LETTER OF TRANSMITTAL

July 10, 1947

HONORABLE W.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)*

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<th>NAME</th>
<th>COUNTY</th>
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<tr>
<td>Abram P. Staples</td>
<td>Roanoke City</td>
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<td>Kenneth C. Patty</td>
<td>Tazewell</td>
<td>Assistant</td>
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<td>G. Stanley Clarke</td>
<td>Henrico</td>
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<td>D. Gardiner Tyler, Jr.</td>
<td>Charles City</td>
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<td>Walter E. Rogers</td>
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<td>M. Ray Doubles</td>
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<td>C. Champion Bowles</td>
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<td>Ernest Ballard Baker</td>
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<td>Jr. Attorney</td>
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<td>Henry T. Wickham</td>
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<td>Nerhea S. Evans</td>
<td>Charlotte</td>
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<td>Helen R. Miller</td>
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**Attorneys General of Virginia**

*From 1776 to 1936*

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<td>Charles Whittlesey (military appointee)</td>
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<td>Samuel W. Williams</td>
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<td>John Garland Pollard</td>
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<td><em>J. D. Hanks, Jr.</em></td>
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<td>John R. Saunders</td>
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<td><strong>Abram P. Staples</strong></td>
<td>1934-1936</td>
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<td>Abram P. Staples</td>
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*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.*

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

10. Riddick, Bruce vs. Commonwealth. From Corporation Court City of Norfolk, Part II. Murder.

Cases Decided in the Supreme Court of Appeals of Virginia


22. Spiak, Nicholas vs. T. Wilson Seay, Sheriff, etc. From Circuit Court of Henrico County. Habeas corpus testing legality of interstate extradition. Dismissed.


28. Young, Clyde vs. Commonwealth. From Circuit Court of Norfolk County. Rape. Reversed and remanded.

Cases Decided in the Supreme Court of the United States

1. Green, John Locke vs. Darden, Governor. Initiated in petition for writ of mandamus invoking the original jurisdiction of Supreme Court of Appeals of Virginia. Writ denied by an order entered October 8, 1945, without an opinion. Certiorari was denied by U. S. Supreme Court on January 2, 1946, without an opinion.


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


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


Cases Pending in United States Circuit Court of Appeals—Fourth Circuit


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

7. *Commonwealth vs. Lauren M. Griffith.* Circuit Court City of Richmond. Tax on intangible personal property.


15. In the Matter of Estate of Charles Macalester, III. Circuit Court of Wythe County. Inheritance tax.


OPINIONS
ACCOUNTANTS—Unlicensed Person Advertising Himself as an Accountant is Guilty of Criminal Violation.

Mr. A. W. Burket, Secretary-Treasurer,
State Board of Accountancy,
American Building,
Richmond 6, Virginia.

My dear Mr. Burket:

This will acknowledge receipt of your letter of August 2, requesting my opinion as to whether or not Messrs. Bass and Talley, of Danville, Virginia, were in violation of the Virginia C.P.A. Law in connection with advertisements, announcements, etc., published by them.

The advertisements which you have forwarded to me indicate that these individuals are holding themselves out to the public as auditors and accountants. You have also stated to me over the telephone that neither of these persons is licensed or registered by the State Board of Accountancy. Section 572 of Michie’s Code of 1942 provides in part:

"From and after the first day of January, nineteen hundred and twenty-nine, it shall be unlawful for any person to engage in the public practice of accountancy in the State of Virginia except those possessing certificates of certified public accountants issued by this State, and/or duly registered public accountants. ** *

While you have given me no evidence that these persons were actually engaged in the practice of accountancy, I think a general holding out to the public that such service is available equally comes within the condemnation of the statute and is, therefore, unlawful.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Eligibility to Vote in Local Option Elections.

Mr. C. G. Nofsinger, Secretary,
Botetourt County Electoral Board,
Fincastle, Virginia.

My dear Mr. Nofsinger:

This is in reply to your letter of October 25th, containing several inquiries concerning an ABC Local Option Election to be held in Botetourt County on November 19, 1946. I shall state your questions in order with the answer for each.

"1. Can a prospective voter be registered between November 5th, the date of the general election, and November 19th, the date of the special election, and can said prospective voter so registered vote in the special election on November 19th?"

As you undoubtedly know, the registration books are closed after October 5, 1946, and through Tuesday, November 5, 1946, because of the general election on the latter date. Anyone desiring to vote in the local option election on November 19, and who has not been previously registered, may register at any time after November 5th, up to and including November 19, and be eligible to vote in the ABC Local Option Election on November 19th.
"2. Does your ruling on the above question also apply to members
of the armed forces and veterans?"
Yes.
"3. What is the law with reference to requiring veterans to pay their
poll tax to qualify them to vote."

Article XVII of the Virginia Constitution cancels all poll tax for all persons
who were in active service as a member of the armed forces of the
United States in World War II for the years 1942, 1943 and 1944, and in
addition, for any other year during any part of which said persons were in
the armed forces on active duty. Therefore, all veterans of World War II
not dishonorably discharged, who meet the age requirements and have been
registered will be eligible to vote in the local option election on November 19,
1946, without the prepayment of any capitation tax provided they were discharged
during 1945 or 1946.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Local Option; Towns and County
to Hold Separate Elections.

August 5, 1946

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

My dear Mr. Carter:

This is in reply to your letter of August 2, in which you address a num-
ber of inquiries to me concerning the local option election provisions of the
Alcoholic Beverage Control Act (section 4675 (30) of Michie's Code of 1942).
This statute was amended and re-enacted by Chapter 200 of the Acts of 1946,
but I do not believe the amendment affects your problem.

Since your letter is lengthy and in detail, I shall answer it without a re-
statement of its contents.

It has heretofore been my opinion that incorporated towns having a popu-
lation of 900 or more are to be considered separate entities from the county
in which they may be for the purposes of local option elections. The county
and the town vote independently and the result in either will not affect the
other. The two cannot be combined for a single result, nor can an election
in a county and town be instituted by a single petition comprising names of
electors of both political subdivisions indiscriminately. See Opinions of At-
torney General 1933-34, p. 4; 1935-36, pp. 8-9; 1936-37, p. 11; 1940-41, pp. 2-3.

This means that, if you desire such elections in both Amherst County and
the Town of Amherst, it is necessary that petitions be filed on behalf of the
electors in both the County and the Town. As you indicate, the statute re-
quires that the petition be signed by a number of qualified voters of the sub-
division not less than 30 per centum of the number of votes cast by the quali-
fied voters of such subdivision for presidential electors in the last preceding
presidential election, but in no event to be less than 100. This really involves
a complex matter when a certain precinct of the county includes the incor-
porated town and also a portion of the county, and the votes are cast without
reference to the residence of the voter. As a practical matter, this could be
determined by a resort to the poll books used in the November, 1944, election
for said precinct if the books are still in existence, and also the Treasurer's
list, as required by section 114 of the Code, for the year 1944 might be of some
possible aid. In the final analysis this is a question for the Judge of the Circuit Court to determine when the petition for a referendum is presented to him. I see no objection to the holding of the referenda in Amherst County and the Town of Amherst on the same day. In fact, I am of opinion that this has been done in a number of instances.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Local Option; How County Exclusive of Towns Therein to Calculate Number of Petitioners Necessary for Referendum; Eligibility to Vote in Town Election.

October 8, 1946

HONORABLE WALTER R. CARTER,
Attorney for the Commonwealth,
Amherst, Virginia.

My dear Mr. Carter:

This is in reply to your letter containing several inquiries with respect to local option provisions of the ABC Act. I shall state your questions separately, and follow each with what I consider the appropriate answer.

First: “Assuming that in the last Presidential Election 2585 votes were cast and counted in Amherst County as a whole including the Town of Amherst, and that 248 votes were cast in the Town of Amherst, leaving 2337 votes cast in the County outside of the Town of Amherst, in arriving at the thirty per cent of the votes cast do you take thirty per cent of 2585 or thirty per cent of 2337 the number of votes cast outside of the Town of Amherst in arriving at the number required to call for a referendum in the County of Amherst?”

To hold elections of this type in Amherst County, exclusive of the town of Amherst, it would be necessary for the petition to contain names aggregating 30% of the figure 2337.

Second: “Section 2995 of the above mentioned Code provides for the appointment of a Registrar for towns, and further provides “The said registrar shall, before any election in said town, register all voters who are residents of the respective precincts of such town, and who shall have previously registered as voters in the County, and none others.” Does this mean that in order for a person to vote in a referendum in the town of Amherst that his name must appear on the Town Registrar’s books where he is properly registered on the books of the Registrar for the Court House precinct in which the town of Amherst is located, or is it sufficient that his name appears on the Registration books for the Court House precinct?”

In order to vote in purely town elections, the voter’s name must appear not only on the registration books for the courthouse precinct, but also on the separate books for the town of Amherst.

Third: “Sections 109 and 114 of the above mentioned Code, provides that the County Treasurer shall certify a list of the persons who have paid their capitation tax six months prior &c. Can a citizen of the town of Amherst who has paid all of his capitation taxes six months prior to the November Election, but did not pay six months prior to
the second Tuesday in June 1946, vote in a referendum on the above
mentioned subject to be held in the town of Amherst in December
1946?"

Yes. The qualifications of electors for this election are governed by Sec-
tion 83 of Michie's Code of 1942. That is, the persons will be qualified to
vote in the referendum in December who are qualified to vote at the general
election on November 5, 1946, and also, all persons who have paid their poll
taxes not later than six months prior to the date set for the special referendum
in December.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ALCOHOLIC BEVERAGE CONTROL—Intermediate Status of Town
Which Votes "Wet" After County Votes "Dry" in Local Option
Elections.

February 19, 1947

HONORABLE JOHN ROBERTS,
Commonwealth's Attorney,
Wise, Virginia.

My dear Mr. Roberts:

This is in reply to your letter of February 17th seeking my opinion with
reference to several ABC local option elections held in Wise County in Decem-
ber 1946. You state that such an election for the whole county including the
incorporated towns was held on December 3, and as a result a majority of
votes in this election was cast against the sale of beer and wine and alcoholic
beverages other than beer and wine. On December 14, an order was entered
by the Circuit Court of Wise County officially declaring the result of this
election, and in accordance with the applicable statute, section 31 of the Alco-
holic Beverage Control Act (chapter 94 of the Acts of Assembly of 1934, § 4675
(31) Michie's Code of 1942) the sale of such beverages is prohibited in the
said county on and after sixty days from December 14, 1946. On December 10,
and December 17, further elections were held in certain incorporated towns,
containing more than 900 inhabitants, which had previously voted in the county
election, and several of these towns voted for the sale of both types of bev-
erages. Court orders officially certifying these results were entered at various
times, and you seek my opinion as to whether or not these towns which voted
wet are allowed to sell said beverages after the effective date of the order
certifying the result of the whole county, but before sixty days has elapsed
from the entry of the order certifying the wet victory in the particular towns.

In the circumstances of this case, it is my opinion that the towns which
voted wet subsequent to December 3, although they participated in the county-
wide election on December 3, are not affected by the county result, and the
sale of said beverages will not be illegal in the said towns.

Ever since the effective date of the Alcoholic Beverage Control Act in
1934, the State as a whole is in popular jargon "wet." For a county, city or
town to become dry requires affirmative action, then an election after which
the result is officially certified, and a sixty-day period established before the
ban on such sales goes into effect. There is no such prescribed period when
a particular locality votes initially and the result is wet. There, conceivably
such beverages may be sold the next day. Such a sixty-day period is also pre-
scribed where the locality has once voted against such sales, but in a subse-
quent election reverses its previous result. See section 31(c). The present
situation could conceivably fall within the wording of section 31(c), since this
election on December 3 resulted in a dry victory. But 31(e) provides:
"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 a part thereof is located, such town shall be treated as being separate and apart from such county."

When subsection (c) is construed along with subsection (e), I am of the opinion that subsection (c) is not applicable to a situation where a town having voted in a county election immediately proceeds to have its own election with a different result.

Applying these principles to the facts of your particular case, I am of the opinion that the sales of beer and wine and alcoholic beverages other than beer and wine in the towns of Norton, Big Stone Gap and Pound are not affected by the county-wide dry victory on December 3, since each of these towns in separate elections on December 10 and 17, voted in favor of such sales.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

APPRENTICESHIP COUNCIL—Authority of the Council to Provide Instruction.

HONORABLE JOHN HOPKINS HALL,
Commissioner of Labor,
Richmond, Virginia.

My dear Mr. Hall:

This is in reply to your letter of April 30, 1947, in which you request my opinion as to the obligation of the State to provide related and supplemental instruction for apprentices under Chapter 421 of the Acts of Assembly, 1938, commonly referred to as the Voluntary Apprenticeship Act.

This Act provides for the appointment of an apprenticeship council to establish standards for apprenticeship agreements, approve such agreements and to issue certificates of journeymanship upon completion of the apprenticeship. The Act provides that the standards established by the council shall not be lower than those prescribed by the Act, which requires that apprenticeship agreements shall provide for not less than four thousand hours of reasonably continuous employment of the apprentice, for his participation in an approved schedule of work experience through employment, and for at least one hundred and forty-four hours per year of related supplemental instruction.

It is my opinion that the council, being vested with the authority to establish standards for such agreements, may prescribe the type of related instruction as well as the type of work experience that will be required before the certificates of journeymanship are issued. The Act, in providing that the administration and supervision of related and supplemental instruction shall be the responsibility of State and local boards responsible for vocational education, apparently contemplated that such instruction would be provided through such program of vocational education as is offered by the State and local school authorities. However, the Apprenticeship Act, itself, does not set up the machinery for such educational program or provide any appropriation therefor. Whether any State or local agency is responsible for providing such educational facilities would, therefore, depend upon whether sufficient funds are appropriated to them to carry out this purpose as well as other functions required of them.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
APPROPRIATIONS—Constitutionality of Appropriation to Home for Needy Confederate Women, Incorporated.

HONORABLE CASSIUS M. CHICHESTER, Director,
Division of Statutory Research and Drafting,
Richmond, Virginia.

My dear Mr. Chichester:

This is in reply to your letter of May 22, in which you ask a number of questions on behalf of a member of the Commission created by House Joint Resolution No. 26 of the last session of the General Assembly "to study and report upon matters pertaining to the Home for Needy Confederate Women" in Richmond. I shall endeavor to answer the questions in the order in which they appear in your communication.

"In view of the provisions of section 67 of the Constitution forbidding appropriations by the General Assembly to charitable institutions which are not owned or controlled by the State is the conveyance of land in 1926 to the home of any effect and can the General Assembly constitutionally make an appropriation of public funds to the home?"

The Home for Needy Confederate Women (hereinafter referred to as the "Home") was incorporated by Chapter 851 of the Acts of Assembly of 1897-98 as a charitable corporation and its purpose was "the establishment and conduct of a home for the needy widows, wives, sisters, and daughters, of Confederate soldiers." In 1916 the State Corporation Commission granted an amendment to the charter of the Home by which its purpose was altered so as to be "the establishment and operation of a home for the needy widows, wives, sisters, daughters and lineal descendants of Confederate soldiers." The Home is "under the control and management of a Board of Directors consisting of not less than five nor more than fifteen women," vacancies to be filled as prescribed by the bylaws.

Section 67 of the Constitution, to which you refer, provides in part that "the General Assembly shall not make any appropriation of public funds, ** to any charitable institution which is not owned or controlled by the State **."

The conveyance referred to in your question is the conveyance of the land on which the Home is now located, and which the Governor was authorized to make by Chapter 3 of the Acts of 1926, as amended by Chapter 91 of the Acts of 1926. The purpose of the Act was to enable the Home to establish "a home for the needy widows, wives, sisters, daughters and female descendants of Confederate soldiers, sailors and marines, such home to be a memorial to the women of the Southern Confederacy." The Deed was required to provide that:

"** the right, title and interest in and to said property so conveyed shall remain in the said grantee, in consideration of the erection and conduct thereon of a home for the needy widows, wives, sisters, daughters, and female descendants of Confederate soldiers, sailors and marines, as a memorial to the women of the Southern Confederacy, so long as the grantee shall conduct the same in conformity with this act, subject to the following conditions and restrictions:

"The building or buildings to be erected on the granted land for the purposes mentioned in this act shall cost not less than two hundred and fifty thousand dollars.

"The governor of the State shall be ex-officio a member of the governing board of the home.

"The art commission of Virginia, or such State agency, as may perform the work of the art commission, shall approve plans and specifications for all buildings and landscape work.

** ** ** ** ** ** ** ** **
 Upon the failure of the grantee to establish the said home within eight years from the date of the deed and to conduct, maintain and operate it continuously after its establishment for the uses, purposes and objects for which the conveyance is made, and subject to the conditions and restrictions contained in this act, then the said property shall revert to the Commonwealth in fee simple, with the right to the Commonwealth to take immediate possession thereof.

Assuming that the Home is a charitable corporation not owned or controlled by the State, it is my opinion that the conveyance under the conditions above described does not constitute an "appropriation" of real estate within the meaning of section 67 of the Constitution. No outright or unrestricted conveyance or "appropriation" is involved. Whenever the Home ceases to conduct on the land conveyed "a home for the needy widows, wives, sisters, daughters, and female descendants of Confederate soldiers, sailors and marines, as a memorial to the women of the Southern Confederacy," the property reverts "to the Commonwealth in fee simple." The establishment of such a memorial is a recognized public purpose. 42 Am. Jur. Public Funds, sec. 59.

You also ask in your first question if "the General Assembly (can) constitutionally make an appropriation of public funds to the home?" You refer to the appropriation made by Item 44 of Chapter 388 of the Acts of 1946, for the benefit of the inmates of the Home. But this appropriation is not made to the Home. It is made to the State Comptroller for the benefit of certain needy Confederate women who are inmates of the Home. The appropriation is expended on warrants of the State Comptroller just as the other appropriations made in the same item for the benefit of other Confederate men and women. Certainly, there is nothing in section 67 of the Constitution to prohibit such an appropriation, and I am of opinion that it is valid.

Your second question is:

"Can the appropriation be used for care of any inmates of the home who are not needy widows, wives, sisters and daughters of Confederate veterans?"

The language of that part of Item 44 involved in your inquiry is as follows:

"It is further provided that out of this appropriation, there shall be expended for care of needy Confederate women who are inmates of the Home for Needy Confederate Women at Richmond, in accordance with the provisions of the act approved March 4, 1914 (Acts of Assembly, 1914, chapter 40, page 60)........... $50,000 each year.

"It is provided, however, that no expenditure in excess of $45,000 each year shall be made out of this appropriation of $50,000 each year, unless and until satisfactory evidence has been furnished to the Governor of Virginia that the entire net income from the endowment fund of the Home for Needy Confederate Women for such year has been expended for care of the aforesaid needy Confederate women on the same level and for the same general purpose for which the said sum of $45,000 was appropriated, and unless the Governor is further satisfied that the proposed additional expenditure is necessary for the proper care of the inmates of the said home."

