of the order appointing him as Committee for Annie V. Atkinson is also enclosed for your information."

It appears from the court order that Sheriff Overbey was appointed Committee in 1939 and that he was not appointed as such Committee in his official capacity as Sheriff. I am, therefore, of opinion that he is entitled to the commissions which were allowed to him as Committee. I might add that, even if he were appointed in his capacity as Sheriff, he would still, under previous rulings of this office, be entitled to his commission, since the appointment was made prior to the taking effect of the Act placing Sheriffs and Sergeants on a salary basis.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Fees In Lunacy Commissions.

June 11, 1946.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond, Virginia.

My dear Mr. Bennett:

This will acknowledge receipt of your letter of June 8, in which you quote from a letter to you from Mr. W. E. Curtis, Sheriff of Stafford County, as follows:

"It has been a question among some of my acquaintances of city sergeants and county sheriffs as to whether or not when holding a lunacy commission they should collect their usual fee and turn it back into the county. Since I have been put on a flat salary with no fees, I have not collected any fees for holding a lunacy commission, except mileage in attending same."

You request my opinion as to whether the sheriff should charge the usual fee in lunacy commissions.

Section 1021 of Michie's Code of 1942 treats the subject of fees and expenses in connection with a commission to ascertain insanity, epilepsy and inebriety. A portion of it is to this effect:

" * * * The officer making the arrest and summoning the commission and witnesses shall receive the same fees as are allowed for like services in a felony case. * * * All expenses incurred, whether such person be committed to any State hospital, or colony, or not, including the fees, attendance and mileage aforesaid, shall be paid by the county or city of which such person was a legal resident at the time of such commitment; * * * "

Chapter 386 of the Acts of the General Assembly of 1942 abolished the fee system as a method of compensation for sheriffs of counties, effective January 1, 1943. Acts 1942, p. 611, et seq. Subsection (b) of this statute provides:

"Every sheriff and sergeant, and every deputy of either, shall thereafter, however, continue to collect all fees and mileage allowances now or hereafter provided by law for the services of such officer, *other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed* and the fees and mileage allowances provided for services in connection with the prosecution of any criminal matter. * * * "

Since this fee is one which the sheriff would be entitled to receive from the county for which he is elected, as above provided, I do not think he should continue to charge a fee for lunacy commissions.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Liability For Substitute Service Of Process.

July 26, 1945.

MR. W. P. HENDERSON, *Sheriff*,
Alleghany County,
Covington, Virginia.

My dear Mr. Henderson:

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

"In the past few months we have been serving Civil Summons on parents or wives of men who are in Service and who are unable to appear in Court on their behalf. Summons are for rent, notes, automobile damages and etc.

"We would like to know if there can be any charges preferred against the Sheriff or his Deputies when they serve a Summons of this type, when the defendant is not present to defend his suit."

In my opinion, a sheriff would not be civilly or criminally liable by serving, in accordance with law, any legal process directed to him to be served. This principle is applicable to the service of such summons as you described in your letter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**SOIL CONSERVATION COMMITTEE—Statewide Blanket Fidelity Bond
On All Employees Not Authorized.**

March 14, 1946.

MR. VERNE R. HILLMAN, *Agricultural Engineer*,
State Soil Conservation Committee,
Blacksburg, Virginia.

My dear Mr. Hillman:

This will acknowledge receipt of your letter of March 1 inquiring of me as to whether or not the State Soil Conservation Committee can take out a public employees' blanket position bond covering all the employees or positions where handling of funds or responsibility for property is concerned.

Section 1289 (19) of the Code provides that:

"The supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; * *."

Section 1289 (17) (g) provides:

" * * * When the application and statement have been made, filed, and recorded, as herein provided, the district shall constitute a governmental subdivision of this State and a public body corporate and politic. * * * "

In view of this last provision, which in effect makes each soil conservation district a separate municipal corporation, I do not believe that the State Committee could take out a bond covering all employees of the various districts throughout the State, but the supervisors of each soil conservation district may take out a blanket position bond for the employees of that district who are entrusted with funds or property.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**STATE EMPLOYEES—Highway Resident Engineers; Bonds Are Non-
Statutory Bonds.**

March 15, 1946.

MR. GEORGE A. PEERY, *Statistician*
State Corporation Commission
State Office Building
Richmond, Virginia.

My dear Mr. Peery:

This letter refers to the recent conversation with you and Mr. Blake T. Newton, Jr., relative to the bonds which the State Highway Commission is requiring the resident engineers of the Department of Highways to execute, and your request for my opinion as to whether or not these bonds should be classed as statutory or non-statutory bonds for the purpose of fixing the premium rate to be charged by the surety company.

I do not find any statute either general or specific which requires resident engineers of the Department of Highways to execute fidelity bonds.

Section 85 of the Constitution provides that

"All State officers and their deputies, assistants or employees, charged with the collection, custody, handling or disbursement of public funds, shall be required to give bond for the faithful performance of such duties; the amount of such bond in each case, and the manner in which security shall be furnished, to be specified and regulated by law."

I heretofore gave an opinion that this provision is not self executing. However, it does serve as a declaration of the public policy of this Commonwealth with respect to the bonding of public employees and others who handle public funds. This opinion will be found in the Annual Report of the Attorney General for 1942-1943, at page 181.

Section 1969f of the Code provides:

"* * * and power is given him (the Highway Commissioner), subject to the provisions of this act, to require that all appointees and employees perform their duties under this act."

This is the only statutory provision I can find giving the Highway Commission or the Commissioner supervision and control of employees. The authority is in general terms, and he is not limited as to what means he shall use in carrying out the authority conferred. The requiring of a bond for faithful performance is a method usually employed in such cases. It may be reasonably inferred that the statute confers this authority. But there is no statutory provision which would become a part of a bond executed under this authority.

A statutory bond as the correspondence shows is considered by the insurers to be one given pursuant to a statute and the provisions of the statute become a part of the bond itself. So, if a bond is given as compliance with a statute requiring faithful performance of duty coverage, the insurer is bound by the statute, and conditions in the bond which purport to nullify the coverage would be read out of this contract.

My opinion, therefore, is that the bond under consideration, for the purpose of fixing the rate of premium, should be considered a non statutory bond.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Constitutionality Of Statute To Increase Base Pay Of Appointed Employees.

HONORABLE Y. MELVIN HODGES,
State Senate,
Richmond, Virginia.

February 28, 1946.

My dear Senator Hodges:

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

"The proposed Appropriation Bill carries several increases in the base pay for appointed officers of the State. As I understand it, it has been reported from the press, and I am today in receipt of a letter from one of my constituents which challenges the proposed increase on the ground that it violated section 63, subsection 14, of the Constitution of Virginia.

"In view of this challenge being made to me, will you not be so kind

as to advise me if, in your opinion, such spot increases to these officers in any wise violate this section of the Constitution."

Section 63 of the Constitution provides that "the General Assembly shall not enact any local, special or private law in the following cases: * * * creating, increasing, or decreasing, or authorizing to be created, increased, or decreased, the salaries, fees, percentages, or allowances of public officers during the term for which they are elected or appointed." You will observe that the prohibition is against enactment of any local, special or private law. The Appropriation Act is a general law and, therefore, is not included in the prohibition to which your constituent refers. It is, therefore, my opinion that your question must be answered in the negative.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Liability For Torts.

January 15, 1946.

MR. C. P. CARDWELL, JR., *Assistant Director,*
Medical College of Virginia Hospital,
Richmond, Virginia.

My dear Mr. Caldwell:

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

"We have been asked by members of our house staff if they are personally subject to suit by a patient. As you know, all members of our house staff receive compensation, either in the form of a stipend or maintenance or both. As such I suppose they would be considered agents of the State like any other employee. However, since the house staff are all graduate physicians and, in some cases, licensed to practice in this State, the question arises as to their personal responsibility to patients. In order to furnish this information to them we would greatly appreciate an opinion from your office."

Generally speaking, a physician is liable to a patient for his negligence in the treatment of such patient, and this is true even where the physician is a State employee. The question of what constitutes negligence in any particular case, of course, depends on the facts and circumstances present in each such case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Rights Of Returning War Veterans Under Federal And State Statutes.

February 21, 1946.

MAJOR C. W. WOODSON, JR.,
Superintendent of State Police,
Richmond, Virginia.

My dear Major Woodson:

I have your letter of February 16 requesting the opinion of this office on the following questions:

"1. Is a State employee's position protected under the 'GI Bill of Rights' and the Acts of the Assembly of 1918, if the employee chooses to remain in the armed forces after he is ordinarily eligible under the point system to be released and return to the position which he held at the time he secured military leave?"

"2. In the case of a commissioned or warrant officer who is eligible for terminal leave and receives it, is the employee's position protected for a period of ninety (90) days after the expiration of the terminal leave; or is the employee required, in order to be re-employed in his position, to report for duty within ninety days of the date on which he received terminal leave?"

At the outset it should be noted that the Federal statutes to which you have reference are not actually included in the Act known as the "GI Bill of Rights," but are parts of other statutes dealing with men drafted under the Selective Service Act and with all reserve personnel on active duty. 50 U. S. C. A. App. Sections 308, 403. The Virginia statute involved is section 291-b of the Virginia Code (Michie 1942). It should further be observed that the Federal statutes are, with respect to State employees, declarations of governmental policy rather than mandatory legal requirements.

In answer to your first question, the State statute would seem clearly applicable to any person who remains in the armed forces of the United States for any reason during the existence of a state of war, since such statute in terms covers all persons engaged in "war service." Likewise the two Federal Acts expressly apply to all personnel on active duty, whether voluntarily or otherwise, except those enlisted or commissioned in the regular Army or the regular establishment of one of the other branches.

With respect to your second question, the Federal statutes require only that the veteran make application for re-employment within ninety days after he is relieved from active duty. I am reliably informed that officers who are granted terminal leave in connection with their separation from the service are, by the terms of their orders, actually released to inactive duty only as of the date when such terminal leave expires. Hence the statutory period of ninety days should be computed from such date.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY SYSTEM—Rights Of Abutting Owner To Abate Nuisances And Trespasses.

May 23, 1946.

GENERAL JAMES A. ANDERSON,
State Highway Commissioner
Department of Highways
Richmond, Virginia.

My dear General Anderson:

You have referred to this office a letter written to you by Mr. Emmett Brewer requesting advice as to what jurisdiction a private owner has over the unimproved portion of a public highway lying in front of his property. Mr. Brewer states that he asks this question because he is bothered by people throwing trash and loitering in this open space in front of his property. You have requested that this office advise Mr. Brewer concerning the question he asks.

For the reason stated on the enclosed card, I am unable to give Mr. Brewer an official opinion on this matter. However, for your guidance I am giving you the benefit of my views.

The rights of a private landowner whose property fronts upon a highway depends in a large measure upon whether the public owns only an easement for highway purposes, the fee being in the abutting owner, or whether the fee simple title to the right of way is owned by the State. In cases where the public has only an easement and the abutting owner owns the fee to the land over which the highway passes, any use of the highway which is not within the scope of the public easement is an infringement on the rights of the owner of the fee for which he may invoke the ordinary legal remedies. He may consider as trespassers all persons who without authority deposit woods, stone or other rubbish on the way. In cases where the State owns the fee simple title the abutting owner, of course, would not have the same rights. Nevertheless, he would have certain legal remedies if other persons created nuisances in front of his property causing him some special injury.

Mr. Brewer's problem, of course, is one which he should discuss with his own private attorney in order that he may be properly advised as to his rights under the particular facts of his case.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY SYSTEM—Procedure In Establishing Additions To Secondary System.

May 13, 1946.

MR. EDWARD P. SIMPKINS, JR.
Attorney for the Commonwealth
Hanover County
Mutual Building
Richmond 19, Virginia.

My dear Mr. Simpkins:

This is in reply to your request for my opinion upon whether the State Highway Commissioner can legally require Boards of Supervisors of the Counties, in establishing new roads to become parts of the secondary system

of State highways, to proceed in accordance with the provisions of section 2 and following of the General County Road law, before such roads are accepted and maintained by the State as parts of said system.

Chapter 415 of the Acts of Assembly of 1932 created the secondary system of State highways. Section 8 of this Act as amended provides that "The local road authorities shall, however, continue to have the powers now vested in them for the establishment of new roads in their respective counties, to become parts of the secondary system of State highways," but it also provides that "no expenditure by the State shall be required upon any new road so established, or any old road the location of which is altered or changed, by the local road authorities, except as may be approved by the State Highway Commissioner."

Section 2 of the General County Road law provides that whenever the board of supervisors is of the opinion that it is necessary to establish a public road, it may appoint viewers, or, in lieu of such viewers, may direct the county road engineer or county engineer, if any, to examine such road and report upon the expediency of establishing the road. Section 3 of this law provides, that "The said viewers, or the county road engineer, or county manager, as the case may be, shall * * * proceed to make the view, any may examine either routes and locations than that proposed, and if of the opinion that there is a necessity to establish * * * the public road, * * * shall locate the same, * * * make a report to said board, stating their reasons for preferring the location made, * * * the convenience and inconvenience that will result as well to individuals as to the public, whether the said road * * * will be one of such mere private convenience as to make it proper that it should be opened, established or altered and kept in order by the person or persons for whose convenience it is desired." Section 3 further provides that if the landowners do not require compensation they may give written consent giving the right of way which shall operate and have the force and effect of a deed from the landowners for the right of way. The nature of the proceedings in case compensation is required is prescribed by subsequent sections.

I agree with your view that the viewers' proceeding is not the exclusive method by which public roads may be established to become a part of the secondary system. The secondary road law specifically authorizes the State Highway Commissioner to condemn rights of way for secondary roads. Under various plat acts, and as a general principle of law, rights of way can be dedicated by private individuals and, if accepted and maintained by road authorities, the same become public roads. If rights of way were so dedicated and were accepted by Boards of Supervisors they would, in my opinion, become a part of the secondary system since the Boards still have the power to establish new roads, and when a new road is established by the local authorities it becomes a part of that system.

Nevertheless the statute expressly provides that even when a road is so established no expenditure of State funds can be required unless approved by the State Highway Commissioner. In view of this fact and the fact that the General County Road law provides a procedure for the determination of the expediency of establishing a new road as well as whether such road is one of mere private convenience to be paid for and maintained by private individuals, I am of the opinion that the State Highway Commissioner is justified in requiring that new roads generally be established by that procedure before accepting it as one to be established or maintained at the expense of the State.

It will be noted that where the landowner is willing to donate the land for the right of way this can be done without difficulty under the proceedings prescribed by the General County Road Law.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY SYSTEM—Where Duty Lies To Remove Encroachments On Highways.

June 7, 1946.

HONORABLE J. H. MASON, *Chairman*,
Board of Supervisors of Russell County,
Lebanon, Virginia.

My dear Mr. Mason:

This is in reply to your request for my opinion as to whether there is any duty upon Boards of Supervisors to see that encroachments upon the rights of way of highways in the secondary system are removed or whether this duty rests solely with the State Highway Department.

This question depends upon when and under what circumstances a road was taken into the secondary system and when the encroachments were placed upon the right of way.

The secondary system of State highways, consisting of all the county roads existing in 1932, was created by Chapter 415, Acts of Assembly of 1932, (1975hh and following of Michie's Code of Virginia). Under section 2 of this Act the control, supervision, management and jurisdiction over the secondary system was vested in the State Highway Department and the Boards of Supervisors were relieved of such control, supervision, management and jurisdiction. Since the statute imposed no duty upon the local authorities to turn over the roads in any specified condition, it is my opinion that the State took the then existing county roads in whatever condition they were at that time, and, if encroachments were then upon the rights of way, the burden of having the same removed rests solely upon the State.

In the case of roads taken into the secondary system since 1932, the State Highway Department sometimes requires the local road authorities to furnish a right of way of thirty feet free of encroachments before the road is maintained at the expense of the State. In such cases, if the encroachments exist before the road is taken over by the State, it is my opinion that the Highway Department can require the Board of Supervisors to see that the encroachments are removed. Section 9 of the Act mentioned above, which provides that the jurisdiction to establish new roads to become a part of the secondary system remains in the local authorities, also states that "no expenditure by the State shall be required upon any new road so established * * * except as may be approved by the State Highway Commissioner."

In any case where an encroachment was placed upon the right of way after the State Highway Department assumed jurisdiction over the road, the obligation to have the encroachment removed is solely that of the Department.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY SYSTEM—Maintenance Of Streets In Cities; Funds Available For; Designation Of Streets.

May 10, 1946.

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

My dear Mr. Mullen:

This is in reply to your letter of May 7, 1946, in which you ask if any part of the funds paid to cities and towns by the State Highway Department

under Section 9 of Chapter 415 of the Acts of Assembly of 1932 as amended by Chapter 135 of the Acts of Assembly of 1946 can be spent on the construction or maintenance of any roads or streets in the cities and towns other than those selected by the State Highway Commissioner for the handling of traffic to or from a road in the State Highway Systems.

This act provides that the Commissioner shall select in certain towns and cities such streets as may, in his judgment, be best for the handling of traffic to or from State Highways. It further provides as follows:

" * * * If such streets and roads * * * so selected * * * shall, in the opinion of the State Highway Commission, be maintained up to the standard of maintenance of the State highway system adjoining such town or city, the State Highway Commissioner shall cause to be paid to such town or city, *to be used by it in the maintenance and improvement, including construction and reconstruction of streets, roads and bridges within such town or city*, subject to the approval of the State High Commission, the sum of Four thousand dollars each year for each mile of such streets and roads or portions thereof, selected by the State Highway Commissioner under the provisions of this section within such town or city, * * *. Plans and specifications for construction and reconstruction shall be approved by the State Highway Commissioner.

"The fund allotted by the Commission shall be paid in equal sums in each quarter of the fiscal year, and no payment shall be made without the approval of the State Highway Commission.

"The town or city receiving this fund shall be required to make quarterly reports accounting for all expenditures and certifying that none of the money received *has been expended for other than the maintenance, improvement, construction or reconstruction of the roads and streets in such town or city.*"

It will be noted that in both instances that the act deals with the use or expenditure of the funds paid to the cities and towns (the provisions which I have underscored) there is no express limitation directing that the funds be spent on the streets selected by the Commissioner. It is only in determining the amount to be paid the cities and towns that the act refers specifically to the streets selected by the Commissioner.