Your question doubtless arises out of the reference in the appropriation to Chapter 40 of the Acts of 1914, which provided that a small appropriation made to the Home by that Act was to be expended for "needy widows, wives, daughters and sisters of Confederate soldiers." Obviously, the source of this provision was the charter of the Home, which at that time (1914) provided that the Home was to be conducted for the 'needy widows, wives, daughters
and sisters of Confederate soldiers." In fact, the Act expressly recognized that the Home was organized for this purpose. But the charter was amended in 1916, as has been pointed out, to add "lineal descendants" of Confederate soldiers to those who may be admitted to the Home. And in 1926 the General Assembly authorized the conveyance of the land on which the Home is now located in order that it might establish and operate thereon "a home for the needy widows, wives, sisters, daughters and female descendants of Confederate soldiers, sailors and marines." It does not seem probable that the General Assembly would have permitted the conveyance of land for the purpose of providing a home for certain needy Confederate women and then limit the appropriation made for their benefit to only a portion of its inmates. While I cannot say that the question is free from doubt, I am inclined to be of opinion that, taking all pertinent statutory provisions into consideration, the better view is that the appropriation in question was intended to be used for those inmates of the Home who were properly admitted under the provisions of its charter. Independent of the legal question, I might suggest it may be that the appropriation for the current biennium is no more than sufficient to care for needy widows, wives, sisters and daughters of Confederate veterans who are inmates of the Home, but this is a question of fact upon which I do not have sufficient information to pass.

You next ask:

"Assuming that the appropriations are valid what degree of control, if any, does the General Assembly have over the institution?"

While the General Assembly has no direct control over the Home, it may, of course, attach such conditions to any appropriation it may make for the benefit of the inmates of the Home so as to insure that such appropriation will be expended for the purposes for which it is made. Thus indirectly the General Assembly may exercise a considerable degree of control.

Your last question is:

"Whether or not the provision of the act of 1926, by which the Governor was made ex officio a member of the Board of Directors is valid in view of the provisions of Section 154 of the Constitution?"

It is true that Chapter 91 of the Acts of 1926, which is the Act authorizing the conveyance of a site for the Home heretofore discussed, assigns as one of the conditions for the conveyance that the Governor shall be ex officio a member of the governing board of the Home. It is likewise true that section 154 of the Constitution provides, in part, that the General Assembly shall not by special Act "regulate the affairs of any corporation, ***." It does not seem to me that it can be reasonably argued that the designation, for reasons which are obvious, of an additional member of a board of a corporation, which board consists of not less than five nor more than fifteen members, is an effort to regulate the affairs of a corporation, and I am, therefore, of the opinion that the provisions in the Act of 1926, to which you refer, does not violate section 154 of the Constitution.

Sincerely yours,

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

APPROPRIATION—To Schools; Act of 1946.  
August 1, 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 July 19, in which you ask for my construction of Item 113 of the Appropriation Act of 1946. You seem to be of the opinion that there is a conflict in the two paragraphs of Item 113 and you wonder which one shall prevail.

It is my opinion that the two paragraphs refer to different and distinct matters. The relevant portion of the first paragraph is to this effect:

"* * * the moneys in Item 112¾ that are undistributed because of the failure of eligible counties or cities to comply with the provision of Item 112¾ shall first be distributed to counties and cities incurring losses due to the plan of distribution being followed in Item 112 of this Act."

This is in effect an appropriation of the balance, if any, left from Item 112¾ due to the failure of any county or city to measure up to the standards therein set out.

The second paragraph of Item 113 is to this effect:

"In order to insure that every county and city will receive at least as large an appropriation during each year of the biennium as was received during the session 1945-46 from the above mentioned 1944 and 1945 appropriations, there is hereby appropriated for the first year of the biennium the sum of $100,000."

This is an appropriation of a definite sum entirely independent of the first paragraph and apparently is to be used by the State Board of Education in an effort to see that all appropriations to the locality for school purposes shall be as great as they were during the session 1945-46 as set out in the 1944-45 appropriations.

Very sincerely yours,

Abram P. Staples,  
Attorney General.

ARRESTS—Fugitives From Justice.  
May 14, 1947

Col. C. W. Woodson, Jr., Superintendent  
Department of State Police,  
Richmond, Virginia.

My dear Col. Woodson:

This is in reply to your letter of May 8, 1947, in which you ask the following:

"Please advise me the proper procedure a member of the State Police should follow after the apprehension of a criminal wanted in another State but not wanted in Virginia.

"Does a Trooper have the authority to advise the officials of the demanding State that the prisoner will be released without consulting the Court having jurisdiction at the point of arrest, or should the
member present the facts before the Judge and allow the responsibility of release rest with the Court?"

The procedure for arresting fugitives from other states is set forth in Sections 5070m-n of the Code of Virginia. From Section 5070n it is seen that arrest of an alleged fugitive may be made "without a warrant upon reasonable information that the accused stands charged in the courts of a (sister) State with a crime punishable by death or imprisonment for a term exceeding one year"—in which event the officer making the arrest should take the alleged fugitive before a justice immediately and have a warrant issued for his further detention or for bail as the justice may determine.

The fugitive thereafter is held by virtue of the justice's warrant, and no one except the justice has authority to release him. The justice will make his determination as to further disposition of the accused depending upon whether the accused waives extradition and voluntarily consents to return to the sister State with an officer thereof, or upon the action of the Governor of Virginia if extradition proceedings are demanded.

In no event does a State Trooper have authority to release the accused without an order of the justice who has issued a warrant for his detention.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ARRESTS—Fugitives From Justice.

May 29, 1947

COL. C. W. WOODSON, JR., Superintendent
Department of State Police,
Richmond, Virginia.

My dear Col. Woodson:

This is in reply to your letter of May 27 and supplementary to my letter of May 14 in answer to your inquiry of May 8, 1947.

My use of the word justice in my previous letter refers to "any judge, justice, justice of the peace or other officer authorized to issue criminal warrants in this State." See the Sections 5070m-n of the Code to which I referred in my letter of May 14.

In reply to the last paragraph of your letter I may say that the warrant of the other state has no validity in Virginia for the purposes of actual restraint of the fugitive. It does serve, however, to satisfy the requirement of "reasonable information" referred to in Section 5070n and mentioned in my previous letter as the prerequisite for making an arrest of the fugitive without a warrant,—and, as I stated before, the officer making the arrest should forthwith take the alleged fugitive before a justice and have a Virginia warrant issued charging the person with being a fugitive from the justice of the demanding State.

As you no doubt know, it is not necessary that you have a warrant from the other State in order for you to make an arrest here. It is necessary that you act on "reasonable information" which would include your teletype, radio, and other forms of reliable communication. Once it is ascertained by you that the fugitive is actually in Virginia, or once you have him in custody, the better practice would be to have the other State forward a warrant immediately for filing with the papers in the office of the justice who issued the Virginia warrant.

Trusting that this answers your inquiry, I am

Very sincerely yours,

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

ART COMMISSION—Emergency Temporary Structures; Approval of Commission Not Necessary.

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

September 25, 1946

Dear Governor Tuck:

You have requested my opinion upon the question whether it is necessary, before beginning the construction and erection of temporary housing and other temporary facilities for the use of veterans at State-owned educational institutions, to obtain the approval of the Art Commission established by section 581 of the Code of Virginia. It appears that these structures are intended to meet the present emergency housing situation to accommodate veterans attending these institutions pursuant to the privileges granted them under recent federal statutes and appropriations. Upon the passing of the emergency, these temporary structures will be removed.

The general design and purpose of requiring approval by the Art Commission, and the extent to which the same is required, appears in the provisions of section 582 of the Code. The manifest purpose is to help develop among the works of art and buildings of the State the beauty and harmony which will naturally result from the approval of these distinguished artists, who are members of the Commission. Obviously, however, it would be an unreasonable and unnecessary trespass upon their time, as well as a substantial and material obstruction and interference with the accomplishment of the emergency purpose, to apply the provisions of this section to the structures contemplated.

In my opinion, it is clear from the general purpose of the statute that the approval of the Art Commission is not required in the cases above referred to.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARD OF DENTAL EXAMINERS—Appointments Thereto; Length of Terms.

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

May 21, 1947

My dear Mr. Moore:

I have received your letter of May 16, in which you ask two questions with regard to the composition and appointment of the Virginia State Board of Dental Examiners.

You first ask if there is a limitation as to the legal authority of the Governor to make appointments for a term exceeding four years.

As you pointed out in your letter, section C of Chapter 187 of the Acts of the General Assembly of 1944 empowers the Governor to appoint qualified persons for terms of five years. Since the General Assembly deemed it fit to expressly give the Governor such power of appointment, and the Constitution does not prohibit such delegation of power to the Governor, it is my opinion that he may legally appoint persons to the Board for a term in excess of four years.
You also ask the following question:

"Section H of this same ACT, indicates that a Board member shall be eligible to serve not more than two (2) successive terms. A question has been raised whether or not a Board member might serve two (2) successive terms, miss a term, and then be eligible to become a Board member at a later date?"

The Act expressly states that "No person shall be eligible to serve for or during more than two successive terms." Therefore, it is my opinion that, while a Board member may not serve more than two successive terms, he may miss a term and again be eligible for appointment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority to Appropriate Money to Voluntary Fire Department.

November 21, 1946

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

My dear Mr. Coleman:

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

"There has recently been organized in this county a volunteer Firemen's Association. This Association has raised, by solicitation, about $6,000, with which a fire truck and other equipment has been purchased.

"It will be necessary to raise a much larger sum in order to construct the necessary buildings to house the equipment and to purchase additional equipment as the needs arise. The Board of Supervisors has been requested to make a contribution to the Association and will make such contribution if it is legal to do so.

"I can find no statute giving the Supervisors this power or authority, unless it be section 2743 of the Code; and the language of this section, in my opinion, gives no such power to the Board of Supervisors where it has no control over the appropriation. In this case the Firemen's Association is an independent organization over which the county has no control and in which it has no interest.

"I have been requested by the Board of Supervisors to request your official opinion on the question, as several members have been advised that similar contributions are made by other counties."

From such examination of the pertinent statutes as I have been able to make, I must advise that I agree with your conclusion that Nelson County does not have the authority to make a contribution to the volunteer firemen's association that has been organized therein. Section 2743 of the Code authorizes counties to provide for the "purchase, operation, manning and maintenance of suitable equipment for fighting fires in or upon the property of the county **", but this section, it seems to me, contemplates that the county should have some degree of control of the fire fighting organization.

Chapter 361 of the Acts of 1946 would have authorized your county to contract with the Association if in section 1 of the Act the reference had been to Chapter 125 of the Code instead of Chapter 121. See in this connection...
Chapter 90 of the Acts of 1946. I cannot help but believe that the reference to Chapter 121 of the Code in Chapter 361, to which I have referred, was unintentional, but I have examined the enrolled bill and find that it has been correctly printed in the Acts. I surmise that it must have been the intention of the sponsors of Chapter 361 to authorize counties to contract with volunteer firemen's associations, but, as the Act is now worded, this purpose does not appear to have been accomplished.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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BOARDS OF SUPERVISORS—No Authority to Appropriate Money to Voluntary Fire Department of Incorporated Town.

March 13, 1947

HONORABLE H. PRINCE BURNETT, Commonwealth's Attorney, Galax, Virginia.

My dear Mr. Burnett:

This is in reply to your letter of March 11th containing this inquiry:

"Can the Board of Supervisors appropriate money to a voluntary fire department in an incorporated town within the County?"

On November 21, 1946, I rendered an opinion to the Honorable J. Tinsley Coleman, Commonwealth's Attorney for Nelson County, to the effect that the Board of Supervisors could not make a contribution to a voluntary fireman's association. There are a number of 1946 statutes dealing with this subject, but it does not appear that any of them are applicable to Grayson County. Cf. chapter 31 of the Acts of Assembly of 1948, but subsequently repealed by chapter 36 of the Acts of Assembly, extra session, 1947; chapter 90 of the Acts of Assembly of 1947 and chapter 361 of the Acts of Assembly of 1946.

§3033 of the Code to which you refer in your letter provides in part:

"The council of any city or town ** may, in their discretion, authorize or require the Fire Department thereof to render aid in cases of fire occurring beyond their limits, and may prescribe the conditions on which such aid may be rendered, and may enter into a contract or contracts, with adjacent or adjoining counties for rendering aid or fire protection in such counties, ** on such terms as may be agreed upon by said council, and the Board of Supervisors ** **".

In line with my opinion to Mr. Coleman, I do not believe Grayson County can make a contribution to the Fire Department of Independence, but an arrangement could be worked out within the ambit of the above statute.

Very truly yours,

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

BOARDS OF SUPERVISORS—No Authority to Pension an Employee.

April 10, 1947

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

My dear Mr. Switzer:

This is in reply to your letter of April 4 with reference to Mr. D. W. Shifflett, former custodian of the Rockingham County courthouse. It appears that on November 1, 1946, Mr. Shifflett was compelled to resign his position as custodian because of his advanced age (77), and you inquire as to the powers of the Board of Supervisors to give Mr. Shifflett a sum of money each month for the remainder of his life or for a stated term.

In Virginia we are committed to the doctrine that the Board of Supervisors like every other quasi corporate body, being the mere creature of statute, has only such powers as are expressly conferred upon it or necessarily implied in furtherance of the object of its creation. Ernst v. Patrick County, 158 Va. 563, 567, (1932). I find no expressed statutory authority for such payment as this. There are many cases holding that pensions to municipal employees are for a public purpose, but these cases involve the construction of statutes expressly authorizing such pensions. See Hammitt v. Gaynor, 144 N. Y. S. 123 (1913). See also 40 Am. Jur. p. 971.

I also find the rule to be that even where pensions are authorized it was illegal to make payment to an employee who has left the service before the effective date of the pension statute. In such a case the payment is held a mere gratuity, and therefore, illegal. See 142 A. L. R. 938.

I realize here that you have a very worthy objective in view, but I do not believe it can be attained in the manner you suggested. It might be that the desired result could be accomplished by assigning to Mr. Shifflett other duties compatible with his present physical condition.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—Authority to Assist Soil Conservation District.

September 26, 1946

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

My dear Mr. Lynch:

This will acknowledge receipt of your letter of September 23, stating that the Virginia Dare Soil Conservation District has been formed in Norfolk and Princess Anne Counties. The Board of Supervisors of the Soil Conservation District has requested the Board of Supervisors of Norfolk County to purchase certain equipment and machinery to be used in that part of the Soil Conservation District which lies within Norfolk County. Title to the machinery and equipment is to be taken in the name of the Board of Supervisors of Norfolk County, but a reasonable charge will be made to persons in the Soil Conservation District for the use of this machinery and equipment, the proceeds of said charge being used to reimburse Norfolk County for the original cost of the equipment, and at that time title to the equipment will be trans-
ferred to the Board of Supervisors of the Soil Conservation District. Your letter further states that the Board of Supervisors is very anxious to assist the Soil Conservation District if it may do so, and you request my opinion as to the authority of the Board of Supervisors of Norfolk County to enter into any such arrangement.


Section 2 (d) is a declaration of policy:

"It is hereby declared to be the policy of the Legislature to provide for the conservation of the soil and soil resources of this State, and for the control and prevention of soil erosion, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this State."

Section 8 of the Act deals with the powers of the Soil Conservation Districts and their Boards of Supervisors. Two of its subsections are thus:

"(6) To make available, on such terms as it shall prescribe, to land occupiers within the district, agricultural and engineering machinery and equipment, fertilizer, seeds, and seedlings, and such other material or equipment, as will assist such land occupiers to carry on operations upon their lands for the conservation of soil resources and for the prevention and control of soil erosion;

* * * * * * * * * * * *

"(9) To accept donations, gifts, and contributions in money, services, materials, or otherwise, from the United States or any of its agencies, or from this State or any of its agencies, or from any other source, and to use or expend such moneys, services, materials, or other contributions in carrying on its operations; * * *"

This statute is legislative recognition of the fact that Soil Conservation Districts perform a function vital to certain rural areas and tending to promote the health, safety and general welfare of the people.

Section 2743 of the Code confers certain powers of a local nature upon Board of Supervisors. Among these is the power "to adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this State."

I am, therefore, of the opinion that the arrangement which you have outlined in your letter is one of which the Board of Supervisors of Norfolk County might lawfully enter.

Very truly yours,

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

BOARDS OF SUPERVISORS—No Authority to Amend Budget, But Supplemental Appropriation of Surplus Funds May Be Made.

September 5, 1946

HONORABLE ERNEST W. GOODRICH,
Attorney for the Commonwealth,
Surry, Virginia.

My dear Mr. Goodrich:

Your letter of September 3 states that the Board of Supervisors of Surry County appropriated the sum of $3,000 in its budget for the fiscal year 1946-47 to be used for the establishment of a health unit in the county. Due to a shortage of personnel for this type of work it appears quite probable at this time that this specific item cannot be expended for this purpose, and you are wondering as to the powers of the Board of Supervisors to use a portion of it to match State funds under Chapter 197 of the Acts of the General Assembly of 1946 providing for the hospitalization and treatment of indigent persons through the joint action of the State, counties and cities. It also appears that a similar item was in the budget for the fiscal year 1945-46, but was not expended for the same reason that the present one cannot be expended.

On a prior occasion I expressed the opinion that there was no provision in the county budget law for a change in the budget after it had been finally adopted and therefore, the Board of Supervisors had no power to make such a change. Report of the Attorney General 1934-35, page 27. That is, the Board of Supervisors cannot alter an appropriation for one specific item and divert the funds to another item. However, this does not mean that the Board cannot make new appropriations for items not included in the budget originally adopted. If surplus funds are available at any time during the fiscal year, it would appear to me that the Board could appropriate them to any legitimate object. In determining whether or not surplus funds are available the Board, as a practical matter, may take into consideration that the $3,000 appropriation for a county health unit will be surplus, inasmuch as that objective can never be realized. If the Board proceeds in that manner, I can see no objection to such use of the funds.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—No Authority to Bind Future Boards to be Responsible for Deficits Incurred in Operation of Hospital or Health Center.

December 16, 1946

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

My dear Mr. Butler:

I am in receipt of your letter of December 12th in which you refer to Chapter 344 of the Acts of 1946 providing for the creation of health center commissions and then ask the following questions:

“The act further provides that the Board of Supervisors may appropriate money out of available funds for the purchase and maintenance of a hospital or health center.

“The question has arisen as to whether or not the Board of Super-


visors and/or the Town Council of the Town of Covington, Virginia, can by proper resolution agree and thereby bind future governing bodies to be responsible for any deficit that may occur in the operation of a hospital under the management of said commission. May I have your opinion in regard to same."

Section 4 of the act expressly provides for the political subdivisions to make appropriations to the commission from available funds, but I know no authority for boards of supervisors or town councils to bind their successors in office to make future appropriations to a commission. Indeed, such an action would be contrary to well recognized principles.

Your second question is:

"Will you also give me your opinion as to whether or not, in setting up future budgets, the political subdivision can legally set up amounts for the operation and maintenance of said hospital and, if necessary, lay an additional tax levy to take care of same."

I know of no reason a political subdivision in fixing its annual levy may not take into consideration the amount which it desires to appropriate to a health center commission and to fix the levy at such a rate as will yield the necessary funds for this purpose.

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

BOARDS OF SUPERVISORS—No Authority to Enact Ordinance Regulating Hunting.

HONORABLE B. D. PEACHY,
Commonwealth's Attorney for James City County,
Williamsburg, Virginia.

My dear Mr. Peachy:

This is in reply to your letter of March 24, 1947, in which you request my opinion as to the validity of an ordinance recently adopted by the Board of Supervisors of James City County prohibiting the use of a rifle of larger caliber than the regular twenty-two in hunting wild game.

Prior to 1930 Boards of Supervisors were by section 2743 of the Code given the power "to prevent the destruction of game, fish, wild fowls, birds, and fur-bearing animals, and to limit still further than is provided by general law the time, manner and means by which they may be taken or killed; the number that may be taken or removed from the county in a given time, and the manner and condition of such removal; * * *." By Chapter 247 of the Acts of Assembly of 1930 this provision of section 2743 was expressly repealed.

In view of the fact that the power of Boards of Supervisors to regulate the hunting of wild game was expressly repealed, and this subject is now regulated by provisions of general law and the Commission of Game and Inland Fisheries (see section 37 of the Game, Inland Fish and Dog Code, section 3305(37) of Michie's Code), it is my opinion that Boards of Supervisors no longer have the power to adopt ordinances regulating the hunting of wild game. While the purpose of the ordinance may be for the protection of the safety of inhabitants of the county, it is in effect a regulation of hunting and, in my opinion, not authorized by the general power given to Boards of Supervisors to adopt measures for the health, safety and general welfare of the inhabitants of the county.

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

BOARDS OF SUPERVISORS—Ordinances: To Provide for Killing of Stray Dogs.

April 15, 1947

HONORABLE S. PAGE HIGGINBOTHAM,
Attorney for the Commonwealth,
Orange, Virginia.

My dear Mr. Higginbotham:

This is in reply to your letter of April 9, 1947, in which you state that the Board of Supervisors of Orange County wishes to prohibit the running at large of dogs and to do this wishes to build a dog pound, have the dogs running at large picked up and held for a certain number of days and, if they are called for, charge the owner the cost of keeping the dog and, if the dog is not claimed after so many days, have it killed.

You ask whether under section 3305 (69a) the Board has the power to pass an ordinance embodying the above provision. The section to which you refer gives the Board of Supervisors authority to prohibit the running at large of dogs, but it does not authorize the enactment of an ordinance providing that such dogs shall be killed. It requires the game warden to enforce the provisions of that Act and provides that any person who, upon being notified that his dog is running at large, permits the dog to run at large thereafter, shall be liable to a fine.

Section 3305(69) provides that all licensed dogs shall be deemed personal property and makes it unlawful for any person except the owner or his authorized agent to kill any such dog, except as otherwise provided by statute. It is my opinion, therefore, that, while the Board of Supervisors may forbid the running at large of dogs, it cannot provide that all dogs running at large may be killed.

Section 3305(70a) of the Code reads as follows:

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

It is my opinion that under this section the Board of Supervisors may provide for the killing of rabid, vicious, or destructive dogs, and that any ordinance applicable only to such dogs would be valid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—When Duty of Board Arises to Make a Levy to Service a Proposed Loan From Literary Fund.

April 17, 1947

HONORABLE R. L. JACKSON,
Commonwealth's Attorney for Madison County,
Madison, Virginia.

My dear Mr. Jackson:

This is in reply to your letter of April 16, 1947, from which I quote:

"* * * At its 1946 meeting the Board of Supervisors approved a budget which provided for the servicing of a loan of about $250,000
from the Literary Fund and made a levy accordingly. At the preliminary 1947 meeting on March 10, 1947, the Board tentatively adopted a budget providing for the servicing of said loan. On March 14, 1947, the School Board signed a contract for the building for which the loan had been requested and approved, an architect having been employed in 1946. At its regular meeting held on the 14th day of April, 1947, the Board of Supervisors was faced with a large delegation and many petitions requesting that the Board of Supervisors not appropriate the money required to go ahead with the school building program. While the loan has been approved and something over $8,000 has been expended by the School Board in payment to the architect in reliance on the program going ahead as planned, no money has actually been borrowed or received from the Literary Fund. After the Board of Supervisors had agreed to make the necessary levies on the life of the loan (30 years) and after the meeting held on March 10, 1947, above mentioned, a member of the Board of Supervisors died and has been replaced by an appointee for the unexpired term. The question is: Under the above facts and circumstances, is the Board of Supervisors compellable to go ahead with the budget and levy under section 644?"

This section of the Code does not require the levy to be made until the School Board has borrowed money from the Literary Fund. Since in your letter you state that no money has actually been borrowed or received from the Literary Fund, although application for the loan has been made and the same has been approved, it is my opinion that, if the County School Board withdraws its application for the loan, the Board of Supervisors will not be compelled to make the levy required by section 644 of the Code. However, if the School Board does not withdraw its application for the loan and the loan is actually made, the duty of the Board of Supervisors to make the levy and to provide funds for the payment of the loan is clear.

In expressing this opinion, however, I am not passing upon the question of whether the School Board or the County has incurred any liability under the contract which has been signed for the building. It may well be that the School Board would be liable for the breach of such contract and that the County would be required to provide funds for the payment of such liability. In the absence of further facts, I do not think that I should express any ruling on this phase of the matter.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

BOARDS OF SUPERVISORS—May Fix School Levy Independently of Anticipated Revenue From A. B. C. Funds.

March 14, 1947

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
State Board of Education,
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of February 28, seeking my opinion on the matter which I will describe hereinafter.

You state that in a particular county the Board of Supervisors has been appropriating its ABC funds as a supplement to the County School Funds. It now wishes to use the ABC funds to accumulate a reserve for capital out-
lay purposes, and you seek my opinion as to whether or not the Board of Supervisors may raise the school levy in that county in order to make up for the supplemental appropriation from the ABC funds which will now go to a different purpose.

§2727 of the Code provides in part:

"The Board of Supervisors shall have power to direct the raising, by levy, of such sums as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority."

Thus, for the fiscal year beginning July 1, 1947, and ending June 30, 1948, the Board may raise by levy, within the otherwise prescribed limits whatever is necessary to provide for the maintenance of county schools. I do not believe that it is incumbent upon them to hold the school levy down because they anticipate that during the fiscal year they will receive ABC profits.

When the county budget is adopted in April there is no legal certainty as to what the ABC profits will be, if anything.

I see no legal objections to allowing these sums to remain a surplus, but by saying this I do not mean to say that the present Board could earmark these funds for a definite purpose which would be binding on succeeding Boards of Supervisors.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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BOARD OF SUPERVISORS—No authority to Refund a License Tax.

June 17, 1947

HONORABLE WATKINS M. ABBITT,
Attorney for the Commonwealth,
Appomattox, Virginia.

My dear Mr. Abbitt:

This is in reply to your letter of June 13, in which you request my opinion upon the authority of the board of supervisors to refund to the American Legion Post of Appomattox County a license tax collected by the County in connection with a carnival, in the holding of which the Legion Post participated.

I have been unable to find any statute which confers authority upon the board of supervisors to make a refund of such a tax, and, in the absence of such a statutory provision, it is my opinion that the board does not possess the authority to make the refund.

You also inquire whether or not the board of supervisors may donate money to the Legion Post.

On frequent occasions I have expressed the view that the board of supervisors does not have authority to make donations unless it is for some specific purpose which the board finds to be in promotion of the general welfare of the county.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CHIROPODISTS—Illegal to Use Cocaine or Similar Narcotics in Their Profession.

June 20, 1947

DR. P. W. BOYD, President,
Board of Medical Examiners,
Winchester, Virginia.

My dear Doctor Boyd:

This is in reply to your letter of June 19, in which you request my opinion upon the authority of a person licensed to practice chiropody, pursuant to the provisions of section 1621 of the Code of Virginia, and other relevant sections of the Code, to use cocaine or other narcotics in connection with the practice of his profession, and to lawfully purchase or prescribe same.

Subsection (h) of section 1609 of the Code, as amended by Chapter 195 of the Acts of 1944, contains this definition of the practice of chiropody:

"The term 'practice of chiropody' means the medical, mechanical or surgical treatment of local ailments of the human hand or foot, but does not include the correction of deformities by surgery, the amputation of the hand, finger, foot or toe, the making of incisions involving deep structures, or the use of other than local anesthetics."

Your said letter contains the following statement:

"While cocaine may be used as a local anesthetic, it has very different and very much broader effects upon the human system than its effect as a local anesthetic. In the opinion of the Board of Medical Examiners, novocain, procaine, apothesine, and other similar drugs, possess all of the necessary properties of local anesthetics which would be found in cocaine, or other narcotics, without the dangerous habit forming properties of such narcotics."

The above quoted provision from section 1609 of the Code does not expressly authorize the use of local anesthetics. The language used primarily refers to the type of surgical treatment which a chiropodist is permitted to engage in. The provision, however, does imply the authority to use local anesthetics in performing such surgery, but, as you state in your letter, cocaine is much more than a local anesthetic. It is universally recognized as a dangerous and insidious habit-forming drug. In my opinion, the above quoted provisions do not carry any implied authority to use narcotics where novocaine and other more appropriate drugs will answer the same purpose in so far as the surgical treatment is concerned.

Chapter 69A of the Code is designated as the Uniform Narcotic Drug Act. Section 1654(1) of this Chapter, in defining physicians for the purpose of determining the authority of persons to use narcotic drugs in connection with the treatment of diseases, provides as follows:

"'Physician' means a person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment."

It is clear from the provisions of the Virginia statutes that, in order for a person to be entitled to purchase narcotic drugs or prescribe same for use by his patients, it is necessary that he should be authorized by law to use said drugs in connection with his treatment of such patients. Inasmuch as the Virginia statutes do not confer any such authority upon a practitioner of chiropody, it is my opinion that he may not lawfully purchase or prescribe said cocaine or other narcotic drugs, the sale of which is regulated by said Uniform Narcotic Drug Act.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CITIES, TOWNS AND COUNTIES—Referendum to Voters of Municipality Not a Necessary Pre-Requisite to Amendment of Charter by General Assembly Respecting Election of Councilmen.

January 2, 1947

CAPTAIN G. ALVIN MASSENBURG,
Member of the House of Delegates,
Hampton, Virginia.

My dear Captain Massenburg:

This is in reply to your request for my opinion upon the following matter: The charter of the town of Phoebus, which has been amended from time to time, now provides for a mayor elected by the qualified voters of the town, and the election of two councilmen from each of the four wards of the town, making a total of eight councilmen. It is now proposed to introduce a bill in the General Assembly for the purpose of securing an amendment to the charter of said town, whereby the number of councilmen shall be reduced from eight to five to be elected at large by the qualified voters of the town, and the mayor, instead of being elected by the qualified voters, shall be one of the five councilmen and shall be elected by the councilmanic body itself.

You request my opinion upon the question whether such a charter provision would be constitutional and valid which did not provide for submitting the proposed amendment to the qualified voters of the town for their approval or disapproval.

Section 117 of the Constitution expressly provides that the General Assembly may, by special act, provide laws for the organization and government of towns, provided such special act is passed in the manner provided in article four of the Constitution, and then only by a recorded vote of two-thirds of the members elected to each house. Neither this section or any other provision of the Constitution contains any requirement that an amendment to a town charter of the type to which you refer shall be submitted to the qualified voters. The only provision with reference to any such submission is contained in paragraph (b) of said section relating to a plan of government for the town which would be inconsistent with other provisions of article eight of the Constitution. This article contains no provision whatsoever with reference to the number of councilmen in towns, or the method of their selection with respect to wards; nor does it or any other provision of the Constitution so far as I have been able to find relate to the method of the election of mayors of towns.

It is my opinion, therefore, that, since the proposed charter amendment would not be in any way in conflict with any of the provisions of article eight of the Constitution, or of any other provisions of the Constitution, it is not necessary that the charter amendment be submitted to the qualified voters of the town in order to render it constitutional and valid.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Authority of City to Condemn Land Outside City for Municipal Recreation Facility.

November 25, 1946

HONORABLE WILLIAM J. GIBSON,
Member of House of Delegates,
Fredericksburg, Virginia.

My dear Mr. Gibson:

I am in receipt of your letter of November 13, from which I quote as follows:
"I would appreciate very much your opinion as to whether or not the City of Fredericksburg has the authority under and by virtue of its charter, Acts of Assembly 1942, page 933, and section 3032-b of the Code of Virginia, to erect a municipal recreation facility as a memorial to the Veterans of World Wars I and II. If they have that authority, I would like to know if they have the further authority to condemn a tract of land outside of the city limits for that purpose."

Section 3032-b of the Code (Michie, 1942) authorizes cities to establish and conduct a system of public recreation and playgrounds and to acquire land, buildings and other recreation facilities for this purpose by gift, purchase, lease, condemnation, or otherwise. I think it is clear that a municipal recreation facility would come within the scope of this section, and I know of no reason why the governing body of the city may not designate such a facility as a memorial to the Veterans of World Wars I and II.

As to the authority of Fredericksburg to condemn a tract of land outside of the city limits on which to construct this recreation facility, section 1 of the charter of Fredericksburg (chapter 481 of the Acts of 1942) provides that the city "may acquire property within or without its boundaries for any municipal purpose, in fee simple or lesser interest or estate, by purchase, gift, devise, lease, or condemnation ***." In my opinion, in view of section 3032-b of the Code, to which I have referred, municipal recreation facility comes within the scope of a "municipal purpose". It would, therefore, follow, it seems to me, that under section 1 of the charter which I have mentioned the city may condemn land outside of the city for this municipal purpose.

I might add that, since the City Attorney is, as you know, the official advisor of the authorities of the city, I suggest that his opinion should also be sought.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Procedure Where Two Counties Desire to Contract with Regional Free Library Agency.

HONORABLE WILMER L. HALL
State Librarian
Virginia State Library
Richmond, Virginia

My dear Mr. Hall:

This is in reply to your request for my opinion upon the proper construction of Section 365 of the Code of Virginia in connection with the following situation.

You state that the Rockingham Library Association, Inc., a private, non-profit corporation, provides public library service for Rockingham County under a contract with the Board of Supervisors and for such service has been receiving grants of State aid from the State Library Board. You further state that the Board of Supervisors of Page County is now considering making a contract with this corporation under which it would also furnish library service to Page County. You say that this plan does not contemplate a contract between the Boards of Supervisors of Rockingham and Page Counties or the designation of the treasurer of either county as the custodian of the library appropriations of the two counties.

You ask whether Section 365 of the Code permits the establishment of a
REPORT OF THE ATTORNEY GENERAL

regional free library system by means of separate contracts between the governing body of each of two counties and the agency to furnish public library service to the several counties, and, if so, could the agency qualify for the larger original grant for a regional library system as provided in Chapter 170 of the Virginia Acts of Assembly of 1946.

Section 305 of the Code provides for the establishment of a county free library system by a single county or of a regional free library system by two or more counties acting together. In either case the management and control of the system is vested in a board of five trustees. A regional system is established by a contract between two or more counties providing for an apportionment of the expenses of the system and designating the treasurer of one of the counties as the custodian of the funds of the system.

However the last paragraph of this section provides as follows:

"The board of supervisors or other governing body of any county in which no such free library system as provided herein shall have been established may, in its discretion, contract for library service with an adjacent city, town, or State-supported institution of higher learning, or with a library not owned by a public corporation but maintained for free public use, may appropriate such sums of money as it deems proper for providing library service to the county, and may, as a part of such contract, receive representation on the board of trustees or other governing body of the library contracting to give such library service. Any county or counties thus contracting for library service shall be entitled to the rights and benefits of county or regional free library systems established as provided herein."

Under this provision boards of supervisors of two counties may, without establishing a regional library system having a board of trustees as its governing body and the treasurer of one of the counties as the custodian of its funds, contract for library service and become entitled to the rights of a regional free library system. It is my opinion, however, that this can not be done by each of the counties making separate contracts with the agency to furnish the library service, but that it should be done by a joint contract between the two counties on one side and the agency which is to furnish the library service on the other in which it is recognized that the library service is to be furnished to the two counties as a region. While this may accomplish the same result as separate contracts, it will show that the two counties intend to act together to serve the region as a whole and would eliminate any question of conflicting interests which might arise if the two counties acted separately.

Section 1 of Chapter 170 of the Acts of Assembly of Virginia of 1946 provides for original grants of State aid to county and regional library systems established pursuant to Section 365 of the Code or to libraries contracting to furnish county or regional library service. Section 2 of said 1946 Act provides for smaller grants of State aid to previously established systems or to libraries previously contracting to furnish such library service.

Though the Rockingham Library Association, Inc., has previously contracted to furnish library service to Rockingham County, it is my opinion that if Page and Rockingham Counties join together and contract for regional service, the association would then become entitled to the larger original grant, provided by Section 1, since this is in the nature of the establishment of a new regional system. This is, of course, predicated upon the association's meeting the standards prescribed by the act and the State Library Board.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CITIES, TOWNS AND COUNTIES—Plans of Municipal Zoning Commissions to be Filed with Clerk Need Not be Recorded.

August 29, 1946

HONORABLE THOMAS P. CHAPMAN, JR., Clerk,
Circuit Court of Fairfax County,
Fairfax, Virginia.

My dear Mr. Chapman:

This is in reply to your letter of August 26, in which you state that the Municipal Planning Commission for the Town of Falls Church, in your County, has presented to you for filing the zoning plan for said town, and you are wondering whether or not under section 8 of the Act, Chapter 88 of the Acts of 1934, page 93, et seq. (section 3091 (34) of Michie’s Code of 1942) filing of the plan requires recordation of the same in your office.

The concluding sentence of section 8 of the Act is to this effect:

"An attested copy of the plan or any adopted part thereof shall then be certified to the Council and to the clerk of the court where the deeds are recorded."

It does not appear to me that the word "filed" is used in this section. Section 9 of the Act begins thus:

"Whenever the planning commission shall have adopted a master plan for the municipality or one or more parts, sections or divisions thereof, and same shall have been filed with the said court clerk * * *."

This is the only reference I find to the word "filed." However, it is not my opinion that "filed" is synonymous in this connection with "recording". Filing connotes depositing papers for safe-keeping and inspection, whereas recording or recordation is something beyond this.

I, therefore, am of the opinion that the zoning plan does not have to be recorded in your office.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—State Use of Property is Not Subject to Municipal Zoning Ordinances.

April 25, 1947

DR. H. H. HIBBS, Dean,
Richmond Professional Institute,
901 West Franklin Street,
Richmond 20, Virginia.

My dear Dr. Hibbs:

This is in reply to your letter of April 18, 1947, in which you request my opinion as to whether the State agencies and institutions in Richmond are subject to the restrictions of the zoning ordinance recently passed by the City of Richmond.

I have previously expressed the opinion that a municipal building code has no application to the construction of buildings by State institutions to be used for State governmental purposes. This opinion was based upon the well established rule that the State is not bound by any statute unless the same is in express terms made to extend to the State, and that a legislative grant of power to a municipal corporation to enact building regulations would not be deemed a cession of the Legislature's prerogative to govern for itself the institutions of the State which
may be located within such municipality, unless it may be clearly gathered from
the statute that such effect was intended.

In my opinion the same principle is applicable to zoning ordinances enacted
by municipalities. The general statutes of the State authorizing zoning regula-
tions by municipalities do not expressly provide that such regulations will be
binding upon the State. It is my opinion, therefore, that the zoning ordinances
of the City of Richmond are not applicable to State property.

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

CITIES, TOWNS AND COUNTIES—Town May Install Parking Meters
on Street in Front of County Court House Located Therein.

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

My dear Mr. Butler:

I have your letter of August 15, in which you inquire whether or not the
town of Covington has the authority to install parking meters along a street in
front of and to the side of the county court house property which is located in
said town.

The operation of parking meters is a very common method of regulating
traffic, and I know of no reason why the regulatory power of the town council
over the street along the side of and in front of the court house should be
different from its general powers over any other portion of the streets. Unless
there is some specific statute which would deprive the council of this power, it
would seem that it is possessed of same.

Yours very truly,
ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Statute Authorizing Designated
Counties to Make Contributions to Designated Charitable Agencies is
Constitutional.

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

My dear Mr. Whitehead:

I am in receipt of your letter of December 11, in which you present a number
of questions, the first of which is as follows:

“From time to time the members of the General Assembly of Virginia
are confronted with bills to enact laws applicable to certain named counties
and frequently they are concerned with whether such bills are in keeping
with the Constitution of Virginia. I have carefully read and reread sections
63, 64 and 65 of our Constitution and the decisions of the courts under them
and it is quite clear that in many instances a bill which singles out a certain
county by name offends the constitutional provisions. I invite your attention
to chapter 31 (page 53) of the Acts of the General Assembly of 1946, ap-
proved February 21, 1946, impowering the Boards of Supervisors of certain
named counties and the Councils of certain named towns to make certain
gifts and donations. Please advise whether, in your opinion, that act is in
keeping with the Virginia Constitution."