The act provides that no payment shall be made without the approval of the State Highway Commission. Since the primary object of the act was to provide for adequate maintenance of the streets handling traffic to and from State highways, it is my opinion that the payment of the specified funds may be withheld if the selected streets are not adequately maintained according to the standard prescribed. However, I am also of the opinion that if any of the specified funds remain after this is done, such surplus funds may be spent on other streets of the cities and towns.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**STATE HIGHWAY SYSTEM—Authority Of Towns To Regulate Traffic
And Parking On A Street A Part Of State System.**

May 22, 1946.

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

My dear Mr. Mullen:

This is in reply to your request for my opinion upon whether towns have the authority to pass ordinances regulating parking on streets within the towns that are a part of the State Highway System.

The Motor Vehicle Code of Virginia defines "Highways" as including the streets in towns and cities. Section 52 of this code, a part of Article III which deals with the regulation of traffic, authorizes towns to pass ordinances regulating in certain respects traffic on the highways within the towns. Under this section towns may "Adopt any such ordinance, rules and regulations not in conflict with the provisions of this chapter, as the proper local authority shall deem advisable and necessary." With respect to the authority of towns to require vehicles to come to a full stop at intersections, the legislation expressly excepts from the exercise of such authority streets designated as a part of the primary system of State Highways in towns of a certain population.

Section 86 of the Motor Vehicle Code, also a part of Article III, contains the following provision:

"(e) The council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits, including the right to install and maintain parking meters and to require the deposit therein of a coin of a denomination to be prescribed in said ordinance, and to determine the time during which a vehicle may be parked and may authorize the city manager, the director of public safety, the chief of police, or other designated officer within said city or town to put said regulations into effect, including specifically the right and authority to classify vehicles with reference to parking, and to designate the time, place and manner such vehicles may be allowed to park on city or town streets. * * *"

In view of this express authority given to towns to regulate parking, and since the exercise of this authority is not expressly prohibited as to streets constituting a part of the State highway systems, it is my opinion that towns have the power to regulate parking on streets within the town even though they may be a part of such systems. The general power given to the State Highway Commission to regulate traffic on State highways does not, in my opinion, deprive the towns of the express authority given them to regulate traffic on the streets within their limits.

The towns, in the maintenance agreements which they make with the State Highway Commissioner with respect to streets of the town constituting a part of the primary system of State highways, agree that such streets are to be subject to the control of the State Highway Commission. These agreements are designed to insure the adequate maintenance of the streets and, I understand from you, have not been construed by the Highway Commission as intended to deprive the town of its police jurisdiction on such local matters as the regulation of parking where the flow of through traffic is not impeded. It is my opinion, therefore, that, in any case where the Commission does not object, towns have the authority to regulate parking on streets covered by such agreements.

There may be cases where the needs of through traffic on the State highway system would prevent the towns from taking such action over the ob-

jection of the Commission, but as to this I express no opinion in the absence of full facts in the particular case.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HOSPITAL BOARD—Authority Of The Board.

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

November 14, 1945.

My dear Senator Goode:

This is in reply to your letter of November 12, in which you ask for my opinion on several questions relating to the DeJarnette State Sanatorium, at Staunton. Specifically your questions relate to the authority of the State Hospital Board in the following matters:

- "1. In the management of the affairs of the institution.
- "2. In the establishment and maintenance of standards of care and treatment of patients.
- "3. In the establishment and maintenance of rates to be charged patients.
- "4. In making administrative changes which may deviate from the policy of receiving and caring for patients on a pay basis."

The DeJarnette State Sanatorium is a "special unit of the Western State Hospital for voluntary pay patients." Chapter 360 of the Acts of 1934. Generally speaking, the control and management of the Sanatorium is vested in the State Hospital Board. See section 3 of said chapter 360 and section 1006 of the Code as amended. However, the Board in operating the institution must be governed by the provisions of the aforesaid Act of 1934. For example, the standards of care and treatment established by the Board must be "equal to that of efficient and well managed private sanatoriums"; and the Superintendent of the Western State Hospital and the Board shall fix the rates and charges for the patients in such amounts as to operate the Sanatorium, it being contemplated by the Act that patients shall be treated at cost of maintenance. The above, I believe, answers your first three inquiries.

In connection with your fourth question, I am of the opinion that the Board may not deviate from the policy of receiving and caring for the patients on a pay basis, since section 2 of said chapter 360 expressly states that the purpose of the Sanatorium "shall be to furnish to white residents of Virginia, affected with nervous diseases, mental diseases, alcoholism or drug addiction, modern sanatorium care and treatment at the appropriate cost of maintenance and operation of the DeJarnette State Sanatorium." Furthermore, section 4 of the Act plainly contemplates that only pay patients shall be received at the Sanatorium.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HOSPITAL BOARD—Trust Funds; Handling Of.

December 4, 1945.

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 November 23, from which I quote as follows:

"The State Hospital Board is custodian and responsible for the proper handling of various trust funds, which through the years from time to time have been given by bequests and otherwise to the several hospitals. Shortly after the opening of the central office in Richmond with a Director of State Hospitals and subsequently with a Commissioner of Mental Hygiene and Hospitals, the State Hospital Board designated the Commissioner to have the custody of these funds. This arrangement continued until shortly before the death of the Commissioner, when the Board temporarily designated the Executive Secretary of the Board to have the custody of these funds. This arrangement is now in effect.

"The Board is now considering whether it would be advisable to place the handling and the custodianship of these funds in the hands of a trust company, and the State Hospital Board, in its meeting on November 9, instructed me to request of you an opinion as to whether the Board, under the existing statute, has the authority to designate a trust company rather than one of its employed officials to handle and have the custody of these funds. It will be appreciated if you will advise us on this so that a report can be made at the next meeting of the Board which will be held on December 6."

Section 1005 of the Code provides in part as follows:

"* * * The State Hospital Board may receive gifts, bequests and endowments to or for the respective hospitals or colonies in their names or to or for any person or persons committed to or in the custody of such hospitals or colonies, and when such gifts, bequests and endowments are accepted by the said board it shall well and faithfully administer such trusts."

In view of this language, I do not think that the Board can divest itself of responsibility for and control of these funds, including the types of investments made. However, I know of nothing to prohibit it from designating a trust company as its agent for the physical custody and handling of such funds. In saying this I am assuming that there is nothing in any particular trust which would prohibit such procedure on the part of the Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE MILITIA—Authority Of Governor To Induct Employees Of Public Utility Into Militia For Purpose Of Operating The Same.

April 18, 1946.

HONORABLE WILLIAM M. TUCK,
Governor of Virginia,
State Capitol,
Richmond 12, Virginia.

Dear Governor Tuck:

In discussing with Your Excellency the power and authority of the Governor to embody that portion of the unorganized militia composed of persons employed in the operation of the Virginia Electric and Power Company, and to direct the members so embodied, in the event of a strike of said employees, to enter into possession of such of the plants and facilities of said company as might be necessary, and to operate the same so as to prevent a shutdown of its power production, I expressed the opinion orally that the Governor does possess such power and authority. I further stated that I would later render a written opinion giving the reasons for the conclusions reached, same having been based upon then existing facts and conditions which you found to be as follows:

The Virginia Electric and Power Company provides electric power and lighting service in an area comprising more than half the State and about two-thirds of its inhabitants.

Within this area are located the following State institutions and buildings, and the governmental activities therein carried on: the Capitol of the State, the Supreme Court of Appeals, the various State office buildings, twelve State institutions of higher learning, two State prison farms, four industrial schools for delinquents, numerous convict road camps, the penitentiary, the office of the State Police and its radio broadcasting station, five State hospitals, and six State mental hospitals. In addition, there are located in this area numerous municipal and county governmental institutions, agencies, functions and activities, such as water works, schools, court houses and jails, street lighting in cities and towns, which would be left in a state of blackout; police protection at night; fire alarm signals; street traffic lights and operation of sewage facilities. All of the foregoing are dependent for electric service upon continued and uninterrupted operation of the plants and facilities of said Company. Any substantial interruption in said service would seriously hinder and obstruct the principal activities of the State, county and city governments, their departments, agencies and institutions in this area. The following nongovernmental activities or functions would either be greatly curtailed or completely eliminated if such service were discontinued: dairy and other farm activities; railway freight and passenger stations; block signal systems in train operations throughout the area; elevators in hospitals and office buildings; x-ray and other equipment in numerous hospitals, and scores of offices of physicians and dentists; cold storage facilities containing large quantities of meat and other perishable foods; electric street railways; gasoline filling station delivery pumps; naval bases and shipyards; army camps; veterans hospitals, and lastly the provision for lighting, cooking, heating and refrigeration in the homes of a large part of about two million private citizens. An interruption in the operation of said Company, therefore, in addition to seriously obstructing the activities of State and local governments, would threaten, endanger and imperil the health, safety and lives of a majority of the citizens of the State. It would also paralyze the operation of numerous factories and industrial plants, throwing great masses of their workers out of employment. In other words, it would create a condition tending to disorder and unrest in about two-thirds of the State. For several weeks a labor dispute had been in progress between said Company and the Union of its