Chapter 31 of the Acts of 1946 authorizes certain named counties and towns
to make gifts and donations of real and personal property and of money "to chari-
table institutions and associations conducting hospitals or voluntary fire fighting
services within the boundaries of their respective counties." I have carefully con-
sidered sections 63, 64 and 65 of our Constitution and I can find nothing in any
of these sections which would prohibit the General Assembly from the enact-
ment of this legislation. Indeed section 67 of the Constitution by clear impli-
cation contemplates that the General Assembly shall have power to authorize
counties, cities, or towns "to make such appropriations to any charitable institu-
tion or association."

Your next question is:

"I have in mind to present a bill to include Nelson County in the list
mentioned in that act if that can lawfully be done. In addition, I shall be
obliged if you will advise me whether a voluntary fire fighting company or
association, not organized in keeping with chapter 125 of the Code of
Virginia, and not having a charter from State Corporation Commission of
Virginia, is, under chapter 31 of the Acts of 1946, eligible to receive gifts or
donations as there provided. In other words, is an unincorporated voluntary
fire fighting association which has not complied with chapter 125 of the Code
of Virginia eligible?"

I find nothing in chapter 31 of the Acts of 1946 to require the "voluntary
fire fighting services" mentioned therein to be organized under the provisions of
chapter 125 of the Code. Of course, the Board of Supervisors in making an
appropriation to the fire fighting association could attach such conditions to the
appropriation as it saw fit, including the condition that it be organized under
chapter 125.

Your next question is:

"Moreover, you will note that section 3121 of our Code was amended in
1946, Acts 1946, page 110. However, the amendment was only to that par-
ticular section and not to the other sections in the same chapter.

"Do you think that a fire company organized in a county in keeping with
section 3121 as amended has the same status or standing as one organized in
a city or town?"

Chapter 90 of the Acts of 1946, amending section 3121 of the Code, reads as
follows:

"How many persons may form a fire company.— Any number of
persons, not less than twenty nor more than ninety, residing in a city, town,
or county, may form themselves into a company for extinguishing fires. The
powers, duties, and responsibilities conferred or imposed upon the governing
bodies of cities and towns under this chapter one hundred twenty-five of the
Code shall be applicable in any county in which the governing body elects to
come under the provisions of this chapter."

In view of the language of this section as amended, it would appear clear that
the provisions of chapter 125 of the Code applicable to fire fighting organizations
the provisions of chapter 125 of the Code applicable to fire fighting organizations
established pursuant to the chapter. It seems to me that this was the purpose of
the 1946 amendment to the section.

Your last question is:
"Moreover, your attention is called to chapter 361 of the Acts of 1946 (page 609), which makes a reference to chapter 121 of the Code of Virginia instead of to chapter 123. Do you think that, if that act were amended to refer to chapter 125, the Board of Supervisors of a county, such as Nelson, could lawfully make a donation or contribution to an unincorporated voluntary fire fighting company, which has not complied with chapter 125 of the Code?"

Chapter 361 of the Acts of 1946 does not deal with the matter of appropriations to the fire fighting organizations described therein, but authorizes certain counties to contract with towns for fire protection. As I indicated in my letter to Mr. Coleman, to which you refer, if this chapter 361 had referred to any county which elected to come under the provisions of chapter 125 of the Code instead of chapter 121, then, if Nelson County had a fire fighting organization established under chapter 125 of the Code, it could make the contract provided for in chapter 361. I do not think, however, that chapter 361 authorizes an outright donation or contribution to any type of fire fighting organization.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Authority of Deputy Treasurer of City to Sign Warrants.

June 11, 1947

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

My dear Mr. Parham:

This is in reply to your letter of June 10, which I quote in full as follows:

"Section 786 of the Code of Virginia of 1942 (Michie), as amended by an Act of the General Assembly of 1946, in prescribing the powers and duties of the city school boards, in Subsection 13 thereof, provides that it shall be the duty of such boards to examine all claims against the school board and, when approved, order or authorize the payment thereof. It is further provided that payment of each such claim shall be ordered or authorized by a warrant drawn on the officer of the city charged by law with the responsibility for the receipt, custody and disbursement of funds for such city. The warrant is to be signed by the chairman of the board and countersigned by the clerk thereof. This warrant may be converted into a negotiable check when the name of the bank upon which the funds stated in the warrant are drawn or by which the check is to be paid is designated upon its face and is signed 'by the officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city'. Provision is made in this same section for the appointment of an agent by resolution spread upon the minutes of the proceedings of the board to examine and approve such claims. However, in this case the warrant may be converted into a negotiable check in the same manner as is prescribed for warrants ordered or authorized to be drawn by the school board.

"It is the duty of the city treasurer of the City of Petersburg to receive all the taxes, rents and other revenues of the city and make such disbursements as the Council may order or the ordinances may require. In the City of Petersburg, therefore, the city treasurer is the officer charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city.

"Moreover, your attention is called to chapter 361 of the Acts of 1946 (page 609), which makes a reference to chapter 121 of the Code of Virginia instead of to chapter 123. Do you think that, if that act were amended to refer to chapter 125, the Board of Supervisors of a county, such as Nelson, could lawfully make a donation or contribution to an unincorporated voluntary fire fighting company, which has not complied with chapter 125 of the Code?"

Chapter 361 of the Acts of 1946 does not deal with the matter of appropriations to the fire fighting organizations described therein, but authorizes certain counties to contract with towns for fire protection. As I indicated in my letter to Mr. Coleman, to which you refer, if this chapter 361 had referred to any county which elected to come under the provisions of chapter 125 of the Code instead of chapter 121, then, if Nelson County had a fire fighting organization established under chapter 125 of the Code, it could make the contract provided for in chapter 361. I do not think, however, that chapter 361 authorizes an outright donation or contribution to any type of fire fighting organization.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CITIES, TOWNS AND COUNTIES—Authority of Deputy Treasurer of City to Sign Warrants.

June 11, 1947

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

My dear Mr. Parham:

This is in reply to your letter of June 10, which I quote in full as follows:

"Section 786 of the Code of Virginia of 1942 (Michie), as amended by an Act of the General Assembly of 1946, in prescribing the powers and duties of the city school boards, in Subsection 13 thereof, provides that it shall be the duty of such boards to examine all claims against the school board and, when approved, order or authorize the payment thereof. It is further provided that payment of each such claim shall be ordered or authorized by a warrant drawn on the officer of the city charged by law with the responsibility for the receipt, custody and disbursement of funds for such city. The warrant is to be signed by the chairman of the board and countersigned by the clerk thereof. This warrant may be converted into a negotiable check when the name of the bank upon which the funds stated in the warrant are drawn or by which the check is to be paid is designated upon its face and is signed 'by the officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city'. Provision is made in this same section for the appointment of an agent by resolution spread upon the minutes of the proceedings of the board to examine and approve such claims. However, in this case the warrant may be converted into a negotiable check in the same manner as is prescribed for warrants ordered or authorized to be drawn by the school board.

"It is the duty of the city treasurer of the City of Petersburg to receive all the taxes, rents and other revenues of the city and make such disbursements as the Council may order or the ordinances may require. In the City of Petersburg, therefore, the city treasurer is the officer charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city.
"The question has arisen as to whether the warrant referred to in Section 786 of the Code of Virginia may be signed by the deputy treasurer of the City of Petersburg. Section 2701 of the Code of Virginia provides that the Treasurer of any city may appoint one or more deputies who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law.

"The Code of the City of Petersburg provides that during the absence, illness or incapacity of the city treasurer, the deputy treasurer shall be the acting city treasurer thereof and authorized to exercise all the powers of the city treasurer and to sign and attest all bonds, instruments or other writings of the city on behalf of the said city.

"The city attorney of the City of Petersburg has expressed some doubt as to whether the warrant provided for in Section 786 of the Code of Virginia can be signed by the deputy treasurer. This doubt arises from the language of the City Code under which the deputy is authorized to exercise the power of the treasurer only during his absence, illness or incapacity. The language of Section 786 quoted above, which provides that the warrant shall be signed by the officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city, has caused some doubt in the mind of the city attorney as to whether a deputy treasurer could sign such a warrant.

"The School Board of the City of Petersburg is having printed warrants which will conform to the requirements of Section 786, and I am in doubt as to whether one of my deputies would be authorized to sign that warrant. I am, therefore, requesting that you give me your opinion upon the question of whether such warrants can be signed by the deputy or whether they should be signed only by me as city treasurer."

Your inquiry raises the question whether the signature of a deputy treasurer to the warrants referred to will constitute a signing "by the officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city" as provided in paragraph (13) of subsection (b) of Code section 786. The officer charged with such responsibility in the city of Petersburg is the City Treasurer. The question, therefore, is whether a signature of this type, "I, Val Parham, Treasurer of the City of Petersburg, by........ Deputy Treasurer" meets the requirement of the statute.

In my opinion, section 2701 of the Code, referred to by you, unquestionably confers this authority upon the deputy unless same is restricted by the ordinance contained in the Petersburg City Code, providing that the authority of the deputy to sign written instruments shall be exercised only in case of the absence, illness or incapacity of the City Treasurer. While there may be some doubt as to whether the ordinance has the effect of forbidding "by law" the exercise of this duty by the deputy except under the circumstances stated, I believe the doubt should be resolved against such exercise. The effect of signing the warrant is to raise it to the dignity of a negotiable check, and as a matter of public policy the validity of the check should not be drawn into question by any doubt as to the authority of the officer signing same.

It is my opinion, therefore, that the deputy treasurer should sign the warrant only during the absence, disability or incapacity of the City Treasurer. As to what constitutes "absence, disability or incapacity" within the meaning of the ordinance, I suggest that you consult the City Attorney.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Finance Building,
Richmond 10, Virginia.

My dear Mr. Bennett:

I have your letter of March 26, which I quote in full as follows:

“In an audit which we have just completed of the records of a clerk of court in a city with a population of between 25,000 and 50,000 we find that—after paying all expenses authorized by the Compensation Board—the clerk had earned fees in excess of $7,500.00. In addition he received a salary of $330.00 from his city.

“We shall appreciate it if you will review Section 3516 of the Code of Virginia and give us your opinion as to the total compensation which this clerk may receive. Your usual co-operation, we assure you, will be very much appreciated.”

Subsection (8) of section 3516 of the Code, above referred to, prescribes the maximum amount that a clerk is entitled to retain out of the fees collected by him in cities with a population between 25,000 and 50,000 shall not exceed $6,000 per annum. The subsection contains, however, a provision that, in determining said maximum compensation which the clerk shall be allowed, any additional compensation allowed to such clerk by his city council shall be disregarded to the extent of $1,500, if the city council allows that much compensation.

In my opinion, it is clear, therefore, that the clerk, in addition to the $6,000 maximum above referred to, is entitled to receive the salary of $330 allowed by his city. In other words, the total compensation which the clerk is entitled to receive under the provisions of the statute referred to will amount to $6,330.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
War II and who was a resident of the county or city at the time of his in-
duction, is presented, it shall be the duty of the clerk to record the informa-
tion contained therein in the proper spaces provided for such purpose in the
book known as 'Induction and Discharge Record World War II'..."

I am, therefore, in accord with your interpretation of the statute that you
are not required to record discharge papers of veterans who were not residents of
Prince William County at the time of their induction.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Students of Mary Washington Col-
lege Eligible for Certain "University of Virginia" Scholarships Since
1944.

August 20, 1946

DR. J. L. NEWCOMB, President,
University of Virginia,
Charlottesville, Virginia.

My dear Doctor Newcomb:

I have before me your letter of August 13, in which you request my opinion
with respect to the eligibility of students of Mary Washington College to receive
awards of certain fellowships established by the will of Evelyn May Bayly
Tiffany.

The seventh item of Mrs. Tiffany's will is as follows:

"All the rest, residue and remainder of my estate of every kind and
description, real, personal and mixed, including the funds in remainder under
the Sixth Item hereunder, I give, devise and bequeath unto the said
UNIVERSITY OF VIRGINIA, with the request that it will use the income
for the support of Fellowships for persons from Northampton and Accomac
Counties—said Fellowships to be known as ‘The Thomas Henry Bayly
Fellowships' and 'The Evelyn and Louis McLane Tiffany Fellowships;' and
to be in Academic, Law and Medical Schools, and should there at any time be
any vacancies in said Fellowships not availed of by persons from either of
said Counties in Virginia they may be awarded to persons from other por-
tions of Virginia or from the State of Maryland."

Under the second item of the will the testatrix also gave “to the University
of Virginia, situated near Charlottesville, Virginia, the sum of $100,000" for the
errection of the Thomas H. Bayly Memorial Building, and also bequeathed certain
portraits and other personal property to the University.

The will was executed on May 6, 1927, and the testatrix died May 25, 1929.
At that time only male students were eligible for admission to the University. The
present Mary Washington College was then one of the State teachers colleges or
normal schools, and its operation was in no way affiliated or connected with that
of the University of Virginia. In 1944, by Chapter 54, page 55, of the Acts of
that year, the General Assembly added six new sections to the Code of Virginia
designated respectively 833-a to 833-f, inclusive. The effect of this legislation was
to merge the Mary Washington College at Fredericksburg with the University of
Virginia. The Act expressly provided that the College should become “an integral
part" of the University. All properties and rights held by the College at the time
were transferred to the University, "and with respect to the College, the rector
and visitors of the University of Virginia shall have the same powers as to grant-
ing degrees and with respect to the appointment and removal of administrative
officers, professors, agents, and servants, and the making of regulations, that one (are) now vested in them and respect to the University of Virginia." The President of the University was made Chancellor of the College and its principal administrative officer.

The specific question presented by your letter is whether the fellowships created by the will may be awarded to girls of Accomac and Northampton Counties seeking admission to the Mary Washington College branch of the University, or whether only students at the Charlottesville branch are eligible for such fellowships.

The answer to your question depends upon whether it can be said to have been the intention of the testatrix that the fellowships created by her will should be restricted to students eligible for admission to the institution as it then existed, or whether it was her intention that it should include students who in the future might become eligible should there be expansions of the University as an institution, regardless of the particular place where the expanded activities of the institution are carried on. Although at the time of the execution of the will only male students were eligible for admission to the University, yet the language employed by the testatrix did not restrict the beneficiaries of the fellowships to members of that sex. On the contrary, it permits them to be given to all "persons" residing in these two counties, without any qualification. The testatrix probably had in mind the possibility of women being later admitted as students and did not desire to exclude them. I do not think that the reference in the second item to the fact that the University was located at Charlottesville can be considered as restricting the fellowships created by the seventh item to studies conducted there, although it might have been intended to designate that location for the erection of the memorial building provided for in the second item. It would hardly be contended that the fellowships would be annulled if the entire University for any reason should be moved to another location in the future.

In my opinion, the fellowships are not restricted either to male students or to students pursuing their studies at Charlottesville, but girls seeking admission to the Mary Washington College of the University at Fredericksburg are also eligible to receive them, the College is an integral part of the University.

With assurances of my highest esteem, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COLLEGES AND UNIVERSITIES—Male War Veterans Eligible for Admission as Day Students to Women’s Teacher Colleges as an Emergency Provision.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

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

"Representatives of the Veterans Administration of World War II have requested Madison College and the State Teachers College at Farmville to permit men veterans of World War II to attend these colleges as day students. "Section 939 of the School Code states that these institutions are for the education of white female teachers.

"Approval of these requests was asked of the State Board of Education at a meeting of the Board on Friday, June the 28th. The State Board was willing to give its approval if its action would be considered legal.
"I would like your opinion as to whether it is legally permissible to permit men students to attend Madison College and the State Teachers College at Farmville as day students so that during the present emergency these colleges may cooperate in providing college education for veterans of World War II."

Section 939 of the Code provides that "The State teachers colleges for the training and education of white female teachers for public schools established at Farmville, * * * and at Harrisonburg, * * * shall be continued as now provided by law, and under the supervision and management and government of the State Board of Education as provided for in this chapter."

It is plain from the quoted provision that the General Assembly intended for these colleges to be operated for the training and education of white female teachers, and I know of no statutory authority for the admission of males. However, your inquiry is limited to the matter of admitting male veterans of World War II to attend these colleges as day students. I can find no statutory authority even for this worthy object.

But there is no statutory prohibition against admitting male veterans as day students. It is a matter of common knowledge that an emergency exists, and that, at present, there are not sufficient educational facilities in Virginia to enable veterans of World War II to take advantage of the educational opportunities offered them by the Federal Government. It would certainly be in accord with sound public policy to bend every effort to provide educational facilities for these veterans, certainly to the extent that by so doing the purposes for which a State educational institution is established are not interfered with. The State owns and operates the teachers colleges at Farmville and Harrisonburg, and if these institutions can take care of the female applicants for admission and at the same time make available their educational facilities to a certain number of veterans of World War II as day students, I can think of no person that would have any reasonable cause for complaint. It is a well known fact that privately owned women educational institutions are admitting men as day students where the facilities are available.

On the whole, in view of the extraordinary situation that now exists, I am of the opinion that the State Board of Education, in its discretion, may admit as day students male veterans of World War II to the State teachers colleges at Harrisonburg and Farmville, provided such action does not interfere with the operation of such institutions as State teachers colleges for women.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COMMISSIONS ON POST-MORTEM EXAMINATIONS—How Expenses of Commission to be Paid. August 15, 1946

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

My dear Mr. Gilmer:

Honorable Cassius M. Chichester, Director of Statutory Research and Drafting, has advised me that you desire my official opinion upon the charges to be made on the books of the Comptroller for expenses incurred, and other disbursements made, by the Commission on Post-Mortem Examinations created by Chapter 355 of the Acts of 1946, page 595, and being designated as a new chapter of the Code numbered 190-A. Said chapter consists of Code sections 4806-a to 4806-o.

Section 4806-f provides as follows:
"The salaries of the Chief Medical Examiner, and the technical and clerical personnel in the central office and laboratory, the expenses of maintaining the central office and laboratory, the cost of pathological, bacteriological and toxicological services rendered by others than the Chief Medical Examiner and his assistant, and the traveling and other expenses of the members of the commission and the personnel of the central office and laboratory, shall be paid by the State of Virginia out of funds appropriated for the payment of criminal charges."

In addition to the foregoing provision, section 5 of the Act appropriates the sum of twenty thousand dollars, or so much thereof as may be necessary, for each year of the biennium beginning July 1, 1946, for the purpose of carrying out the provisions of the Act.

It is my opinion that all of the items for the expenses and disbursements referred to in section 4806-f should be paid out of funds appropriated for the payment of criminal charges as therein provided. Other expenses, such as acquisition of furniture and other equipment, should be paid out of the twenty thousand dollars appropriated.

Sincerely yours,
ABRAM P. STAPLES,
Attorney General.

COMMONWEALTH'S ATTORNEY—Fees; Misdemeanor Cases in Justice's Court.

May 1, 1947

HONORABLE W. B. F. COLE,
Attorney for the Commonwealth,
Fredericksburg, Virginia.

My dear Mr. Cole:

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

"On April 15, 1947, inspectors of the State Department of Labor swore out four certain warrants against the proprietor of a certain restaurant. The first warrant charged that on the 15th day of April the said proprietor worked a certain woman in excess of the legal hours for women. The second warrant charged the said proprietor at various times between February 12, 1947, and April 5, 1947, with working a second woman in excess of the legal hours. The third warrant charged that at various times between February 12, 1947, and April 12, 1947, the said proprietor worked a third woman in excess of the legal hours. The fourth warrant charged failure to post the required schedule of working hours.

"Upon proper request the Commonwealth's Attorney prosecuted, at the trial on April 17th the said proprietor pled guilty to each of the four warrants and was fined the minimum of $10 and costs on each of said warrants, as it was a first conviction. The trial was before the local Civil and Police Justice and a Commonwealth's Attorney's fee of $5 was taxed as cost in each of the said warrants.

"Will you please advise the proper Commonwealth's Attorney's fee to be taxed as cost in this matter? Since the trial was before the Civil and Police Justice, it is presumed the Commonwealth's Attorney's fee for a misdemeanor is $5. Should $5 be taxed as cost on each of the warrants or should only one fee of $5 be taxed on all four warrants?"

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

"* * * and for each person prosecuted by him before any court or justice of his county or city for a misdemeanor which he is required by law to
prosecute, * * * he shall be paid five dollars, * * * and in every misdemeanor case so prosecuted the court or justice shall tax in the costs and enter judgment for such misdemeanor fees.” (Italics supplied)

In view of the above statute, which allows the Commonwealth's Attorney a fee of five dollars for a misdemeanor which he is required to prosecute, and requires the justice to tax in the costs in every misdemeanor case, I am of the opinion that a fee of five dollars should be taxed as cost on each of the warrants in question, for the defendant has been charged with four misdemeanors and prosecuted for the same. The fact that the four distinct misdemeanor cases were prosecuted at the same trial is immaterial.

This office has previously expressed the view that in a trial before the Civil and Police Justice the Commonwealth Attorney's fee for a misdemeanor is five dollars.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CONVICTS—Statute Authorizing Force to be Used to Prevent Escape; to Whom Applicable.

HONORABLE RICE M. YOUELL,
Commissioner of Corrections,
Richmond 6, Virginia.

My dear Major Youell:

This will acknowledge receipt of your letters of July 12 and July 29 with respect to a construction of Chapter 210 of the Acts of 1946. This inquiry was not answered previously because the 1946 Acts have just recently been made available to me.

The statute to which you refer provides:

"1. That whenever any prisoner confined in the State Penitentiary, State Convict Road Force, or at any State owned or operated penal farm or institution shall attempt to escape, the officer, guard or overseer in charge of such prisoner may use such means as may be reasonably necessary to prevent the escape of such prisoner."

The correspondence states that the State Farm has been designated as a jail for several counties near thereto and also that certain minors from the industrial schools are transferred there. The inquiry is as to whether or not this statute is applicable to such persons at the State Farm. I am of the opinion that the statute is applicable to persons on the State Farm who are held there awaiting trial in the various courts. The statute makes no distinction between felonies and misdemeanors and I, therefore, take it that no such distinction was intended. The statute is applicable to any prisoner confined at the State Farm and surely such persons are prisoners confined at the State Farm.

In contrast, I do not believe the statute is applicable to minors transferred from the State industrial schools. In reaching this conclusion I presume that you are referring to minors under eighteen who have been declared delinquent by the various juvenile courts of the State and committed to the State Department of Public Welfare. Persons committed under such procedure are not, in my opinion, prisoners and certainly not prisoners within the definition of this statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

October 14, 1946.

DR. L. J. ROPER, Chairman,
Commission on Post-Mortem Examinations,
Richmond 19, Virginia.

My dear Dr. Roper:

This is in reply to your letter of October 11, in which you request my opinion upon a question raised by Honorable W. O. Fife, Commonwealth's Attorney for Albemarle County.

The question is whether or not the provisions of sub-section b of section 2773(49) of Michie's Code are superseded by the provisions of Chapter 355 of the Acts of the General Assembly of 1946, insofar as these statutes relate to the appointment of coroners for Albemarle County which has adopted the County Executive Plan of Government. Under the Code section above referred to the following provision is applicable to such form of government:

"(b) County coroner; his powers shall be exercised and his duties performed by the attorney for the commonwealth, who shall not be required to hold inquests, except when he considers that in the interest of the public such should be done. He may, subject to authorization by the board of county supervisors, employ medical assistance whenever it becomes necessary. He shall not, however, act as sheriff."

It will be observed that the effect of the foregoing provision is to make the Commonwealth's Attorney ex officio the county coroner.

Section 4806-h of the Code, which is a part of Chapter 355 of the Acts of 1946, provides as follows:

"The Commission shall, on or before the first day of October, nineteen hundred forty-six, appoint one or more coroners for each county and city in the State having no coroner in office at the time, to take office on October first, nineteen hundred forty-six, and to hold office for terms of two years and until their successors are appointed by the Commission and have qualified."

It will be noted that the above language applies to each county and city in the State without exception. Section 4 of said Act is as follows:

"That all acts and parts of acts, both general and special, including charters of cities and towns, inconsistent with the provisions of this act, are hereby repealed to the extent of such inconsistency."

In my opinion it is quite clear that the effect of the provisions of Chapter 355 of the Acts of 1946 is to repeal the provision of sub-section b of section 2773(49) above quoted.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General
CORONERS—Jurisdiction Depends Upon Place Where Death Occurs.

October 31, 1946

HONORABLE HUGH B. MARSH,
Commonwealth's Attorney,
Fairfax, Virginia.

My dear Mr. Marsh:

In your letter of October 29, you inquired as to whether or not in my opinion the coroner of Fairfax County has any authority to conduct an inquest or investigation of the death of a man who was struck by an automobile in the County, but who was taken to a Washington hospital and died in the District of Columbia.

In my opinion, the coroner is not authorized by the new Act to conduct an inquiry under such circumstances. Sections 4806-i and 4806-j of the Code, as amended and reenacted by Chapter 355 of the Acts of 1946, provide that upon the death of a person under the circumstances indicated therein, the coroner of the county or city in which such death occurs shall be notified thereof, and, upon receipt of such notice, he shall take charge of the dead body and make inquiry regarding the cause and manner of death and make a report thereof to the Chief Medical Examiner. Since the person you refer to did not die in Fairfax County, the statute would not seem to be applicable to his case.

However, I see no objection to you, as Commonwealth's Attorney, obtaining such information as you deem pertinent from the coroner of the District of Columbia, although I doubt if a report by the District coroner would be admissible evidence in any legal proceeding.

The case you refer to seems to me to come more appropriately within the scope of the duties of the sheriff or law enforcement officers of the County, and also of the Commonwealth's Attorney to investigate to the extent he deems advisable.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CORONERS—Jurisdiction Depends Upon Place Where Death Occurred.

June 25, 1947

HONORABLE HERBERT S. BREYFOGLE, M. D.
Chief Medical Examiner,
State Department of Health,
Richmond, Virginia.

My dear Doctor Breyfogle:

I am in receipt of your letter of May 27, 1947, in which you request my opinion as to the jurisdiction of coroners and the proper source of their fees.

As you know, the legislature in 1946 repealed the then-existing statutes pertaining to the matter and passed a new act, now carried in the 1946 Supplement to Michie's Code of 1942 as Chapter 190A, §§4818(1) through 4818(15). Sections 4818(9) and 4818(10) refer to the matters raised by your letter.

Section 4818(9) reads as follows:

"Upon the death of any person on or after October first, nineteen hundred forty-six, from violence, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious, unusual or unnatural manner, the coroner of the county or city in which such death occurs shall be notified by the physician in attendance, by any law enforcement officer having the knowledge of such death, by the undertaker, or by
any other person present. If the death occur in the penitentiary the notice shall be given to the coroner of the City of Richmond."

Under this section, it is my opinion that the determining factor as to the jurisdiction of the coroner is the place where the death occurs. This altered the previous act under which if it appeared that an inquiry received in some other county caused the death the coroner of such other county would be called.

You give four possible situations, and ask an opinion as to each. Under the above interpretation of §4818(9), my opinion is as follows:

Where the death occurs beyond the corporation limits of the county or city for which he is appointed, the coroner is under no duty, nor does he have any authority, to take charge of the body or make investigation.

Where it appears that an injury received in another county caused the death, but the death occurred in the county or city for which the coroner was appointed, the coroner for the county or city in which the death occurred has the duty of taking charge of the body and making investigation.

Where the death is caused by an injury received in one city or county but occurs while en route to another city or town, and death has not been declared by a qualified practitioner, the same interpretation would apply. The difficulty is determining just where the death did actually occur. Where it is not known just where the death did occur, it is my opinion that the presumption exists that the death occurred in the city or county in which it is first discovered. It will be observed that it is not necessary that a qualified doctor notify the coroner of the death. The statute specifically states that the coroner may be notified by "any other person present."

Where the body is moved before death has been declared by a qualified practitioner from one city or county to another and is there declared dead by a coroner, it would appear that if the death is proven to have occurred in the first county, then the coroner of such county must make the investigation. The question in each case is where did the death occur. The fact that a qualified practitioner did not declare the death does not relieve the coroner of the county where the death did in fact occur from the duty of making the investigation.

You also ask what determines the source of the coroner's fee after he takes charge and makes an investigation.

Section 4818(10), so far as it pertains to fees, reads as follows:

"For each investigation under this chapter, including the making of the required reports, the coroner shall receive a fee of ten dollars, this to be paid by the county or city for which he is appointed."

It appears from this that the city or county for which the coroner is appointed provides the fee for the coroner when he makes an investigation under this chapter. As a coroner can only make such investigation when the death occurs in his city or county, then the place of death does, in effect, determine the source of the fees.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—On Recordation of Assignment of Lease; How Calculated.

HONORABLE P. J. MARSHALL, Clerk,
Corporation Commission,
Winchester, Virginia.

My dear Mr. Marshall:

This will acknowledge receipt of your letter of July 23, enclosing copy of an instrument which has been presented to you for recordation. The instrument
appears to be an assignment of interest in three outstanding leases by the assignor. You ask whether or not such an instrument is subject to a recordation tax and, if so, on what basis.

I am of the opinion that the instrument is subject to a recordation tax. See Report of Attorney General 1936-1937, page 174.

The basis of the tax would depend upon the terms of the original leases. If the leases are for a definite term, the tax would be based on the rentals due after the date of the assignment. If the leases are for an indefinite term, or, if the term of the leases multiplied by the annual rental would exceed the value of the property, then the value of the property would be the basis for the tax. See Report of Attorney General 1937-38, page 166.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

COSTS AND FEES—Fees On Peace Warrants to Be Taxed by Court and Remitted to State Treasury.

October 14, 1946

MR. J. S. POTTER,
Sheriff of Wise County,
Coeburn, Virginia.

My dear Mr. Potter:

Your letter of October 3 addressed to Honorable E. R. Combs, Chairman of the State Compensation Board, has been referred to this office. I quote from your letter as follows:

"A question has arisen as to whether it is now legal for a deputy sheriff to collect the fee for serving a peace warrant. My understanding is that my department collects all fees to turn in to the Commonwealth, which we formerly collected under the fee system. We have been collecting one dollar and fifty cents ($1.50) for serving peace warrants, and turning this amount in to the Commonwealth.

"However, a local lawyer questions the legality of this. Would you please give me the opinion of the Attorney General on this? Thank you for prompt cooperation."

I presume that you refer to a warrant and proceeding under the provisions of sections 4790 and 4791 of the Code. Section 4791 provides that the judge or the trying officer may give judgment against the complainant for costs if he considers that there was not good cause for the complaint. Or the section goes on to provide that, if there is good cause for the complaint, judgment should be given against the defendant for costs. The proceeding being criminal in its nature, I am of opinion that the sheriff or his deputy should not collect in advance his fee for serving the warrant, but that such fee should be collected from the person against whom judgment for costs is given and when so collected the fee should be turned in to the treasury of the county and distributed as provided by section 1, subsection (b) of Chapter 386 of the Acts of 1942.

Very sincerely yours,

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

COSTS AND FEES—Taxing of Costs Where Accused is Fined and Pays Fine After Being Jailed.

Honorable Charles L. Hutchins, Clerk
Circuit Court of the City of Suffolk,
Suffolk, Virginia.

March 26, 1947

My dear Mr. Hutchins:

This will acknowledge receipt of your letter of March 20th containing the following:

"A defendant is found guilty and given a fine (plus costs), and a date is set by which the fine and costs must be paid. The fine is not paid and I issue a capias (copy of which is enclosed) directing the City Sergeant to arrest the man and place him in jail. A few days later a friend of the defendant comes to my office to pay the man out of jail. Should I collect commissions for the City Sergeant on the amount due me, plus the arrest fee of $1.00? Is the City Sergeant entitled to collect commissions on a capias? A Fi Fa directs the Sergeant to collect the money, but a capias does not mention collecting the money due, but specifies that the man be arrested and placed in jail. "If the Sergeant is entitled to commissions in the above case, do I figure the commission on the fine only, or on the fine plus costs, at the rate of 10% on the first one hundred dollars and 5% on all over?"

§2561 of the Code provides:

"Any writ of fieri facias or capias pro fine on a judgment for a fine may be directed to the sheriff, sergeant, or a constable of any county or city, who shall be entitled to a commission of five per cent on the amount collected to be paid by the defendant as other costs are paid."

It is my opinion that under this section the sergeant is entitled to the commission of 5% on the capias pro fine.

I am further of the opinion that the arrest fee of $1.00 should be taxed as part of the costs. In 1941 I stated in an opinion on this matter that an officer who arrests a prisoner and carries him to jail under a capias pro fine is entitled to an arrest fee and mileage as prescribed by §3508 of the Code, such fee and mileage to be taxed against the defendant as a part of the costs. See Report of the Attorney General, 1940-41, p. 155.

I am further of the opinion that in computing the commission of 5% the basis of computation would include the fine plus costs. §2561 quoted Supra provides for the commission "on the amount collected". With reference to the criminal costs §4964 provides that after the clerk has made up his statement it is the same:

"* * * as if on the day of completing said statement there was a judgment in such court in favor of the Commonwealth against the accused for the said amount as a fine."

In view of this provision it seems to me the commission should be computed on the basis of both the fine and costs. The rate of commission is just as prescribed by statute, that is, 5% on the amount collected.

Very truly yours,

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

COSTS AND FEES—United States Not Subjected to Writ Tax in State Courts.

October 4, 1946

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

My dear Mr. Prieur:

I am in receipt of your letter of October 3, in which you inquire whether a writ tax or clerk's fee should be collected by you in suits brought by the Federal Price Administrator under the Federal Emergency Price Control Act for License Suspensions.

Such a suit is in effect brought by the United States and, in accordance with prior opinions of this office, I do not think that any writ tax should be assessed or collected.

Furthermore, since section 205-c of the Price Control Act provides that "no cost shall be assessed against the Administrator or the United States Government in any proceeding under this Act", I do not think that any advance costs should be collected from the Administrator. However, I think that all proper costs should be noted and where the Price Administrator prevails such costs should be collected from the defendant.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Carrying a Weapon on Sunday in an Automobile.

January 9, 1947

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

My dear Mr. Goodman:

I am in receipt of your letter of January 6, in which you refer to that part of section 4578 of the Code making it a misdemeanor for any person to, "without good and sufficient cause therefor, carry any such weapon on a Sunday at any place other than his own premises." The weapon referred to is a gun, pistol, or other dangerous weapon.

You desire my opinion on the question whether the word "premises" would include an automobile in which a person may be riding. Certainly a person's automobile would not ordinarily be considered to be his "premises" and from such examination of the authorities as I have been able to make this is likewise the rule in cases dealing with the carrying of weapons. See Lattimore v. State (Texas), 145 S. W. 588.

Your attention is also invited to that part of the section which indicates that with good and sufficient cause a person may carry a weapon on Sunday at a place other than his own premises.

Very sincerely yours,

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

CRIMINAL LAW—Service of Criminal Process Against a Corporation; Violation of Forest Fire Laws.

September 26, 1946

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

My dear Mr. Dean:

This is in reply to your letter of September 24, which I shall quote:

"On occasions, when enforcing the forest laws of the State, it becomes necessary to issue a warrant against railroad companies particularly concerning section 3991, chapter 155, Code of 1936 and section 542, chapter 28, Code of 1936 as amended in chapter 204, Acts 1942.

"Against whom should we have the warrant issued, the Section Master or the Station Agent as representatives of the railroad company, or a general warrant against the company? Your advice on this matter will be appreciated."

Section 3991 of the Code provides:

"Every railroad shall keep its right of way clear and free from weeds, grass, and decayed timber, which from their nature and condition, are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property."

Section 4003 of the Code, which is in the same chapter as 3991, provides:

"Any railroad company failing to comply with, or violating, or permitting any of its agents or employees to violate, any of the provisions of this chapter, or any valid order, rule, or regulation of the State Corporation Commission, relating to the provisions of this chapter, if not otherwise provided in this chapter, shall be fined not less than ten dollars nor more than five hundred dollars for each offense."

The offense referred to thus is a misdemeanor and the usual criminal process for such a prosecution is the conventional warrant of arrest. Such a procedure has been approved by our appellate court, although from the very nature of things a corporation is not subject to physical arrest. Postal Telegraph and Cable Company v. Charlottesville, 126 Va. 800.

Section 4892 of the Code outlines criminal procedure against corporate defendants. It provides in part:

"A summons against a corporation to answer an indictment, presentment, or information may be served as provided in sections six thousand and sixty-three and six thousand and sixty-four; and if the defendant after being so served, fail to appear, the court may proceed to trial and judgment, without further process, as if the defendant had appeared and pleaded not guilty."

This does not exclude the use of warrants, but as a practical matter it is a far better way to proceed, it appears to me. The Commonwealth's Attorney will bring the matter to the attention of the Grand Jury or the Circuit Court, the court will award the appropriate process and then may, in its discretion, certify the matter to the Trial Justice for trial on its merits. Under section 6063 process may be served on a domestic corporation or on any officer or agent found in the city or county in which the action is commenced; against a foreign corporation service shall be forwarded to its statutory agent.

The other statute to which you refer, section 542-a of Michie's Code of 1942, is not a criminal statute, but one providing for recovery of fire fighting costs incurred by the county and State for fighting or extinguishing a fire caused by the negligence of any person. This is purely a civil recovery and the statute provides that it shall be the duty of the Commonwealth's Attorney to institute proper proceedings under that section. Of course, he can proceed either by civil warrant or notice of motion, depending upon the amount in controversy, etc.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
CRIMINAL LAW—The Offense of "Desertion and Non-Support" is a Crime Subject to Extradition.

February 12, 1947

HONORABLE J. ALDEN OAST,
Commonwealth's Attorney,
Portsmouth, Virginia.

My dear Mr. Oast:

This will acknowledge receipt of your communication of February 10, 1947, In Re: Extradition of Virgil McCartney from Michigan, together with the enclosed copy of a Memorandum Brief filed by counsel for McCartney in a habeas corpus proceeding in the Circuit Court of Genesee County, Michigan; also the request of the Michigan authorities for a reply brief.

The import of the brief is that Chapter 80 of the Code of Virginia, comprising §§1936-1944a, does not make "Desertion and Non-support" a crime, but that the proceedings are only quasi-criminal, and isolated phrases from some of the sections are quoted.

There appears to be no merit whatever in the argument set out in the brief filed by McCartney, but unless the Court has a full copy of the statute I feel confident they could not intelligently consider the matter. I am enclosing here-with for your use in event you care to forward these to Michigan two sheets from Michie's Code: (1) §§1936-1938 from the 1944 Supplement; (2) §§1939-1942 from 1936 Code.