employees and a notice had been given to the Company by the Union of a proposed strike to become effective April 1. The effect of such a strike would be to shut down the operation of the electric and power plants of the utility. Because of apparently reliable information to the effect that there was serious danger the strike would occur, since the parties were unable to make any satisfactory progress in their negotiations to settle their dispute, you became apprehensive and on March 22, 1946, you requested that three representatives each of the Union and of the Company attend a conference in your office with a view to bringing about an accord; or at least a delay in the threatened strike. The Company stated its willingness to comply with your request. The Union leaders, however, expressed the view that they should not do so unless there were also present at the conference the Governors of North Carolina and West Virginia, into which States a small part of the Company's service extends. About ninety-two per cent of the revenue of the Company is derived from its Virginia operations. Because of the shortness of time before the day fixed for the strike you felt it would be unwise to delay the matter by undertaking to arrange such a conference. You thereupon issued a public statement, pointing out in detail some of the disastrous consequences to the people and the Government of Virginia which would result from such a strike and declared that, if same should occur, it was your intention to take possession of the Company's facilities in your official capacity and operate same so as to protect the interests, safety and lives of the people of Virginia, who would be affected thereby. Receiving no further communication from either of the disputing parties, on March 24 you notified the Union representatives and the Company that, unless you were assured by noon of March 28 that the planned strike would not occur, you would declare an emergency to exist and would forthwith make preparations to take the steps necessary to seize and continue the operation of the plants and facilities of the Company without interruption by a strike should it occur. At the same time you requested from each party to the dispute information as to whether, in the event of a strike, each would cooperate in the State's seizure and operation of the utility so as to prevent a shutdown. The Company answered that it would not oppose same. The Union representatives replied that they were without authority to speak for their members in the matter. Shortly thereafter, however, you learned that these representatives had initiated a movement to secure official action of the Union which would prohibit its members from cooperating in such proposal. You were satisfied that they would succeed in their efforts, and your expectations were later confirmed when you were officially advised by the authorities of the Union that its members would not voluntarily work for the State. Your investigations in the meantime had developed the fact that, because of the special skill, knowledge, and familiarity with the work necessary for the personnel to have in order to operate the utility, it would be impossible to prevent an interruption in its service by the use of members of the State Guard, and that the only possible way in which continuous service to the public could be maintained was with the aid and assistance of those members of the unorganized militia who were the regular employees of the Company. On March 27 both parties to the dispute indicated that their negotiations were hopelessly deadlocked and it was stated in the press that a majority of the Union representatives had left the city, and that negotiations had been abandoned. Thereupon, as Governor of Virginia, on Thursday, March 28 at noon, you declared an emergency to exist threatening the public welfare, health, and security, and expressed the intention, should a strike occur, of taking possession of the Company's properties on behalf of the Commonwealth and undertaking to operate same in the public interest.

You then requested my opinion upon the question whether under these circumstances, as Governor and Commander in Chief of the land and naval forces of the State, in order to avoid an interruption of said operations by reason of a strike, you were empowered to seize the utility and in order to accomplish such seizure draft and order into active service that part of the unorganized militia which consisted of certain of the officers and employees of

said Company necessary to operate same, and to assign to them temporarily, pending the organization by the State of an independent operating force, the duty should the strike occur of seizing the necessary plants and properties of the Company, and of performing such duties in connection with their operation as might be assigned them by their superior officers, provided such duties were essential to prevent a shutdown of said operations. It was proposed that said plants and facilities would be seized and operated by the State in the public interest and not in the interest of the Company or the Union, and that the service of the said members of the militia so drafted would be performed solely for the State and not for said Company. As above stated, I expressed the view that the said facts and conditions found by you to exist as above stated constituted such an exigency as to justify the exercise of the authority and power of the Governor as proposed. Accordingly, on March 29 said members of the unorganized militia were embodied into an emergency service unit of the State Militia. An order was immediately given to each member of said unit suspending his active military duties unless and until the operations of the Company should be interrupted by a strike. In that event, the order stated, the State would take possession of the properties of the utility and the status of each member as an employee of the Company would immediately cease and determine, and he would automatically be returned to active militia service with the duty to seize said properties in concerted action with other members of the unit, and to perform for the State the same work that he had been accustomed to perform in the usual course of his duties while he was working for the Company.

I now respectfully submit the authorities and reasons upon which the opinion I then expressed is based.

II

The foregoing state of facts portrays a condition of affairs which not only constituted a grave threat to the health and safety of the people within the area affected, but also threatened to interfere with and obstruct the proper functioning of the State Government itself. The situation presented a direct challenge to the power of the Government to protect itself and its citizens from the happening of the impending disaster and the resulting chaos, and was apparently intended as such a challenge, because the Union, instead of cooperating with the Government in its proposal to operate the utility, as the Chief Executive invited it to do, held meetings and bound the rank and file of its members not to work voluntarily for the State should it take over the Company's plants. By this action the Union had deprived the Commonwealth of the voluntary services of the only persons who were able to operate the plant. The situation then posed this question: Was the State Government impotent and helpless to avert the threatened disaster, or did it possess the power to compel these persons as members of the militia to render under compulsion the necessary services they were prohibited by the Union from rendering voluntarily until the State could form an organization of competent workmen to carry on the operation. I hold that it did possess such power.

The general principles underlying the duty and obligation of a State Government to its citizens was clearly and succinctly stated by the New York Court of Appeals in these words:

"The fundamental purpose of government is to protect the health, safety, and general welfare of the public. All its complicated activities have that simple end in view. Its power plant for the purpose consists of the power of taxation, the police power, and the power of eminent domain. Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the Government to apply whatever power is necessary and appropriate to check it. * * *" (*New York v. Muller*, 270 N. Y. 333).

The constitutions of the several states were framed upon the theory and principle that Government, in one or the other of its several branches, should be vested with all powers necessary to protect itself from interferences and obstructions, and to shield the people who created it from any calamities or disasters which might threaten them in so far as same can be accomplished by human action. *Burrough v. Peyton*, 57 Va. (16 Grat.) 470, 473. Obviously it is impossible to foresee and provide by law a specific remedy for every danger and threat which may arise. To meet such unforeseen emergency situations, in most State Constitutions a general reservoir of power has been created by vesting in the Chief Executive power and authority whereby he can, in emergencies, make available and utilize all the resources of the State and its people for their protection. "The prime idea of government is that power must be lodged somewhere for the protection of the Commonwealth." *Re Moyer* (Col.) 12 L. R. A. (N. S.) 979, 985. This emergency power has been usually created by conferring upon the Governor the authority to use the entire militia (consisting in Virginia of all able-bodied male citizens of the State from the ages of sixteen to fifty-five years, if required, to enforce the execution of the laws and prevent serious obstructions thereto or interferences therewith. And so in section 73 of the Virginia Constitution we find this direct grant of residuary power in these words: "He (the Governor) shall be commander in chief of the land and naval forces of the State; have power to embody the militia to repel invasion, suppress insurrection and enforce the execution of the laws." It is to be noted that this is a constitutional power, is absolute, and is not dependent upon any legislative delegation of power to the Governor. In fact, the exercise of this emergency power is free legislative control of any kind. This power may be used wherever a situation arises where, on account of obstructions, or threats of obstructions to the enforcement of the laws or obedience thereto, the functioning of the government or the health and safety of the people of the State are jeopardized. No limitation is imposed upon the exercise of the power by the State Constitution. The Governor is vested with absolute discretion in its use and in the selection of members of the militia he will embody, and when the power is employed in good faith the Governor's actions are not subject to challenge in either the State or Federal Courts. He is the sole judge of whether an exigency exists which requires the aid of the militia and has full discretion as to the method of utilizing that aid. On the other hand, of course, if the facts leave no room for doubt that an emergency does not exist, the power cannot be exercised under a mere pretense that it does. The foregoing principles are established by numerous cases in the Federal courts, though no case has been found involving a State Governor's use of the militia for purposes other than to suppress insurrection and disorder. In no other type of use has it ever been challenged. In such a case, *Sterling v. Constantin*, 287 U. S. 378, the Supreme Court concluded that the Governor of Texas, under pretense that a state of insurrection existed when it did not and in violation of a Federal Court injunction restraining him from so doing, attempted, through use of the militia, to regulate the quantity of oil which might be taken from the Texas oil wells. The Court held that there being no insurrection the Governor's action was without justification in fact, but Chief Justice Hughes, in delivering the opinion of the Court said, (287 U. S. 399, 400):

"* * * As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full recognition of its importance. It is with apprecia-

1Code of Virginia, Section 2673 (1).

tion of the gravity of such an issue that the governing principles have been declared.