A reading of the sections would seem to make it perfectly clear that a violation of these provisions constitutes a misdemeanor. Initiation of the complaint by way of "petition" is beside the point; the institution of the criminal action is when the court causes a warrant for the arrest of the husband to be issued. Nor is there anything exceptional about the ability of the court to try the defendant in his absence; section 4883 of the Code allows a court in Virginia to try any misdemeanor in the absence of the accused and the section has been held constitutional; Shiflett v. Commonwealth, 90 Va. 386, 18 S. E. 838. Nor is lack of a trial by jury of consequence, because §1937c(b) expressly grants a right to appeal to a circuit or corporation court where a trial by jury may be had. Nor is it of consequence that a grand jury has not indicated the accused (a fugitive); §1937c(a) provides that in such cases the grand jury "may indict", but it is not mandatory.

It is made abundantly clear in Heflin v. Heflin, 177 Va. 385, 14 S. E. (2d) 317; and McClougherty v. McClougherty, 180 Va. 51, 21 S. E. (2d) 761, that this chapter creates a crime, and that it is in addition to the ordinary civil remedies that a spouse or child has against the one responsible for his support.

May I also call to your attention the provisions of §1942 of the statute, which makes the offense the subject of extradition. The General Assembly would not have so provided unless the offense was considered strictly of a criminal nature.

Trusting that the above will be of service to you and with kindest regards,

I am

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Suspension of Sentence of Persons Convicted of Driving While Drunk.

December 31, 1946

HONORABLE R. A. BICKERS,
Commonwealth's Attorney,
Culpeper, Virginia.

My dear Mr. Bickers:

This is in reply to your letter of December 30, requesting my opinion as to whether or not a jail sentence imposed for a second or subsequent offense under
§4722a of Michie's Virginia Code of 1942, the drunken driving statute, may be suspended by the court or justice.

This statute is chapter 144 of the Acts of Assembly of 1934 as amended and re-enacted by chapter 87, the Acts of Assembly of 1940. The concluding sentence of section 2 of the statute originally was:

"* * * Any person convicted of a second, or other subsequent offense under this act shall be punishable by a fine of not less than one hundred dollars nor more than one thousand dollars and by imprisonment for not less than one month nor more than one year, and no court shall suspend the sentence in any such case."

In the re-enactment of section 2 of this statute the underscored clause was omitted.

The second sentence of section 3 of the original statute was:

"If any person has heretofore been convicted of violating any similar act of the State and thereafter is convicted of violating the provisions of section one of this act, such conviction shall for the purpose of this act be a subsequent offense and shall be punished accordingly."

In the re-enactment of section 3 this was added to the sentence quoted above:

"and the court may, in its discretion suspend the sentence during the good behavior of the person convicted."

When these two amendments are read together, I am of the opinion that one of the purposes of the 1940 amendment and re-enactment of this statute was to permit suspension of sentence for a second or subsequent offense.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Lottery; Wheel of Chance Respecting Gasoline Purchases.

HONORABLE B. D. PEACHY,
Attorney for the Commonwealth,
Williamsburg, Virginia.

My dear Mr. Peachy:

I am in receipt of your letter of May 19, 1947, in which you ask whether or not the following set of facts is in violation of the law:

"A filling station operator has a wheel with one hundred numbers on it. When gas is purchased, he allows the purchaser to call a number, and then the wheel is spun, and should it stop on the number called, the purchaser gets the gas free of charge. Otherwise, he pays the regular price for it."

Lotteries are prohibited by section 60 of the Virginia Constitution and by sections 4693 and 4694 of the Code. Therefore, the question presented is what is a lottery.

The Code does not undertake to give a definition, but it is generally understood that the elements of a lottery are threefold, namely, chance, prize and consideration. As the facts set out above indicate, the element of chance is present as is the element of prize (free gas).

The essential element of consideration was dealt with in the case of Maughes v. Porter, 157 Va. 415, 161 S. E. 242, and the Court held that where a car was given away at an auction sale, attendance at the sale was found to be sufficient consideration to make the scheme a lottery.
In view of the decision in the Maughs Case, supra, it appears that the element of consideration in a lottery has sufficient flexibility to meet any situation which the Court may think is contrary to the public policy behind the prohibition of lotteries. Therefore, it is my opinion that the filling station operator in question is conducting a lottery in violation of the laws of the Commonwealth, since he is not only receiving a consideration when his gas is purchased, but is deriving a benefit from an increase in sales which undoubtedly follows such a scheme.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Goods Manufactured Outside State Nevertheless Subject to State Sanitation Laws Before Sale Inside State.

July 17, 1946.

DR. P. E. SCHOOLS, Director,
Bureau of Industrial Hygiene,
Department of Health,
Richmond 19, Virginia.

My dear Dr. Schools:

This will acknowledge receipt of your letter of June 11, seeking my opinion with respect to certain portions of the Virginia Bedding Law, which is chapter 263 of the Acts of Assembly of 1946. Specifically you ask as to whether or not you can require manufacturers outside of this State to pay the required $25 permit fee for sterilization processes under section 4 of the Act.

Statutes of this type are fairly common in the United States. See Flack's Annotated Code of Maryland 1939, Article 43, Section 64. Also McKinney's Consolidated Laws of New York, Vol. 19, page 387. As long ago as 1915 the Supreme Court of Illinois said:

"... The provision in section 3 of the act requiring that material used in re-making mattresses, quilts and comforters for the person's own use must be sterilized does not violate any constitutional prohibition and is a proper exercise of the police power. That same requirement could be made in an act with reference to the manufacture and sale of mattresses. ..."

(People v. Weiner, 271 Ill. 74, 110 N. E. 870, Ann. Cas. 1917C, 1065 and see annotation beginning at page 1068.)

See also Lisichin v. Andrews, 26 Fed. Sup. 882. The Supreme Court of the United States has shown a decided tendency to uphold state regulations affecting health and sanitation even as applicable to articles of commerce shipped from without the State. See Mints v. Baldwin, 289 U. S. 346, 77 L. ed. 1245.

In my opinion, there is no way that you require out-of-State manufacturers to secure this permit and pay the fee. However, the same result can be reached by another approach. The criminal sanctions of the Act are directed against any person who shall sell, lease, offer to sell or lease, deliver or consign in sale or lease any article made or remade or renovated in violation of this Act unless it has been sterilized and disinfected by a reasonable process approved by the Commissioner. Thus the sale of the goods of any manufacturer who does not comply with this Act may be stopped at the retail outlet or point of delivery in this State and, in order to avoid this result, it seems natural that the manufacturer would comply with the statute by submitting his process to you in advance and paying the necessary fee.

You next ask:

"Will it be necessary for me to submit to you for approval the rules and regulations that I will promulgate under the provision of section 10?"

Section 10 in part provides:
"The State Board of Health may make rules and regulations for the enforcement of this Act * * * ."

I find no requirement that these rules and regulations must be submitted for my approval and, therefore, I do not think the same is necessary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Segregation Law as Applicable to Passengers on Carriers.

July 23, 1946.

COLONEL C. W. WOODSON, Superintendent,
Department of State Police.
Richmond, Virginia.

My dear Colonel Woodson:

I have your letter of June 28, 1946, which I quote in full as follows:

"Since Section 4533-a of the Code of Virginia is now in effect, it is requested that you render an opinion as to the effect which the recent ruling of the Supreme Court of the United States will have on the following part of the section—namely, "Failing to Move to another Seat When Lawfully Requested to So Do By the Operator, or Otherwise Annoying Passengers or Employees Therein," in reference to travel by interstate and intrastate carriers of passengers.

"We are endeavoring to apprise all members of this department of any changes in the Code, and would like to quote your opinion in reference to this particular section."

The recent decision of the United States Supreme Court nullified the provisions of the Virginia statute relating to segregation of passengers, where such passengers are traveling from one State to another. If, however, their travel begins and ends inside the State of Virginia, the general segregation statute would seem to be applicable. Under this statute, in order for the carrier to lawfully request a passenger to change from one seat to another it is first necessary that the carrier shall promulgate a rule or regulation covering the questions of segregation of the races in intrastate commerce. It is also necessary that the operator of the bus explain this regulation to the passenger when requesting him to change his seat. His refusal to change after such explanation, in my opinion, would be a violation of section 4533a of the Code, as amended by the Acts of 1946.

Whether or not a State Police Officer should undertake to make any arrest in the absence of a warrant sworn out by the operator of the bus, charging the passenger with violation of the segregation statute or of the above Code section, would seem to be a matter of policy rather than a legal question. Of course, the officer has the right to arrest a person for a misdemeanor committed in his presence.

There may be cases in which the regulations of a carrier covering interstate passengers would be held to be valid where they are uniform throughout the entire trip of the bus. However, upon this question there seems to be considerable confusion and I would not care to express an opinion in absence of actual knowledge of the regulations adopted by the carrier and the circumstances under which same were promulgated.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
CRIMINAL LAW—Bringing Stolen Goods Into Virginia Is An Offense.

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

My dear Mr. Chandler:

This will acknowledge receipt of your letter of January 17th seeking my opinion with reference to a criminal prosecution now pending in the circuit Court of Westmoreland County. I shall attempt to restate the facts:

In October 1946, a power saw was stolen from a lumber company of your county, and shortly thereafter one Howell was arrested in Maryland for the larceny of this saw. Howell waved extradition, was returned to Westmoreland County and duly indicted for grand larceny of the saw. It then developed that Howell and one Connors had brought two saws to Westmoreland County in May, 1946, and sold them to the Lumber Company from which Howell later stole one saw. Upon investigation in Maryland it developed that these two saws had been stolen by Howell and Connors from a lumber company there. Both parties have been indicted for grand larceny in Maryland for the original taking of the two saws, and you ask my opinion as to whether or not Howell and Connors may be prosecuted in Westmoreland County, Virginia under the provision of §4769 of the Code.

The relevant portion of that statute provides:

"... and if any person shall commit larceny or robbery beyond the jurisdiction of this State and bring the stolen property into the same, he shall be liable to prosecution and punishment for his offense in any county or corporation in which he may be found as if the same had been wholly committed therein."

If the evidence indicates that these parties committed larceny in Maryland and then brought the stolen property to Westmoreland County where they sold it, I am of the opinion that each is "found" in Westmoreland County and each may be prosecuted under the above statute there.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Obtaining Taxi Ride Without Intent to Pay Therefor.

HONORABLE EMERSON D. BAUGH,
Trial Justice of Brunswick County,
Lawrenceville, Virginia.

My dear Mr. Baugh:

This is in reply to your communication of February 19, 1947, in which you refer to my opinion of February 8, 1946 (Report of Attorney General, 1945-1946, page 43), in which, after tracing the history of the common law doctrine of obtaining property by cheat or false pretense and discussing the pertinent Virginia statutes, I concluded that "the obtaining of a taxi-ride through deceit is not a criminal offense in Virginia". You then ask my consideration of sections 4567 and 4567-A of Michie's Code of Virginia on this question.

These sections make it an offense either to damage or injure any horse, mule, automobile, aeroplane, or other animal or vehicle after having "hired," "rented or leased" the same, or to "procure (any of the said chattels) without previously
making arrangements for credit and use the same without paying therefor with intent to cheat or defraud," or to procure (any of said chattels) by fraud or by misrepresenting himself as some other person ***." Section 4567-a then provides that "failure to pay the rental *** shall be prima facie evidence of the intent to defraud."

In my opinion it is clear that these sections of the Code refer to cases where the chattels are leased or rented, i.e., where possession of the chattel is delivered to the accused. The terms "hire, rent and lease" the chattels are quite distinct from the hiring or employing of a servant or operator to operate them; and the phrases "procure" the said chattels and fail to pay the "rental", when read in the full context of the statutes, make it clear that a renting or leasing of the vehicle itself is contemplated, as distinguished from the hiring or employment of the driver.

I am of the opinion, therefore, that sections 4567 and 4567-a do not make the obtaining of a taxi-ride through deceit an offense.

Thanking you for your interest in this matter, which as you point out, has been receiving some recent publicity in the press, I am

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

CRIMINAL LAW—Venue in Seduction Cases is Place Where First Act of Intercourse Occurred.

HONORABLE CHARLES FUNK,
Commonwealth's Attorney,
Marion, Virginia.

My dear Mr. Funk:

This is in reply to your letter of December 31, stating that a criminal prosecution has been instigated in Smyth County against a young man on a charge of seduction under promise of marriage. Prior to the preliminary hearing you were informed that the first act of sexual intercourse between the parties took place in Washington, D. C., and you are concerned as to whether or not the prosecution can be maintained in Smyth County, Virginia, although subsequent intimacies occurred in Smyth County.

I have not been able to find the question of venue in seduction cases covered by our statute or any Virginia decision. However, in what appears to be a well considered opinion, a Georgia Appellate Court decided that the venue of such an offense was in the county where the first act of intercourse occurred. Davis v. State 28 Ga. App. 372, 110 S. E. 922 (1922). The question there was as to which of two counties was the proper venue, but I believe the same principle would control here.

For that reason I am of the opinion that the venue of this offense cannot be laid in Smyth County, Virginia.

Very truly yours,

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

DIVISION OF PURCHASE AND PRINTING—Purchases Made by Military Store at Virginia Military Institute.

October 17, 1946.

CAPTAIN ROBERT LITTERM,
Purchasing Officer,
Virginia Military Institute,
Lexington, Virginia.

My dear Captain Littrell:

I have carefully considered your letter of October 11 together with the correspondence which was enclosed.

Section 401-b of the Code as found in the 1946 Supplement to Michie's Code of 1942 provides in part as follows:

"Except as hereinafter provided, every department, division, institution, officer and agency of the State, hereinafter called the using agency, shall purchase through the Director of the Division of Purchase and Printing all materials, equipment and supplies of every description, the whole or a part of the costs whereof is to be paid out of the State treasury; it shall be the duty of the said Director to make such purchases in conformity with this chapter."

From the correspondence you appear to be familiar with the exceptions contained in section 401-e of the Code (1946 Supplement to Michie's Code of 1942). I also gather from the correspondence that all receipts and payments in connection with the Military Store at V. M. I. clear through the State treasury and, in view of the provision of section 401-b which I have quoted above, I can see no escape from the conclusion that, except as provided in section 401-e, all purchases for the Store must be made through the State Purchasing Agent. If any change is necessary in the existing law, it will have to be made by the General Assembly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Absentee Voting: Ballots Applied For Before Amended Statute Becomes Effective are Validly Voted.

July 16, 1946.

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

My dear Mr. Booth:

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

"The Electoral Board had the ballots for the August primary ready sixty days before the election to be held on August 6th, and on June 12th turned over to me a sufficient supply of ballots.

"From June 15th to June 19th inclusive, I voted in my office and sent out ballots to persons applying for them, sixty in all. From June 19th to June 26th I voted and mailed out twenty-nine, making eighty-nine in all. We have nine wards, one locked box for each ward, and as the ballots came back to me, I have deposited them in the proper ballot box, to be taken to the polls on day of election.

"We did not know about the new law until June 28th, when we received a copy of it and a supply of new applications. Since then we have followed instructions of the new law to the letter, and mail ballots is being sent out by the Electoral Board.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
"What I want to know, is how to handle the 89 ballots I received before I knew of the new law."

As you know, section 205 of the Code, as amended in 1946, provides that the registrar shall forward the application for an absent voter's ballot to the electoral board, and the board furnishes the applicant with the ballot and other papers mentioned in the section. The section, as amended, however, did not go into effect until June 19 of this year, therefore, absentee ballots sent out by you until June 19 were sent out in accordance with the law as it then existed, and, since there is nothing in the amended section to indicate that it is to have any retroactive effect, I am of opinion that ballots voted as a result of applications made before June 19 are valid ballots and should be counted.

As to ballots voted as a result of applications made on and after June 19, while it is unfortunate that it was not generally known that the law had been amended, yet, I am of opinion that these ballots were not properly voted under the new law and should not be counted. It seems to me, therefore, that you would be justified in now sending to those who applied for ballots on or after June 19, and to whom ballots were sent out under the old law, new applications for ballots under the law as now amended and in effect as of June 19.

As to the disposition of ballots and other papers which have been returned to you on applications made under the old law, I suggest that this is a matter which should be governed by instructions or regulations of the State Board of Elections to whom I am sending a copy of this communication.

Very sincerely yours,

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

ELECTIONS—Absentee Voting: How Applications For Ballots May be Distributed; Custody of Ballots.  
July 23, 1946.

HONORABLE E. D. COBURN,  
Member House of Delegates,  
Narrows, Virginia.

My dear Mr. Coburn:

This will acknowledge receipt of your letter of July 19 in which are a number of specific inquiries upon which you seek my opinion.

"1. * * * could the electoral board appoint someone to stay in an office at the court house for the purpose of taking care of the absentee ballots?"

This involves a construction of section 216a of the Code which was included in Chapter 193 of the Acts of 1946. The section provides “The governing body of each county and city shall provide the electoral boards with such assistance as may be necessary to carry out the provisions of this chapter.”

In my opinion this statute is broad enough to authorize the electoral board to employ someone to stay in an office in the court house in connection with receiving applications and other incidentals connected with absentee voting.”

"2. Would it be permissible for me or any other interested person to mail applications for ballots to those who live out of the county so long as the applications are returned to the Registrar by the voter?"

Yes.

"3. Is there anything in the law which would prohibit a Notary Public from taking applications for ballots to voters who are confined at home on account of sickness so long as the application is returned to the registrar by mail?"

I know of no law which would prohibit this.

Very sincerely yours,

ABRAM P. STAPLES, 
Attorney General.

ELECTIONS—Candidates: Lawful for Candidate to Personally Circulate his Petition for Candidacy.

June 11, 1947.

HONORABLE WILLIAM F. HUDGINS, Clerk,  
Circuit Court Princess Anne County, 
Princess Anne, Virginia.

My dear Mr. Hudgins:

I have your letter of June 6, in which you request my opinion as to whether or not a petition circulated in person by a candidate for office is legal.

I know of no provision in the statute which either expressly or impliedly would prevent a candidate from circulating his own petition, and, in the absence of such a prohibition, I am of opinion that same is lawful.

With best wishes, I am

Sincerely yours,

ABRAM P. STAPLES, 
Attorney General.
ELECTIONS—Candidates: No Provision for an Independent Candidate for 
President to Have his Name on Ballot.

December 10, 1946.

HONORABLE MARVIN L. GRAY, Secretary,
State Board of Elections,
Richmond 12, Virginia.

My dear Mr. Gray:

I am in receipt of your letter of December 6, in which you ask the following 
question:

"Please advise me the proper procedure for an Independent Candidate for 
the President of the United States to get his name on the ballots in Virginia."

I can find no provision of our election laws which will permit an Independent 
candidate for President of the United States to have his name printed on the 
balloots in Virginia. You will observe that section 157 of the Code contemplates 
that only the names of electors selected by the different political parties, together 
with the names of the candidates for whom they are expected to vote in the 
electoral college, shall be printed on the ballots.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: To be Eligible in Party Primary Candidate 
Must Have Voted for Party's Candidates in Preceding General Election.

April 17, 1947.

HONORABLE LEVIN NOCK DAVIS, Secretary
State Board of Elections,
Richmond, Virginia.

My dear Mr. Davis:

This is in reply to your letter of April 16, enclosing a letter under date of 
April 13 from Mr. Perry Bloxom of Parksley, Virginia, addressed to your 
predecessor, the Honorable Marvin L. Gray. Mr. Bloxom states that the Repub-
clican Chairman of Accomack County has announced his candidacy for the 
office of County Treasurer subject to the Democratic primary to be held in 
August 1947. Mr. Bloxom wishes to know whether or not it is legal for the 
Republican Chairman to run for a county office in the Democratic primary.