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, 'necessarily results from the nature of the power itself, and from the manifest object contemplated.' The power 'is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.' *Martin v. Mott*, 12 Wheat. 19, 29, 30, 6 L. ed. 537, 540, 541. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder." (Citing cases.) "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force will force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. * * *

When the Governor's proclamation that an emergency exists which requires the use of the militia is made in good faith, the ordinary constitutional rights of personal liberty and property must yield to the public interest and to the principle that the safety of the people is the supreme law, or, as expressed in the old Roman maxim, "*salus populi, suprema lex.*" It was so stated by Mr. Justice Holmes in *Moyer v. Peabody*, 212, U. S. 78. In that case a strike of miners in Colorado had caused such disturbance that the Governor declared that a state of insurrection existed and called out troops to put down the trouble. He had ordered the arrest of the president of the Union as a leader of the outbreak and his detention until he could be discharged without danger of his causing further disturbance. He was not released from jail until two and a half months later, and he brought suit against Governor Peabody for damages, claiming that his imprisonment deprived him of his liberty without due process of law. In denying the validity of the claim the opinion referred to the duty of the Governor to order the National Guard to suppress or repel a threatened insurrection and continued:

"* * * That means that he shall make the ordinary use of the soldiers to that end, that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercises of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judgment and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. * * *

* * *

"* * * When it comes to a decision by the head of the state upon a matter involving life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Keely v. Sanders*, 99 U. S. 441, 446, 25 L. ed. 327, 328. This was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it

was disputed that the same is true of temporary detention *to prevent apprehended harm.* * * * (Italics supplied).

The emphasis in the above cases was placed upon the power of the Governor to *prevent* the happening of disturbances to the public peace and safety, and the subordination of the liberty of the citizen to that *preventive* purpose. It was in furtherance of such a preventive purpose that the President seized the railroads during the present war when threatened with a strike of railroad employees. He appointed the presidents of certain railway companies as Colonels of the United States Army with orders to operate the lines until the emergency passed, after which they were restored to their owners. The President also seized and operated the Elgin, Joliet and Eastern Railroad when its operations were obstructed by strikes.

It is clearly established, therefore, both by judicial authority and by precedent, that the militia may properly be used to prevent the occurrence of threatened events which would cause interruption of services necessary and vital to the public interest and welfare.

There can be no doubt that under both the common law and the Virginia statutes a public service corporation is bound to render continuous service, and its patrons, on their part, are entitled to be furnished such service. Code of Virginia, section 4066, *Jeter v. Roanoke Water Co.*, 114 Va. 784-5, 43 Am. Jur. p. 586, sec. 22; id. pp. 591-596, sections 30-36, incl. 51 C. J. pp. 6-8, incl. This requirement is further exemplified by Code section 3810, which provides that a public service corporation cannot surrender its charter and relieve itself of the duty to discharge its public functions without the consent of the State granted by the State Corporation Commission in proceedings conducted after notice to all persons interested and opportunity to be heard. The utility may be compelled to perform its duty to provide proper service by order of the State Corporation Commission pursuant to Code section 4072. In the past such action by the Commission has proven effective, but, of course, it would be fruitless in a case of this kind because the Company itself could not comply with the Commission's order if its employees were on strike.

The State Government having assumed supervision and control of electric lighting and power companies, is charged with the duty of seeing to it that the operation of their plants is continuously maintained. If by reason of threatened strikes or other obstructions there is imminent danger that they will be closed down and as a result the welfare, health, peace, safety, and lives of a vast number of the citizens of the Commonwealth will be placed in jeopardy, or that the proper functioning of agencies of the Government itself will be interfered with, it is unquestionably that Government's duty to utilize every resource and instrumentality at its command to forestall the threatened shut-down. This same duty has been held by the Supreme Court of the United States to rest upon the Federal Government in the exercise of its constitutional powers. It was thus expressed in *Re Debs*, 158 U. S. 564, 586:

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

The case from which this quotation is taken involved power of a Federal Court to enjoin Debs from stirring up strikes on all railroads hauling pullman cars following a labor dispute between his union and the Pullman Company. The opinion also stated the power of the Government to prevent such obstructions to interstate commerce in the following language:

"But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce of the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws." (158 U. S. 564, 582).

The holding that the "army of the nation, and *all its militia*," may be utilized to remove the obstruction to and interference with the operation of the railroads in the discharge of the duty of the National Government is necessarily applicable to the availability of the State Militia for use in the performance of the similar duty of the State Government to keep in operation the vital public utility here involved. Likewise applicable to the power of the Virginia Government to use the militia to actually operate the plants here involved is the rule as stated in that recently published standard authority American Jurisprudence (Vol. 36 p. 198), where it is said:

"* * * there is no doubt that in the event of a great national strike on the interstate railroads of the country which seriously interfered with or prevented interstate transportation or the transportation of the mails, *the President, under his constitutional duty to see that the laws are enforced*, has the power to use the Army, and the militia if necessary, to prevent such interference and *to operate the railroads.*" (Italics supplied.)

The duties of the Chief Executive of Virginia with respect to the enforcement of the laws at the State level are parallel to those of the Nation's Chief Executive at the national level. Each is charged with the duty of enforcing the laws, and each is Commander in Chief of the military forces within his respective jurisdiction.

The President, being Commander in Chief of the armed forces, during the recent World War, used military personnel to manage the operation of the railroads when obstructions were threatened by strikes or for other reasons. Perhaps the most spectacular instance of seizure and operation of a business by the army on account of a strike was that of Montgomery Ward and Company, when its president, Mr. Avery, was forcibly removed from the premises of the Company by army officers. In that case a strike of its employees was due to the Company's refusal to institute a maintenance of membership in the Union representing a majority of the employees in its establishments, with check off of dues and other privileges as ordered by the War Labor Board. The Company objected to the seizure on the ground that it was not conducting a business of the type contemplated by the Federal Acts relating to such seizures and there was no such exigency as would otherwise justify placing the army in charge of its business. But the United States Circuit Court of Appeals held the acts by the President were justified. *United States v. Montgomery Ward and Company*, 150 Fed. (2d) 369. The army officers took possession of the Company's properties and the striking employees immediately returned to their jobs to work for this military agency of the Government.

If the operation of railroads and retail stores by the militia in cases of emergency induced by strikes is a proper use of that agency by the President, a fortiori it is true that the militia is an appropriate agency for use by the Governor of Virginia to operate a public utility as essential as one providing light and power to two-thirds of the people of the State when faced with a similar emergency.

III

It appears from the press that there are some who concede the propriety of the Governor's use of the militia for seizure and operation of the utility

in the event of a strike, but deny that an emergency existed which justified embodying into an organized unit of the militia only those members of the unorganized militia who were employees of the Company. They argue that no strike had actually occurred, and further that the Governor could not embody particular individuals into such a unit but must employ some such scheme as drawing names by lot.

First, as to the justification for preparing for seizure and operation in the event a strike should occur. It appeared highly probable that it would. The Union representatives had declined an invitation to a joint conference designed to alleviate the situation; they had been unable or unwilling to give assurances of co-operation with the Governor in operating the properties to prevent a shut-down; on the contrary they had set on foot a movement within the Union to prevent such co-operation; the parties had abandoned negotiations for a settlement of their disputes or a postponement of the threatened strike; a majority of the Union representatives had left the city. The Company had stated that it would not oppose a seizure of its property, but had not indicated any lack of intention to adhere to its position with respect to the matters in controversy even though a strike should result. It cannot be said that these acts of the Union and Company representatives were consistent with a determination on the part of either of them to yield ground in order to avoid a shut down of the utility's operations. It cannot be fairly argued that because the parties resumed negotiations after the Governor had acted, and agreed to call off the strike and submit to arbitration of their differences, that the same thing would have happened without such action on his part. It would seem more reasonable to conclude that neither the Company nor Union representatives liked the idea of the State taking over the operation in the manner planned by the Governor and for that reason they promptly resumed negotiations and made mutual concessions with the fortunate result above indicated. In my opinion the Governor had every reasonable ground to believe that the threatened catastrophe would probably happen.

If he had delayed action until the strike actually took place, the plants would have been shut down and the employees, whom he considered the only persons capable of operating them, would have been scattered and difficult to find. There would, in all probability, have been a delay of several days in getting the operations started up again. For this reason the Governor fixed a deadline for Thursday noon to afford time to complete his plans to prevent a shut down from happening Sunday at midnight. Only by using these precautions did he think public inconvenience and suffering could be avoided.

As to the action of the Governor in designating by name the persons to be embodied in the organization of the militia which was ordered to seize and operate the plant, the Governor had found as a fact that these persons, the Company's employees, who were familiar with and possessed the skill necessary to do the required work, were the only ones who could continue the operation without interruption of the service which he regarded as so vital to the public welfare. It would have been an idle gesture to embody in the organization persons who were absolutely unfitted to carry out its purposes. It would have been but a pretense, utterly lacking in good faith to have included therein any such unqualified persons.

But, it has been argued by some, the Governor exceeded his powers because, they assert, he did not comply with the requirements of section 4 of Article VI of the Military Code of Virginia (Acts 1930, p. 965, Michie's Code section 2673 (74)). This section is as follows:

"If the unorganized militia is ordered out by draft, the governor shall designate the persons in each county and city to make the draft, and prescribe rules and regulations for conducting the same."

Section 4, Article 1, of said Military Code (Michie's Code, section 2673 (4)), thus defines the unorganized militia:

"The unorganized militia shall consist of all able-bodied males as set out in section one above, except such as may be included in section two and section three, and except such as may be exempted as hereinafter provided."

Section two provides for the organization of the National Guard and section three the Naval Militia. The unorganized militia, therefore, consists of all other able-bodied male citizens of Virginia between sixteen and fifty-five years of age. The exemptions referred to are here immaterial.

It is clear that the Governor did comply with these sections. He designated certain members of the State Guard to make the draft in each county and city affected, and he prescribed the rules and regulations applicable by designating by name the members of the unorganized militia who should be embodied in the organization. No others were needed, and no others would have been useful or desirable. But even if it should be conceded, for the sake of the argument, that the method adopted did not comply with the quoted section, it is nevertheless clear that the Governor had ample authority to employ the method he used. As has been hereinbefore pointed out (II supra.), the power of the Governor to embody the militia to enforce the execution of the laws is derived, not from legislative enactment, but directly from the Constitution itself. (Section 73.) It is an emergency power coupled with that to repel invasions and suppress insurrections. Its effectiveness would be completely destroyed if it were subjected to the delay necessary to conduct complicated induction proceedings throughout the entire State, as some have contended is required. Prompt and immediate action to meet the threat of the emergency is imperative, and the Constitution grants the Governor full power to take that action. If the quoted section of the Military Code should be construed as an attempt to modify or curtail the power thus granted him, it would be obviously unconstitutional. He is not restricted as to the method he shall employ in embodying the militia, nor is he in any way limited in the particular members thereof he may select for the group embodied or in the duties to be assigned to them. This power of the Governor is, of course, far broader and more comprehensive than that of the sheriff's *posse comitatus*, but it is analogous thereto. Under the common law, as well as by statute in Virginia (Code section 4511), the sheriff may select any persons he desires and summon them to his aid in suppressing disorders or making arrests. Refusal to comply with his request subjects the offender to a fine of one hundred dollars and six months imprisonment in jail. Naturally, this officer will select the persons best qualified to perform the tasks to be assigned them. Certainly the Governor cannot be said to have a narrower range of selectivity in impressing into service members of the unorganized militia to meet an emergency than a sheriff would have under similar circumstances. Unquestionably the Governor may likewise order out those militia members best qualified to meet the demands of the occasion. The emergency with which the State was confronted on March 28, 1946, clearly justified the action taken.

IV

The National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. 151 *et seq.*, establishes a general and uniform jurisdiction over labor relations in the National Labor Relations Board with respect to businesses and industries affecting interstate commerce, but expressly excepting States and their political subdivisions. It guarantees to the employees the right of collective bargaining which may not be impaired by State laws or by State action. *Hill v. Florida*, 325 U. S. 538. The Virginia Electric and Power Company and its employees are subject to the Act. *N. L. R. B. v. V. E. P. Co.*, 314 U. S. 476. It is pertinent to consider, therefore, whether the embodying of that part of the unorganized militia consisting of these employees in the manner and for the purposes stated, and at a time when collective bargaining had been abandoned, constituted an impairment of their right to bargain collectively. The Governor's executive order did not interfere with the asserted right to strike, because the obligation imposed to

render active service for the State in the capacity of militiamen was conditional upon, and effective only at the time of, the occurrence of the proposed strike.

Did the Governor's order impair the employee's lawful bargaining rights guaranteed by said Act? The only possible effect upon the bargaining powers of the Union and Company representatives was to eliminate as a factor of their negotiations the threat of causing a *public calamity* by shutting down the operations. I have never heard of, nor can I conceive of any principle or law or justice which clothes any man or group of men with the right to insist upon inflicting such a hardship upon the great masses of the people in order to achieve their own private purposes. The claim of such a right and that it is violated by being required to render military service to avert the threatened calamity carries with it a repudiation of the duties which both the officers and employees of the Company, as citizens of Virginia, owe to their State and its Government. As said by Mr. Chief Justice White in *Aver v. United States*, 245 U. S., at page 378, "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in time of need and the right to compel it."

Clearly neither the Company nor the Union has a right to take advantage of its capacity to cause public misfortune by using same as a lever to force compliance by the other party with its demands.

Did the proposed taking over of the utility for operation and the use of its employees as members of the militia give the Company an unfair advantage over the union in their bargaining negotiations in violation of said Federal Act? Though statements have appeared in the press that the proposed action had this effect, past precedents would indicate the contrary. In the *Montgomery Ward Case*, supra, it was the Company which objected to government seizure, not the Union. Its members voluntarily went to work for the army and operated Ward's stores. And the same has been true with respect to railroads, coal mines and industrial plants seized by the President, and operated by the Government under his direction. The workers were not deprived of their employment and wages though the owners were divested of possession of their property. The argument that removal of the threat of public disaster was prejudicial to the Union carries with it the implication that its members were less reluctant to inflict such hardships upon the people and were less patriotic and less loyal to their duties and obligations to the State than the officers of the Company were. There is no evidence of the truth of any such implication. It is true that this is the only known case in which the workers and officers of a public utility have been called upon to serve as militiamen to avert a public catastrophe due to a strike or threatened strike, but it is also true that this is the only time that the utility employees have refused to work for the Government. When the Governor of New Jersey took over the operation of the gas utility a few days ago under similar circumstances, the employees voluntarily went to work for the State to keep the plant in operation. In that instance there was no necessity for the step which the Governor of Virginia was compelled to take to prevent a shutdown.

The Governor's action, therefore, did not impinge upon or impair any rights of collective bargaining guaranteed to the members of the Union by the National Labor Relations Act.

V

Does the purpose for which the members of the militia were embodied, or the duties conditionally assigned to them to perform for the State the same work they had been accustomed to do in operating the utility, subject them to involuntary servitude in violation of the Thirteenth Amendment of the Constitution of the United States as has been asserted by some? The amendment, by its own terms, applied alike to both State and Federal Governments.

This question has been the subject of widespread judicial consideration in the last two or three years in which numerous conscientious objectors, who were

drafted by the United States to perform work not related to combat service, such as cutting trees in the National Forest, soil conservation and the planting of trees in civilian camps, aids in mental and other hospitals, claimed they were forced into involuntary servitude without pay. A typical case is *Kramer v. United States*, 147 Fed. (2d) 756, in which the contention was emphatically rejected, and to which judgment the Supreme Court denied a writ of certiorari. 324 U. S. 878. The principle is well established that the involuntary servitude prohibited by the Constitution is restricted to private relationships and does not embrace the imposition upon one of the duty to discharge the obligations of the citizen to his State or Nation which arise out of conditions which threaten the safety and security of the State and its people. Many of the cases so holding, decided by the various Circuit Courts of Appeal, are cited in *Wolfe v. United States*, 149 Fed. (2d) 393. *Aver v. United States*, *supra*, sustained the validity of the Selective Service Act of 1917. That Act, to quote from the opinion, "while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a noncombatant character, to be defined by the President." It is clear from the decisions that there is no merit in the argument that the employees of the Virginia Electric and Power Company would have been subjected to involuntary servitude in violation of the Thirteenth Amendment had a strike occurred and, as members of the Virginia militia, they had been compelled to serve the State in maintaining the public service which the strike would otherwise have terminated.

It follows from the foregoing that I am of the opinion that the action of the Governor of Virginia in embodying the said members of the unorganized militia, and ordering them as militia members to perform the specified duties in connection with the operation by the Commonwealth of the plants of the said utility, was fully justified by the exigency of the occasion, and, under the circumstances, was a proper exercise of his powers as Chief Executive of the State and Commander in Chief of its land and naval forces.

Respectfully yours,

ABRAM P. STAPLES,
Attorney General.

STATE MILITIA—Eligibility To Rank Of Major General.

April 26, 1946.

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

My dear General Waller:

This will acknowledge receipt of your letter of April 16, in which you seek my opinion as to whether or not, should the Governor desire to appoint an Adjutant General who is a Brigadier General, he can appoint that officer a Major General of the State Guard of the Militia of the Commonwealth of Virginia, with no change in the amount of pay.

As you have indicated, the second paragraph of section 2673 (12) of Michie's Code of 1942 provides:

"The governor shall appoint as adjutant general, with the rank of brigadier general, to serve at the pleasure of the governor, who shall have had not less than five years commissioned service in the Virginia national guard,

and who, while holding such office, may be a member of the national guard. The adjutant general shall receive the present base pay of an officer of the same grade of the regular army, but he shall receive no other pay from the State."

It seems to me that the statute is sufficiently clear in describing the military rank of the Adjutant General. I do not believe it was intended for the Governor to appoint him a Major General in the State Guard while at the same time holding the rank of Brigadier General in the National Guard.

Such being the case, the question of increase in pay would not arise.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**STATE MILK COMMISSION—Hearing Necessary Before Maximum
Prices Are Raised.**

June 8, 1946.

STATE MILK COMMISSION,
1203 East Broad Street,
Richmond, Virginia.

Gentlemen:

This is in response to the oral request of Mr. Dixon as to whether or not the Commission may increase milk prices in the various districts throughout the State without respective hearings. This request is made in anticipation that the Office of Price Administration will raise the maximum prices for milk, and you are wondering whether or not you must conduct hearings to raise your prices to the same figures.

The only power which the Board has to fix prices is derived from subsection (j) of section 1211-y of Michie's Code of 1942. This provides:

"The Commission, after a public hearing and investigation, may fix the price to be paid * * *."

I am, therefore, of the opinion that a public hearing and investigation under this subsection are mandatory in order to raise milk prices under the Virginia Act, even though you are bound by and go no further than the maximum price previously approved by the Office of Price Administration, a Federal instrumentality.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF VETERINARY EXAMINERS—Manner Of Giving Examinations.

March 20, 1946.