Your letter of April 16 requests me to reply to Mr. Bloxom with a copy to 
your office. However, Mr. Bloxom's letter does not indicate that he is a State 
oficial, and I am not allowed to render official opinions to private citizens. See 
§374a(2) of the Virginia Code as amended, and the enclosed card. Therefore, I 
shall express my views on the matter to you, and you in turn may forward the 
information to Mr. Bloxom.

§228 of Michie's Code of 1942 provides in part:

"No person shall be permitted to vote for the candidates of any party in 
any primary unless such person is a member of such party and in the last 
preceding general election, in which such person participated he or she voted 
for the nominees of such party; * * *.

§229 provides:

"The name of no candidate shall be printed upon an official ballot used 
at any primary unless such person is legally qualified to hold the office for 
which he is a candidate, and unless he is eligible to vote in the primary in 
which he seeks to be a candidate, * * *."
It seems fairly obvious that a Republican County Chairman could hardly be called a member of the Democratic party within the meaning of §228. Party allegiance, of course, can be changed, but it would at least require resigning an official position in the opposite party. In addition to this, however, such person must be able to show that he supported the Democratic nominees in the last general election in which he participated.

I am, therefore, of the opinion that the Republican County Chairman of Accomack County is not eligible to be a candidate for the Democratic nomination for County Treasurer.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Must be Eligible to Vote in Election in Order to Have Name Printed on Ballot; Mistake in Payment of Poll Taxes No Excuse.

May 5, 1947.

Mr. V. R. SHACKLEFORD, JR., Secretary,
Orange County Electoral Board,
Orange, Virginia.

My dear Mr. Shackleford:

This is in reply to your letter of May 2, 1947, in which you request my opinion as to whether Mr. D. H. Stella is a qualified candidate and entitled to have his name on the Town Council ballot for the election to be held in Orange on June 10, 1947. From your letter and the accompanying papers it appears that the name of Mr. Stella was omitted from the list prepared by the Treasurer showing the names of persons who had paid, at least six months prior to the date of the June election, the necessary capitation taxes in order to qualify them for voting in said election. The Treasurer states that Mr. Stella's name was omitted because his 1946 capitation tax had not been paid until March 17, 1947.

Mr. Stella contends that on January 31, 1946, he paid three years' capitation taxes, intending that they should be applied to the years 1944, 1945 and 1946, but instead the Treasurer applied the same to the years 1943, 1944 and 1945.

Section 154 of the code provides that no person who is not qualified to vote in the election in which he offers as a candidate shall have his name printed on the ballots provided for such election. Since under sections 109 and 110 of the Code, dealing with the preparation and posting of the list showing persons who have paid all capitation taxes to qualify them to vote in an election, any person whose name is omitted from such list may apply to the Circuit Court of his county within thirty days after the list has been posted to have the same corrected and his name entered thereon, and since this was not done by Mr. Stella, it is my opinion that he cannot be considered as a qualified voter in the June election and, therefore, is not entitled to have his name printed on the ballot.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Candidates; Six Months Residence in County Prior to Election Qualifies Candidate for County Office to Have Name Printed on Ballot.

June 17, 1947.

CRAIG COUNTY ELECTORAL BOARD,
New Castle,
Virginia.
Attn: Mr. C. Walter Surber, Secretary

Gentlemen:

I have your letter of June 13, from which I quote as follows:

“The Craig County Electoral Board has a request from an aspirant to the office of Commonwealth’s Attorney for Craig County, at the November 4 general election, regarding whether or not he is eligible to have his name printed on the official ballot. The following is his status in connection with his request:

“He became a resident of the County on February 18, 1947, and has resided here ever since; he paid capitation tax in Roanoke, March 17, 1947, and transferred to Court House precinct, New Castle, Craig County, Virginia, March 18, 1947, according to the local registrar's books.

“The Board has information that the party in question will have opposition, and due to this fact, it wants a definite ruling from you in this matter.”

Section 154 of the Code lays down the requirements with which a candidate must comply in order to have his name printed upon the official ballot in a general election. It contains the provision that no person who is not qualified to vote in the election in which he offers as a candidate shall have his name printed on the ballots provided for the election, unless he be a party primary nominee.

Section 18 of the Constitution of Virginia provides that every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes as required by law, shall be entitled to vote for members of the General Assembly and all officers elective by the people.

It appears from your letter, above quoted, that at the time the election will be held on November 4, next, the party referred to will have been a resident of Craig County for more than six months, and that he is already registered at the court house precinct in New Castle. It is clear, therefore, that under the provisions of section 18 of the Constitution he will be eligible to vote in said election.

Section 32 of the Constitution of Virginia contains this provision:

“Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, * * *.”

There are no other provisions of the Constitution which would affect the person you refer to, unless he is disqualified for some reason not mentioned in your letter.

Section 2703 of the Code of Virginia provides that every county officer shall at the time of his election or appointment have resided one year next preceding his election or appointment in the county for which he is elected or appointed. However, this provision was inserted by the revisors of the official Code in 1919, in order that same might conform to the requirements of section 18 of the Constitution as it then existed. (See note of the revisors of the Code under this section in the Code of 1919).

The provision requiring one year's residence in a county in order to be eligible to be elected to a county office is in conflict with section 18 of the Constitution, as it was amended in 1928. The amendment reduced the requirement of residence in a county in order to be eligible to vote from twelve months to six
months. While the General Assembly has not amended section 2703 of the Code to conform to this change in the constitutional requirement, it is, nevertheless, clear that, in so far as this conflict exists, the provisions of the Constitution must prevail and the one year's residence requirement contained in said Code section is by virtue of the constitutional amendment itself amended as a matter of law to conform thereto.

Inasmuch, therefore, as the party referred to in your letter will be eligible to vote in the November, 1947, election, he is eligible to be elected to the office of Commonwealth's Attorney of Craig County by virtue of the provisions of section 32 of the Constitution, above referred to, and, if he complies with the provisions of section 154, in my opinion, it would be the duty of the electoral boards to print his name upon the official ballot for that election.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Last Day for Filing Notices of Candidacy for August Primary.

HONORABLE HUGH B. MARSH,
Commonwealth's Attorney for Fairfax County,
Fairfax, Virginia.

My dear Mr. Marsh:

In reply to your letter of June 6, 1947, I wish to advise that I have heretofore expressed the opinion that June 6 was the last day on which notices of candidacy for legislative and local offices could be filed for the August Primary.

In your letter you also ask whether or not the Treasurer of the County is required to accept filing fees for a candidate after office hours on the last day for filing.

It is my opinion that, while the Treasurer may accept such filing fees after office hours, he is not required to do so. I think that he would be entirely within his rights in requiring parties wishing to transact business with him to do so during office hours.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Procedure for a Candidate to Withdraw Candidacy and Cause his Name to be Omitted From Ballot.

HONORABLE LEVIN NOCK DAVIS, Secretary,
State Board of Elections,
Richmond, Virginia.

My dear Mr. Davis:

This is in reply to your letter of even date requesting my opinion upon the question whether or not a person who has filed notice of his candidacy for the democratic nomination as a member of the House of Delegates or Senate of the General Assembly of Virginia, or for any county or district office, has the privilege of withdrawing his candidacy.

I have heretofore frequently ruled that any such person does have such right.
You further request my opinion upon what action such person who has decided
to withdraw his candidacy should take in order to prevent the printing of his
name upon the official ballot to be used in the primary election.

In my opinion, the proper action to be taken by such a person would be to
give written notice to the chairman of the electoral board or boards of the county
or counties, or city or cities, in which the election is to be held, stating that he
desires to withdraw his candidacy for such nomination, and that he requests the
electoral board or boards to omit his name from the official ballot to be printed
for said election. Upon receipt of such notice from such person withdrawing his
candidacy, it is my opinion that it is the duty of the electoral board to comply
with such request, and to refrain from printing the name of such person as a
candidate upon said official ballots.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Candidates: Last Day for Qualifying in Order to Have
Name Appear on Ballot.

Honorable R. A. Robertson,
Treasurer of Norfolk County,
Box 578,
Portsmouth, Virginia.

My dear Mr. Robertson:

This is in reply to your letter of February 4th in which you state:

"Will you please advise me as to the deadline date for qualifying in the
next primary election to be held on August 5th, i. e., whether one has to
qualify sixty days or ninety days before the primary."

Prior to 1945 this was controlled by §229 of Michie's Code of 1942, which
provided:

"The name of no candidate shall be printed upon any official ballot used
at any primary unless *** at least sixty days before the primary he make
and file a written declaration of candidacy, and has complied with the rules
and regulations of the proper committee of his party, ***."

Chapter 2 of the Acts of the Assembly, extra session 1945, wrought a change.
Section 3 (§220(43) 1945 Supplement to Michie's Code of 1942) of this statute
was to this effect:

"During the effective period of this act in order that ballots may be
printed in primary elections in ample time for the transmission of same to
absent members of the armed forces, and their return, all declarations of
candidacy required by section two hundred twenty-nine of the Code to be
filed by candidates in primary elections shall be filed at least ninety days
before the primary, regardless of whether the candidacy is for an office filled
by election by the voters of the State at large or of a district, county, or city."

This was an emergency act effective March 26, 1945, and by its own terms
was to expire July 1, 1948.

The 1945 statute was in turn amended by Chapter 1 of the Acts of Assembly
of 1946. Section 3, (§220(43) 1946 Supplement to Michie's Code of 1942) was
changed to read:

"During the effective period of this act, all declarations of candidacy,
required by section two hundred twenty-nine of the Code of Virginia, for an
office to be filled by election by the qualified voters of the State at large, or by a congressional district, shall be filed at least ninety days, and in all other cases at least sixty days before the primary."

The 1946 Act was an emergency measure and effective on and after January 24, 1946. There will be no state-wide or congressional district primaries in 1947. The answer to your question, therefore, is that for the August 1947 primary a prospective candidate must qualify at least sixty days before the primary. The ninety-day provision was effective only between March 1945, and January 24, 1946.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

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ELECTIONS—Candidates: Conditions Under Which Declaration of Candidacy Fee is to be Refunded.

June 24, 1947.

HONORABLE STIRLING M. HARRISON,
Acting Commonwealth's Attorney for Loudoun County,
Leesburg, Virginia.

My dear Mr. Harrison:

This is in reply to your letter of June 23, 1947, in which you state:

"During the night of June 5, 1947, Howard E. Cole, Treasurer of Loudoun County, Virginia, died. At this time Mr. Cole had filed his declaration of candidacy and paid into the county treasury as required. On June 6, 1947, the last day on which a candidate could file, three persons filed their declaration of candidacy, one of whom was a Mr. Tyler. On the following morning, June 7, Mr. Tyler withdrew his declaration and requested the return of his fee."

You ask whether or not the fees which have been deposited by Mr. Cole and Mr. Tyler as required by law may be refunded to them.

Section 24a of chapter 305 of the Acts of Assembly of 1914 as amended, found on pages 89 and 90 of the Virginia election laws, provides in part as follows:

"** In the event a prospective candidate pays the fee to a county or city treasurer and does not become a candidate, the treasurer shall pay back the fee."

In view of this provision, it is my opinion that the fees paid by Mr. Cole and Mr. Tyler should be refunded.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Electoral Board: Compensation Where Board Serves Town and County.

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

December 31, 1946.

My dear Mr. Craft:

This is in reply to your letter of December 24, which I quote in full below:

"The Secretary of the Electoral Board of Scott County, Virginia, has been paid the sum of $25.00 by the Board of Supervisors of Scott County for his services for the year 1946.

There were two special elections held in the Town of Gate City during the year 1946, and the Secretary of the Electoral Board has rendered a statement for his services to the Town of Gate City which reads as follows:

Salary Election September 17, 1946  $25.00
Salary Election November 12, 1946  $25.00
Postage 50

Total $50.50

"The Secretary of the Electoral Board has not shown on his statement the number of actual days of service he rendered in these two special elections. Evidently, he takes the position that he is entitled to the sum of $25.00 for every election.

"In view of the provisions of section 89 of the Code of Virginia and the fact that he has already received payment of the sum of $25.00 from the Board of Supervisors of Scott County for his services for the year 1946, I would like to have your opinion as to whether the Secretary of the Electoral Board is entitled to any compensation at all from the Town of Gate City, and if so, whether the Town is responsible to him for more than $25 per year."

The answer to your inquiry is to be found in section 89 of the Code. The first portion of the section provides as follows:

"Each member of the electoral board shall receive from the county, city or town, respectively, for each day of actual services the sum of six dollars, and the same mileage as is now paid to jurors; provided that no member of such board shall receive from the county, city or town, respectively, more than twenty-five dollars in any other year, exclusive of mileage, * * *

It appears from the first paragraph of your letter that the Secretary of the Electoral Board of Scott County has already received his compensation from the County to which he is entitled in 1946 under the language above quoted. Later on in this section appears the following:

"* * * and provided further that in the event one or more special elections be held in any county, city or town in any year, the members of the electoral board shall be paid additional amounts at the same per diem and mileage; * * *"

Construing the above quoted provision, I am of opinion that each member of the Electoral Board, which includes the Secretary, is entitled to be paid by the Town of Gate City six dollars for each day of actual service rendered in connection with each of the special elections which were held in Gate City in 1946.

In connection with your inquiry as to whether the Town of Gate City is obligated to pay to the Secretary of the Electoral Board compensation amounting to more than $25 per year, I will state that that part of section 89 dealing with
compensation of the Electoral Board in cases of special elections does not fix any limit to such compensation. To be specific, I am of the opinion that the Secretary of the Electoral Board is entitled to six dollars per day for each day's service rendered in the said special elections, whether or not the total compensation would amount to more or less than $25 in any one year.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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August 7, 1946.

HONORABLE Wm. HODGES BAKER, Clerk,
The Court of Hustings for the City of Portsmouth,
Portsmouth, Virginia.

My dear Mr. Baker:

This is in reply to yours of August 6, in which you request my opinion upon the following question which I quote in full from your letter:

"Some question has arisen as to whether a former member of the armed forces who is now entitled to vote in 1946 and 1947 elections without the payment of poll tax, (Chapter 79 of the Acts of the Assembly, Extra Session, 1945, approved May 19, 1945) will be required when he pays his poll tax for 1948, to also pay taxes for 1946 and 1947, in order to vote in 1948."

In order for the party to whom you refer to be entitled to vote in the 1947 elections without the payment of poll tax, he must have been discharged in 1946. Under the provisions of Article XVII of the Constitution of Virginia, which consists of the amendment adopted by the Constitutional Convention of 1945, all poll taxes for the years 1942, 1943, and 1944, assessed or assessable against any person who is, or who at any time during the existence of World War II has been a member of the armed forces of the United States in active service, are thereby canceled and annulled. In addition thereto, all poll taxes already assessed, or otherwise assessable, for every year during any part of which such person is a member of said forces in active service during said war, or any future war, and for the three years next preceding such person's discharge from said active service, provided such discharge is not dishonorable, although such person was not in such service during all of said years, are by said amendment canceled and annulled. Furthermore, members of the armed forces in active service in time of war are exempt from future assessments of poll taxes by the State for all years during a part of which they are engaged in such service after the adoption of said amendment.

It follows from the foregoing that the veteran to whom you refer will not be required to pay his poll tax for the year 1946. However, since he was discharged prior to 1947, he will have to pay the poll tax for 1947 in order to vote in 1948.

Sincerely,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Eligibility to Vote: War Veteran is Excused From Payment of Poll Tax for Year Any Part of Which he Was in Service and 1942, 1943 and 1944.

Miss Edith H. Farrar, Treasurer,
Fluvanna County,
Palmyra, Virginia.

My dear Miss Farrar:

This will acknowledge receipt of your letter of July 24, which is as follows:

"A Soldier released to reserves in 1943 and received his final discharge in 1945 would not be able to vote in the coming election with out the payment of capitation tax on or before May 2, 1945. Would he? This man was released on account of age."

By virtue of section 2 of Article 17 of the Constitution, effective May 3, 1945, all persons who at any time during World War II were a member of the armed forces in active service are relieved from the payment of a capitation tax for the years 1942, 1943, 1944. In addition to that any such person is also relieved from the payment of a capitation tax for any year any part of which such person was in said forces in active service.

Therefore, the soldier in your case is exempt from capitation taxes for the years, 1942, 1943 and 1944, but is liable for the same in 1945 since at no time during that year he was in active service as a member of the armed forces. Therefore, in order to vote in the coming primary and general election such person must have paid capitation tax for 1945 not later than May 4, 1946.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Eligibility to Vote: When Poll Tax Must be Paid by Person Just Becoming of Age.

Honorable E. S. Ashby,
City Treasurer,
Harrisonburg, Virginia.

My dear Mr. Ashby:

I am in receipt of your letter of November 1, with reference to capitation taxes to be paid by persons becoming of age in order to enable them to register and vote.

It is my opinion that a person becoming of age in 1945 and after January 1, if he registers in 1945, may do so without paying any capitation tax, and he may thereafter vote in the November, 1946, election without paying any capitation tax because no capitation taxes are assessed or assessable against him for any of the three years next preceding the year in which he offers to vote.

However, if a person becomes of age in 1945 and after January 1, but delays registering until 1946, in order to be eligible to register in 1946 he must first pay his 1946 capitation tax, since section 20 of the Constitution dealing with registration provides that, if a person becomes of age at such a time that no capitation tax shall have been assessable against him for the year preceding the year in which he offers to register, such person must pay the first year's capitation tax assessable against him. The first year's capitation tax assessable against a person becoming of age in 1945 is the 1946 tax; therefore, in order to be
eligible to register in 1946, the 1946 tax must first be paid. This rather unusual result is brought about by a person becoming of age in 1945 waiting until 1946 to register.

Unquestionably a person becoming of age during 1946 may register and vote in 1946 without the payment of any capitation tax.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Citizen Entitled to Register Even Though Ineligible to Vote in that Year.

August 30, 1946.

MR. W. L. SHUMATE, Registrar,
Room 17, City Hall,
Newport News, Virginia.

My dear Mr. Shumate:

This will acknowledge receipt of your letter of August 27, in which you state that a person possessing the necessary residential requirements has applied to you for registration as a voter and that he has never registered nor paid any previous poll taxes. This person is aware that he cannot qualify to vote this year, but wants to register at this time in order to be eligible to vote next year, and you are in doubt as to whether or not you should register him at this time.

This matter is governed by section 20 of the Virginia Constitution, which provides:

"Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

"First. That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register, "**"."

Registration, of course, does not automatically confer upon him eligibility to vote. This person will not be eligible to vote until 1947, and then upon proof to judges of election that poll taxes for 1944, 1945 and 1946 were paid six months prior to the general election. You are required to register this man at any time the registration books are open if he is otherwise qualified and has paid capitation taxes for the years 1943, 1944 and 1945.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote: Primary Election; Person Just Becoming of Age Must be Registered Before Books Close.

July 17, 1946.

MISS HAZELTINE M. SETTLE,
Central Registrar,
Roanoke, Virginia.

My dear Miss Settle:

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

"The question has come up as to whether or not a person who becomes
twenty one years of age after July 6, 1946, (the last day to register for voting in the August 6, Primary) should be allowed to register and vote even though the books are closed.”

As a general proposition all persons are eligible to vote in a primary election who will be eligible to vote in the general election for which the primary election is held. In other words, all persons who will be eligible to vote in the general election on November 5, 1946, are eligible to vote in the primary election on August 6, even though they may not have become twenty one years of age until after August 6 and on or before November 5 (section 228 of the Code).