DR. H. T. FARMER, *Secretary-Treasurer*,
Virginia State Board of Veterinary Examiners,
P. O. Box 436,
Richmond 3, Virginia.

My dear Dr. Farmer:

This is in reply to your letter of March 19, from which I quote as follows:

"This query is occasioned by the fact that formerly our Board has given written examinations only and further that the examination was of only one day's duration. Our next examination will include two consecutive days and we are planning to make the examination both oral and written provided this is in conformity with the law.

"With the limited law I have on the subject I cannot decide if an oral, given in conjunction with a written, examination is according to the law. "Therefore, it is requested that I be favored with a ruling on this point."

Section 1276 of the Code, providing for examination of applicants for the practice of veterinary medicine and surgery, states that it shall be the duty of the Board "at any of its meetings to examine all persons making application to them who shall desire to commence the practice of veterinary medicine or surgery in this State and who shall not by the provisions of this chapter be exempt from such examination * * * ." The section does not stipulate how the examinations are to be given, nor does it prescribe their duration.

Section 1275 of the Code, dealing with the Board of Veterinary Examiners, provides that "the Board may prescribe rules, regulations and by-laws for its own proceedings and government, and for the examination by its members of candidates for the practice of veterinary medicine and surgery."

In view of the above it is my opinion that the form of the examinations and their duration are matters to be determined by the Board in the exercise of reasonable discretion, provided they are not in conflict with the Rules of the Board as approved by the Commission on Administrative Agencies.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATUTES—When General Statute Does Not Repeal Existing Local Statute.

February 20, 1946.

HONORABLE WILLIAM N. NEFF,
State Senate,
Richmond, Virginia.

My dear Senator Neff:

This is in reply to your letter of February 9, in which you ask the following questions:

"By special Act passed in 1932, which was amended in the Extra Session of 1945, the tax rate for school purposes in Washington County

is set at a maximum of \$2.00. If the Bill pending in the current Session setting a maximum of \$2.50 for the State at large is passed, will this take precedence over the special Act and operate to increase the limit for Washington County to \$2.50?"

It is well established that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former statute which is special or local unless there is a plain indication that the Legislature contemplated and intended the repeal of the special statute. The repeal of a special statute must be either express, or the manifestation of the legislative intent to repeal must be so clear as to amount to an express direction. See *Commonwealth v. Richmond, etc. R. Co.*, 81 Va. 355; *Trehy v. Marye*, 100 Va. 40, and also cases cited in 9 Michie's Digest of Virginia-West Virginia Reports, at page 71.

House Bill 190, to which you refer, amending section 698 of the Code relating to levying taxes and appropriating money for school purposes, not only does not expressly repeal the special Act for Washington County mentioned by you, but it does not even contain any sort of repealing clause. It is my opinion, therefore, applying the rule which I have indicated above, should House Bill 190 be passed, that it would not have the effect of repealing chapter 17 of the Acts of the Extra Session of 1945, and the limitation of the tax levy of \$2 in Washington County for county school purposes would still be in effect.

While you do not raise the question, and I do not pass upon it, I invite your attention to the possibility of chapter 17 of the Acts of the Extra Session of 1945 being held unconstitutional, if challenged, as being in conflict with section 63 of the Constitution prohibiting the enactment of any local, special or private law "for the assessment and collection of taxes * * *."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATUTES—When General Statute Does Not Repeal Existing Special Statute.

March 26, 1946.

HONORABLE ALTON I. CROWELL,
Attorney for the Commonwealth,
Pulaski, Virginia.

My dear Mr. Crowell:

This will acknowledge receipt of your letter of March 15, concerning residence requirements for members of the County School Board of Pulaski County. Your specific inquiry is framed thus:

"What effect, if any, do you consider that section 653-a-2 of the Code of Virginia (Chapter 422 of the Acts of 1942, amended by Chapter 316 of the Acts of 1944) has on the application of Chapter 416 of the Acts of 1932?"

I do not believe that section 653-a-2 of the Code in any way amends or repeals Chapter 416 of the Acts of 1932. The provisions of section 653-a-2 to which you refer were in existence in another general statute (See section 653

of Michie's Code of 1930) when the 1932 Act was passed; therefore, the latter would constitute an exception to the general statute.

"When there is a conflict between the provisions of a special or local Act and the general law on the subject, the special or local Act is controlling." *Powers v. School Board of Dickenson County*, 148 Va. 661 (1927).

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Capitation Tax: Levy By Counties.

February 9, 1946.

HONORABLE WILLIAM W. CARSON, JR.,
Commonwealth's Attorney, Cumberland County,
Planters Bank Building,
Farmville, Virginia.

My dear Mr. Carson:

This is in reply to your letter of February 5, in which you state that you have been unable to find any statute authorizing the board of supervisors of Cumberland County to levy a capitation tax of one dollar for county school purposes.

I find in the Acts of 1920, Chapter 150, page 212, an Act which, for your convenience, I quote in full as follows:

"Be it enacted by the general assembly of Virginia, That the board of supervisors of the counties of Appomattox, Amelia, Cumberland, Nottoway, Lunenburg and Prince Edward be, and they are, hereby authorized to levy, in accordance with section one hundred and seventy-three of the Constitution of Virginia, an additional capitation tax not exceeding one dollar per annum, on every male citizen in said county not less than twenty-one years of age, except those who are exempted from the payment of State capitation tax."

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—State Operated Ferry Not Subject To Local License.

May 29, 1946.

MR. C. J. ALLARD, *Auditor*,
Department of Highways,
Richmond, Virginia.

My dear Mr. Allard:

This is in reply to your letter of May 27, 1946, requesting my opinion upon whether or not the Highway Department should pay certain city license taxes

to the cities of Newport News and Norfolk in connection with the operation of the ferries of the Chesapeake Ferry Company acquired for temporary use by the State Highway Commissioner.

As I have previously advised you it is my opinion that the Commissioner holds possession of and operates these ferries in the performance of a State function and not as an agent for the private owners.

As a general principle of law tax statutes are construed not to embrace property of government or its instrumentalities unless the legislative intention to include such property is plainly and clearly expressed. The general statute authorizing cities to impose license taxes does not specifically authorize the imposition of such a tax against State agencies.

The order of the court under which the Commissioner took possession of the ferries directed him to pay all taxes upon the operation of the ferry property as may be required of him by lawful authority. However, since localities cannot tax the State in the absence of express authority, the license taxes of which you speak are not such as may be required by lawful authority, unless there are provisions in the charters of Newport News and Norfolk which can be said to confer such express authority. In the absence of a showing of such a provision, I think that the license taxes you mention should not be paid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

**TAXATION—State Not Liable For Federal Tax On Gasoline Used In
Operation of Ferry.**

May 20, 1946.

MR. C. J. ALLARD, *Auditor*,
Department of Highways,
Richmond, Virginia.

My dear Mr. Allard:

This is in reply to your request for my opinion upon whether the Highway Department should pay the Federal excise tax on gasoline and oil purchased by it for use in the operation of the ferries of the Chesapeake Ferry Company acquired for temporary use by the State Highway Commissioner.

Sections 3442 and 3443 of the Internal Revenue Code provide for an exemption as to the tax on gasoline and lubricating oil when these products are sold "for the exclusive use of any State, Territory of the United States, or any political subdivision of the foregoing."

Possession of the Chesapeake ferries was taken by the State Highway Commissioner pursuant to an order of the Circuit Court of the City of Norfolk entered on February 25, 1946, in proceedings had under Chapter 39 of the Acts of Assembly of 1946. This Act authorizes the Commissioner to take temporary possession of privately owned ferries when the normal operation thereof has been so impaired or suspended as to result in a serious obstruction to the use and operation of the State Highway System. The Commissioner is required to operate such ferry in such manner as will best meet and satisfy the public needs and facilitate the operation and use of the State Highway System. All charges and tolls collected are paid into the State treasury for credit to the highway funds.

While the ferries are to be returned to private owners whenever the owners can and will resume operation and render normal ferry service and the owners

are to be paid "reasonable, proper, and lawful compensation for the use of the ferry," it is my opinion that the State Highway Commissioner does not hold possession of the ferry properties as an agent of the private owners or operate the same for their benefit. The Commissioner has taken possession of the ferries and is operating them to facilitate the operation and use of the State Highway System, a State function and purpose.

The gasoline and lubricating oil purchased for use in the operation of the ferries are bought "for the exclusive use of" the State and, in my opinion, are within the tax exemption provided by Section 3442 and 3443 of the Internal Revenue Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Agricultural Land To Be Taxed At Same Rate As Other Land.

January 22, 1946.

HONORABLE EDWIN LYNCH,
Member of House of Delegates,
Richmond, Virginia.

My dear Mr. Lynch:

This is in reply to your letter of January 17, from which I quote as follows:

"The Advisory Committee on Taxation and Finance to the Fairfax County Board of Supervisors recommended that consideration be given to a local bill that would permit the Board to levy a tax on agricultural land different from that of other real estate. In other words, they wanted the Board to be able to set a lower rate on agricultural land than on other real estate.

"This letter is to ask you if you think a local bill of this nature would be in accordance with the Virginia Constitution."

While the question you raise has not been passed on by any reported case in Virginia so far as I can find, it has come up in a number of other jurisdictions. A considerable number of cases are collected in an annotation appearing in 111 American Law Reports, beginning at page 1486. In this annotation it is stated that, while there is some conflict, the substantial weight of authority is to the effect that in those jurisdictions whose Constitutions require taxes to be uniform the classification of land for the purpose of property taxation as agricultural and otherwise results in an unconstitutional discrimination. Section 168 of the Virginia Constitution expressly provides that:

"All taxes, whether State, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, * * *."

Generally speaking, it would be unwise to attempt to say categorically that any proposed statute would be unconstitutional, but from such authority as I have been able to examine, in my opinion, a statute such as you describe is of quite doubtful constitutionality.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—As Of What Date Real Estate Taxes Become Delinquent.

June 28, 1946.

HONORABLE DELAMATER DAVIS,
Member House of Delegates,
Bank of Commerce Building,
Norfolk, Virginia.

My dear Mr. Davis:

This will acknowledge receipt of your letter of June 21, with reference to House Bill 133 purported to amend and reenact section 282 of the Tax Code. This Act will appear as chapter 360 of the Acts of 1946. The first paragraph provides as follows:

"All liens upon real estate for taxes and levies due and payable to the Commonwealth or any political subdivision thereof which taxes and levies have been, or hereafter become, delinquent for twenty or more years are hereby released."

You ask my opinion as to when these land taxes become delinquent in order for the limitation prescribed in this statute to begin to run.

It appears to me that you have put a proper construction upon the matter since, as you have indicated, section 388 of the Tax Code prescribes that the delinquent list compiled by the treasurers shall speak as of June 30 of each year; that is, delinquent land taxes for the year 1925 would be released after June 30, 1946.

What I have said is only with reference to this particular statute as there might be provisions in town or city charters fixing delinquency dates to the contrary in some localities. I express no opinion as to their effect.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Delinquent Real Estate Taxes Of Soldiers And Sailors.

June 11, 1946.

HONORABLE J. A. GARDNER, *Clerk,*
Circuit Court of Wise County,
Wise, Virginia.

My dear Mr. Gardner:

I am in receipt of your letter of June 6, from which I quote as follows:

"Will you kindly refer to section 373-A1, 1944 Supplement of the Virginia Code of 1942, and give the writer your opinion on the following:

"In 1932, a property owner of this county joined the United States Army and has served continuously since that time and is at present a Captain with the United States Army in China. This person owes taxes on real estate from 1933 through 1945.

- "1. Does penalty and interest apply from 1933 to January 1, 1941?
- "2. Can this person pay from 1941 to the present time without penalty

and interest; or should this person pay the assessment from January 1, 1933, to January 1, 1941, with penalty and interest and be permitted to pay from 1941 through 1945 without penalties and interest?"

The statute to which you refer (chapter 48 of the Acts of 1944) provides in part as follows:

"Any person who, on or after the first day of January, nineteen hundred and forty-one, was or is assessed with any real estate, personal property, income or capitation tax for any year during all or any part of which he was or is in the armed forces of the United States, may, during the period of such service and within one year after it is terminated, pay the principal of such tax without the addition of any penalty or interest thereon, either because of failure to file a return within the time prescribed by law, if a return was required, or because of failure to pay the tax within the time prescribed by law. Every such person desiring to be relieved from the payment of such penalty or interest, or both, shall make request therefor to the officer receiving the tax at the time payment is made. * * *

In view of the language of the statute, I am of the opinion that the individual to whom you refer is relieved from penalties and interest on the taxes on his real estate only for the years 1941, 1942, 1943, 1944 and 1945, and for every other year during which he is a member of the armed forces of the United States so long as the statute is in effect. For the years prior to 1941, I am of opinion that the penalties and interest on his real estate taxes should be collected. Of course, the other provisions of the statute, with which you are familiar, must be complied with.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Constitutionality Of Statute Releasing Lien For Delinquent Taxes.

HONORABLE FURMAN WHITESCARVER,
Member of House of Delegates,
Richmond, Virginia.

February 4, 1946.

My dear Mr. Whitescarver:

I have your letter of January 30, enclosing House Bill No. 133, the effect of which is to release liens for taxes and levies due the Commonwealth and its political subdivisions when such taxes and levies have been delinquent for twenty years or more. You inquire as to the constitutionality of this Bill particularly in the light of section 194 of the Constitution prohibiting the passage of any law staying the collection of debts.

After careful consideration, I beg to advise that it is my opinion that such a statute as you propose, merely releasing the lien for certain taxes and levies, is not a stay law within the meaning of section 194. Your Bill does not stay the collection of any debt, even if a tax could be said to be a debt within the

meaning of the section, which I doubt. Nor do I know of any other provision of the Constitution that would be violated by the Bill you propose.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Re-assessment Of Real Estate; By Whom And When To Be Made.

July 13, 1945.

MR. T. S. DUNNAWAY, JR.,
Director of Finance for Warwick County,
Hilton Village, Virginia.

My dear Mr. Dunnaway:

I am in receipt of your letter of July 11, in which you state that the Board of Supervisors of Warwick County ordered a general reassessment of real estate in the county and that, pursuant to section 2773(60) of the Code (Michie, 1942), this general reassessment will be made by you as Director of Finance. You then ask if a general reassessment for the year 1945 should be completed by December 31 of this year.

It is my opinion that, by virtue of section 247 of the Tax Code of Virginia, such reassessment should be completed not later than December 31 of this year. Section 2773(60) of the Code, to which I have referred, simply provides that in certain circumstances the reassessment shall be made by the Director of Finance, but there is nothing in this section that sets up the machinery for making such reassessment and we must, therefore, look to section 242 to 250 of the Tax Code for this purpose. I do not see how it could be reasonably held that your term of office as Director of Finance controls the time within which the reassessment must be made.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA COMMISSION FOR THE BLIND—No Authority To Engage In Vending Machine Business.

April 24, 1946.

MR. L. L. WATTS, *Executive Secretary*,
Virginia Commission for the Blind,
3003 Parkwood Avenue,
Richmond 21, Virginia.

My dear Mr. Watts:

I have already explained to you the reason for my delay in replying to your letter of March 14, in which you ask for my opinion on the following matter:

"I am advised that this Institution may receive bequests, donations, and gifts to be used as the donor may designate.

"I should like to have your opinion as to the legality of us receiving donations and contributions to be used in providing profitable work for certain of our blind men in a profitable business undertaking. The business venture referred to is for some nine or more blind men to service automatic merchandising machines and the blind men servicing these machines will earn much better than an average wage and at the same time this Commission would make a nice profit for use in providing more employment for more blind people who are not qualified to service automatic merchandising equipment."

The powers of the Virginia Commission for the Blind are outlined in section 978-a of the Code (Michie, 1942). Among other things, the Commission may "act as a bureau of information and industrial aid, the object of which shall be to assist the blind in finding employment, and to teach them industries which may be followed in their homes." Also, "the Commission may establish, equip and maintain schools for industrial training and workshops for the employment of suitable blind persons, pay the employees suitable wages, and devise means for the sale and distribution of the products thereof." Furthermore, the Commission "shall have authority to use any receipts or earnings that accrue from the operation of industrial schools and workshops as provided in this Act."

While I think it is unquestionably true that the statute prescribing the powers of the Commission for the Blind should be liberally construed to carry out its beneficent purposes, I can find nothing in the powers of the Commission to which I have referred which in my opinion can be construed to authorize it to engage in a mercantile business such as you describe. Certainly such a business cannot be said to be a school for industrial training or a workshop; nor can the employment of blind persons to service these merchandising machines be said to be teaching such persons industries which may be followed in their homes.

It is entirely true, as you suggest, that section 978-a authorizes the Commission to receive and use donations and bequests in such manner as it may deem proper within the limitations imposed by the donors, yet such donations may be used only "for the purposes enumerated" in the section.

After carefully considering the matter I must reluctantly advise you that to authorize the Commission to engage in the enterprise you describe I think further legislative authority is necessary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

WAR—When Does A State Of War Cease To Exist.

HONORABLE CHARLES B. GODWIN, JR.,
Commonwealth Attorney,
Suffolk, Virginia.

October 11, 1945.

My dear Mr. Godwin:

This is in reply to your letter of October 8, in which you request my opinion upon the question whether or not at this time a state of war exists between the United States and any foreign power, so as to continue in effect the prohibition in section 4722(4a) of the Code against purchase and sale of fireworks during any such time.

The statute itself does not undertake to define the meaning of a "state of war," so that recourse must be had to the authoritative decisions on the question in order to determine the generally accepted meaning of such a provision at the time of its enactment. In *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, Mr. Justice Brandeis, speaking for the Court, said:

"In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace."

Again, in *Commercial Cable Company v. Burleson*, 255 Fed. 99, 104, Judge Learned Hand rejected the contention that certain wartime powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added:

"Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war."

See also *Kahn v. Anderson*, 255 U. S. 1, 10; *Ware v. Hylton*, 3 Dall. 199, 236; 22 Op. A. G. 190 (1898).

Of course, the General Assembly may amend this and other similar statutes or repeal the same as may be desirable. However, I believe that the generally accepted meaning of the language used is such as to continue in force the provisions of the statutes involved until the necessary treaties of peace have been ratified or else the statutes themselves further dealt with by the General Assembly of Virginia.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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