However, registration is a prerequisite to vote at any time and, of course, such registration must have been had when the registration books were open. A person becoming twenty one on or before November 5 could have registered on or before July 6 and can register after August 7 and on or before October 5, but the failure to register on or before July 6 disqualifies him to vote in the August 6 primary.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Days for Registration; 1946 Amendment.

July 24, 1946.

HONORABLE MARTIN M. FOLKS, Clerk,
Highland County,
Monterey, Virginia.

My dear Mr. Folks:

This will acknowledge receipt of your letter of July 23, in which you make reference to section 98 of the Code as to registration of voters and ask my opinion on the same.

Inasmuch as this section was materially amended and reenacted by Chapter 89 of the Acts of the General Assembly of 1946 (effective June 19, 1946). I will not attempt to answer your question but will quote the relevant portion of the new statute:

“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 every general election to be held therein, at his office or voting place, 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 in said registrar's jurisdictional area, who shall apply to be registered and shall on said day complete the registration of voters for the succeeding primary or general election. He shall give notice of the time and place at which he will sit for said purpose 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 a newspaper of general circulation therein. The registrar shall, at any time previous to the regular days of registration, register any voter entitled to vote at the next succeeding election who may apply to him to be registered; and he shall receive as compensation ten cents for each name so registered on days other than the regular days of registration, the same to be paid out of the county or city treasury; provided that in counties having a population less than thirty thousand the registrar shall receive a fee of twenty-five cents for each name registered on days other than the regular days of registration, the same to be paid out of the county treasury; and provided, further, that, if the registrar be compensated by a salary by or pursuant to a statute dispensing with the payment of any fees to him, he shall not be paid any
fee. It shall be the duty of the registrar within five days after each sitting to have posted at three or more public places in his jurisdiction written or printed lists of the names of all persons so admitted to registration, and at the same time to also certify to the clerk of the circuit court of the county, or the corporation court of the city a true copy of such list, and to have a list posted on the day of the election at each place of voting in his jurisdiction, showing the names of such registrants residing in that precinct."

By the provisions of this all the registrars in the State sit on two days, those days this year being Saturday, July 6 and Saturday, October 5. In addition to the two days above mentioned, registrars in cities and towns also sit thirty days before primary and/or general elections for municipal officers.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: August 5 Primary; Last Day for Registration Falling on Sunday Makes Saturday July 5 Last Day.

June 6, 1947.

HONORABLE LEVIN NOCK DAVIS, Secretary,
State Board of Elections,
Room 3, State Capitol Building,
Richmond 12, Virginia.

My dear Mr. Davis:

This is in reply to your letter of June 5, 1947, in which you request my opinion as to the last day registrars shall sit to register the names of qualified voters prior to the August Democratic Primary Elections to be held on August 5, 1947.

Section 98 of the Code of Virginia provides in part as follows:

"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 every general election to be held therein, at his office or voting place, 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 in said registrar's jurisdictional area, who shall apply to be registered and shall on said day complete the registration of voters for the succeeding primary or general election. * * *"

I have previously ruled that, since the day thirty days before the August Primary falls on Sunday, the last day for registration before the August Primary is Saturday, July 5.

In your letter you refer to correspondence from Hazeltine M. Settle, Central Registrar of the City of Roanoke, in which she states that a number of business places in her city are planning to close for the 4th and 5th of July and that there is a possibility that the city offices will also be closed for that long week-end. She asks whether it will be legal for the registrar's office to close on the 5th of July.

It is my opinion that the action of localities would not alter the provisions of the State statute governing the time for the registration of voters and that it would not be legal for the registrar's office to close on the 5th of July.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Registration: Books to Remain Closed Thirty Days Preceding Regular Primary Elections.

Mr. Henry H. Elswick, Registrar,
Richlands Precinct, Tazewell County,
Richlands, Virginia.

My dear Mr. Elswick:

Replying to your letter of June 29, I will advise that at the last General Assembly section 98 of the Code, dealing with registration, was amended so as to provide that registration books shall be closed thirty days before primary elections as well as before general elections.

Pursuant to this amended statute, I have expressed the opinion that registration books should be closed on July 6 of this year, and remain closed up to and including the day of the August primary. Immediately after the primary the books may be opened again for registering voters, and remain open until thirty days before the November election.

Very sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Registration: Books Not to Close Prior to Local Option Election, Same Being a Special Election.

Honorable W. Earle Crank,
Commonwealth's Attorney,
Louisa, Virginia.

My dear Mr. Crank:

This will acknowledge receipt of your letter of July 30, in which you state that Judge Miller has ordered an Alcoholic Beverage Control local option election to be held in Louisa County on October 1, 1946. You wish to know whether or not the registration books must be closed thirty days before this election.

Section 98 of the Code, as amended and reenacted by chapter 89, Acts of 1946, provides:

"Each registrar * * * shall annually, thirty days before the day fixed by law for every regular primary election and every general election to be held * * * proceed to register * * * ."

"After the completion of the registration on the day fixed therefor as herein provided, no additional persons shall be registered until after the day on which the succeeding primary or general election is held."

This provision is applicable only to regular primary and general elections. I am of the opinion that Alcoholic Beverage Control local option elections are special elections and therefore the registration books are not closed on that account.

Very sincerely yours,

Abram P. Staples,
Attorney General.
ELECTIONS—Registration: Books to Remain Closed Thirty Days Preceding Regular Election, But Not Preceding Special Election.

October 8, 1946.

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

My dear Mr. Funk:

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

"As Commonwealth Attorney of Smyth County, I have been requested to get a ruling from you as to when the registration books are to be closed prior to a special election involving the wet and dry issue. Some contend that they should be closed on October 5 for an election to be held on November 5 and others contend that they should remain open until the day prior to the election."

Section 98 of the Code as amended by Chapter 89 of the Acts of 1946 provides that each registrar in the counties, cities and towns of the State shall, 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 within his election district who have not previously registered, and shall on that day complete the registration of voters for the succeeding general election. The section further provides that after the completion of the registration on the day fixed therefor no additional persons shall be registered until after the day on which the succeeding primary or general election is held. It is my opinion, therefore, that when the registration books are closed on October 5 preceding the coming general election to be held in November no other new registrations may be received up to and including the day of such general election.

You are doubtless familiar with the provision in section 4675(30) of the Code (Michie, 1942) that elections held under that section "shall not be held on any day that any other election is held in the said county, city or town."

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Books to Remain Closed Thirty Days Preceding Regular Election, But Not Preceding Special Election.

October 10, 1946.

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

My dear Mr. Whitehead:

I have your letter of October 5, which I quote in full as follows:

"There will be a referendum held in the county on November 12, 1946, and the general election will be held on November 5, 1946.

"Several of the registrars would like to know whether or not a voter who desires to register after October 5 and before October 12 would have the right to do so in order to vote on November 12."

Section 98 of the Code provides that thirty days before any regular primary or general election each registrar shall proceed to register all qualified voters
within his jurisdiction and complete the registration on that day. The section contains this provision:

"After the completion of the registration on the day fixed therefor as herein provided, no additional persons shall be registered until after the day on which the succeeding primary or general election is held."

I have heretofore expressed the opinion that the language quoted prohibits the registration of persons during the prohibited time, even though the purpose of registration might be to qualify a person for a special election. However, since the special election you refer to will not be held until November 12, in my opinion persons desiring to register for said special election may register on and after November 6 and up to and including the day of the special election, November 12. Section 98 does not require the registration books to be closed before special elections, the provision being applicable only to regular elections and regular primaries.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Eligibility to Vote: Last Day for Registration if Poll Taxes Have Been Paid in Time.

December 23, 1946.

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

My dear Mr. Green:

I am in receipt of your letter of December 20, from which I quote as follows:

"Please give me your decision on the following question:

"Can a person having lived in Virginia the required length of time, and having paid his or her capitation taxes assessed or assessable against him, or her, on or before December 10, 1946, be allowed to vote in the Special Election to be held in the year 1947?"

"There are many new voters in Arlington County who have the impression that if they are not allowed to register under Section 93 in the year 1946, in order to participate in a Special Election in 1947, they would not be allowed to vote in said Special Election if held in 1947. For example, Mr. 'A' moved into Arlington County after January 1, 1943. He has paid 1944, 1945 and 1946 capitation taxes prior to December 5, 1946, but has been denied the right to register until after January 1, 1947. Question: Can Mr. 'A' register after January 1, 1947, and vote in the Special Election to be held before the second Tuesday in June of said year?"

Section 83 of the Code, dealing with qualifications of voters at special elections, provides in part as follows:

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

Construing the quoted language in the light of the illustration given by you,
REPORT OF THE ATTORNEY GENERAL

I am of opinion that a person who has paid his 1944, 1945 and 1946 capitation taxes six months prior to the second Tuesday in June of 1947 may register on and after January 1, 1947, and be eligible to vote in a special election to be held before the second Tuesday in June of 1947.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Books Remain Open for Transfers Even Though Closed for Original Registration; War Veteran May Vote Even Though Not Registered Due to Books Being Closed, But Not a Person Just Becoming of Age; What Names the Registration List to Contain.

July 16, 1946.

HONORABLE E. T. WHITE,
Clerk of Norfolk County,
Portsmouth, Virginia.

My dear Mr. White:

I am in receipt of your letter of July 13, in which you ask a number of questions relating to the election laws which I shall endeavor to answer in the order in which they appear in your letter.

"1. It appears to be generally conceded that, under the new law, the registration books close, so far as the registration of new voters are concerned, thirty days prior to August 6, 1946. Nothing is said specifically in this new law about transfers. In your opinion, are the registration books now closed for transfers as well as for registration of voters?"

It is my view that Section 98 of the Code, as amended at the last session of the legislature, deals primarily with original registrations and is not intended to amend or repeal any provision of Section 100 of the Code relating to transfers of registered voters who change their residences. It is my opinion, therefore, that transfers may still be made in accordance with Section 100.

"2. A member of the armed forces who was discharged after July 6th, 1946 (the date the registration books closed) and had not previously registered. What must he do to vote in the coming primary?"

The above question is answered by Section 4 of Chapter 79 of the Acts of the Special Session of 1945. This section provides, in effect, that where a member of the armed services is discharged at a time when the registration books are closed for the election at which he desires to vote he may be allowed to vote at such election even though not registered. Of course, the facts in each particular case of this character will have to be passed on by the judges of election.

"3. A young man who will be twenty-one years old in September of this year, who failed to register before the registration books closed, is it possible for him to vote in the primary August 6th, 1946?"

I know of no statutory provision which will allow the young man you describe to now register so as to vote in the August primary. Under the law he should have registered before the books were closed.

"4. There appears to be some confusion among registrars as to what the list required to be posted and furnished the Clerk should contain. Should the list contain all the registrations and transfers made since the preceding election or simply the list of those who registered on the day of the last sitting?"
In connection with the above question Section 98 of the Code provides as follows:

"*** It shall be the duty of the registrar within five days after each sitting to have posted at three or more public places in his jurisdiction written or printed lists of the names of all persons so admitted to registration, and at the same time to also certify to the clerk of the circuit court of the county, or the corporation court of the city a true copy of such list, and to have a list posted on the day of the election at each place of voting in his jurisdiction, showing the names of such registrants residing in that precinct."

This provision is substantially the same as it has been in the past, but I must confess that its language is not as clear as it might be. However, when the intent of the provision is considered, I am inclined to be of opinion that the better practice would be to include on the list the names of all registrants and transfers which have occurred since the last time such a list was made.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Registration: Residence Qualification is One of Fact.

Miss BERTHA N. MCWHIRT,
Registrar Court House Precinct,
Spotsylvania, Virginia.

My dear Miss McWhirt:

I have your letter of June 19, requesting my opinion upon the authority of you, as registrar, to register a person who is not a resident of such precinct.

In my opinion, you do not have any authority to register such a person, but the question of whether the applicant is a resident of your precinct is sometimes very difficult to determine. If such person ever established a residence in your precinct, this residence would continue unless and until he not only changed his place of abode to some other precinct, but did so with the intention of permanently abandoning his residence in your precinct and establishing one in the precinct to which he had removed. Thus, under these circumstances, the answer to the question of residence is almost entirely controlled by the intention of the applicant.

Your next question is whether or not you may register persons who have not resided in your precinct for thirty days preceding the next election.

If by the word "election" you refer to a general election as distinguished from the primary, such persons are not entitled to register. However, if they will have been a resident of your precinct thirty days before the next succeeding general election, and are otherwise qualified, they will be entitled to vote in the primary to nominate candidates for that election, and, therefore, are entitled to register so as to be permitted to vote in the primary.

The answer to your third question depends upon the facts of residency as above set forth. Generally speaking, I think a registrar should be very reluctant to undertake to pass upon the residence of a person applying for a transfer. Usually the right of such a person to vote is passed upon by the judges of election. However, the right of a person to register is dependent upon the facts in any particular case.

Sincerely yours,

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

ELECTIONS—Eligibility to Vote: Who is Qualified to Vote in Special Elections.

Mr. C. G. Nofsinger, Secretary,
Electoral Board Botetourt County,
Fincastle, Virginia.

My dear Mr. Nofsinger:

This is in reply to your letter of November 7, in which you request my opinion upon the question as to the last day upon which a prospective voter must have paid his poll tax or poll taxes so as to render him eligible to vote in the special ABC election to be held on November 19, 1946.

Under the provisions of sections 82 and 83 of the Code, any person properly registered and otherwise qualified, who has paid his poll taxes on or before May 19, 1946, is eligible to vote in said special election. All persons who were qualified to vote in the election held November 5 of this year are qualified to vote in special elections. Of course, under the recent State constitutional amendment, members of the armed forces who were discharged during the calendar years 1945 and 1946, and who are duly registered, may vote without the payment of any poll tax.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Judges of Election: No Requirement as to Precinct, Ward or Election District Respecting Eligibility. Eligibility to Vote: Qualification as to Residence is a Question of Fact.

Mr. J. N. Colasanto, Secretary,
City Electoral Board,
Alexandria, Virginia.

My dear Mr. Colasanto:

This will acknowledge receipt of your letter of July 31, in which you ask my opinion as to whether or not judges of election must reside in the respective wards in which they serve.

Section 148 of the Code, providing for the appointment of judges of election, stipulates that they be competent citizens and qualified voters, but the statute contains no requirement as to residence in their precinct, ward or election district. I am, therefore, of opinion that the electoral board could appoint any qualified voter in the City of Alexandria as a judge of election and that such person could serve in any ward in the city.

You further ask:

"I would also like to know whether or not a person who does not reside in the City of Alexandria, but who votes in the City of Alexandria by reason of the fact that he was a former resident of the City and maintains a business in Alexandria, is still eligible to vote here."

This is a question of fact and cannot be determined categorically. If such person left the City of Alexandria, but did not abandon his domicile there, he still would be eligible to vote in the City. The question of domicile involves a number of factual elements which are not mentioned in your letter and in the absence of which I cannot give a positive answer to your inquiry. This would be a matter for the judges of election to decide.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
ELECTIONS—Judges and Clerks; No Provision for Two Sets of Officials at Given Precinct to Accommodate Voters; Remedy is to Create New Election District.

May 28, 1947.

HONORABLE HUGH B. MARSH,
Commonwealth's Attorney for Fairfax County,
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your request for my opinion upon the following question set forth in your letter of May 27, 1947:

"The Town of Falls Church is in Fairfax County, and the precinct of Falls Church is composed of people residing on the outskirts of the Town and those who live within the confines of the corporate limits. It is anticipated that there will be a considerable vote cast at this precinct, both in the Primary and General Elections for the year 1947. In the past it has been rather difficult for one set of judges and clerks of election to accommodate expeditiously the voters who come and offer to vote, and in some instances it has been impossible to accommodate the voters, some of whom have failed to vote because of the fact that they were unable to wait until they could be accommodated. The question that is propounded to me is whether or not the Electoral Board of this County has the authority to designate two sets of judges and clerks of election at Falls Church Precinct to serve in the Democratic Primary and the General Election for 1947, and who will serve in the same building. The reason for the two sets of judges and clerks is to accommodate promptly the voters who offer to vote."

Section 224 of the Code provides that Primary Elections shall be held by three judges, one of whom shall act as clerk, at each of the several precincts provided by law. It also provides that said Primaries shall be held by three judges and two clerks if in the judgment of the Electoral Board the two clerks are necessary in order to have the vote cast at any voting place. With respect to General Elections, section 148 provides that it shall be the duty of the Electoral Board to appoint three persons to act as judges and two clerks to hold the elections in the respective election districts.

I know of no statute providing for the appointment of two sets of judges and clerks for even the appointment of a larger number of judges and clerks than that specified by the above sections to hold an election in any particular precinct.

It would seem that the only solution to the difficulty presented by the situation at Falls Church is to have that election district divided in the manner provided by law.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Polls: Hours of Opening and Closing.

July 30, 1946.

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

My dear Mr. Burks:

In reply to your letter of July 26, this is to advise you that by virtue of Chapter 192 of the Acts of 1946 (effective June 19, 1946) section 152 of the Code has been amended to provide that the polls shall be open at each voting place from 6:00 o'clock, a.m. Eastern Standard Time of the day of the election until
REPORT OF THE ATTORNEY GENERAL

6:00 o'clock, p.m. Eastern Standard Time of the same day except that elections held between May 31 and October 1 the polls shall be open at 6:30 o'clock, a.m. Eastern Standard Time and shall be closed at 7:30 o'clock, p.m. Eastern Standard Time of the same day.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Poll Tax Lists: Public Records and Therefore Open to Inspection by Persons Having Legitimate Interest.

April 11, 1947.

HONORABLE CHARLES C. LOUDERBACK,
Member House of Delegates,
Stanley, Virginia.

My dear Mr. Louderback:

This is in reply to your letter of April 8, in which you request my opinion upon the question whether or not a representative of either the Democratic or Republican Party has the right to inspect a book or other list in the treasurer's office containing the names of persons who have paid their 1946 capitation taxes, as the same may be compiled from time to time prior to the completion of the regular treasurer's poll tax list which is required to be delivered to the clerk five months before the November election.

A list of this kind is required to be published when completed, and, in my opinion, the same is a public record, open to inspection by any person or persons having a legitimate interest therein at any time while the poll taxes are in course of being paid. Any accredited party authority of any party, such as the chairman, secretary, or other officer, of the party would certainly have a sufficiently legitimate interest to entitle him to the information which would be disclosed by such poll tax book or list, and it is my opinion that it is the duty of the treasurer to permit such a person to have access to same.

You further inquire whether, in my opinion, a list containing the information above indicated, prepared in such manner as is not required by any law and the preparation of which is not a legal duty of the treasurer, is to be deemed a public record when same has been prepared and compiled by the treasurer, and his deputies, assistants, and clerks.

As above indicated, the information contained on this list is a legitimate subject of inquiry by the persons above indicated as it is useful in providing them with information which they are entitled to obtain from the office. Having been compiled by public officers and employees who are compensated by both the State and the county or city in which the office is located, it should, in my opinion, unquestionably be considered a public record, and the information thereon should be supplied any person who has a legitimate interest therein.

You further request my opinion upon the question whether or not any taxpayer has the right to inspect the various tax tickets, and other papers and records, in order to ascertain the information above referred to as to the payment of the poll tax. Section 354 of the Tax Code contains this provision:

"The treasurer shall keep a correct account of all moneys received and disbursed by him for the county. The treasurer shall keep the books, papers and moneys pertaining to his office, at all times ready for inspection of the Commonwealth's attorney or board of supervisors, or any taxpayer of the county, * * * ."

While I do not think that this provision should be construed so as to permit an indiscriminate examination of the records of the treasurer's office by numerous persons to the extent that same would substantially interfere with the discharge
of the officer's duties, in my opinion, any person having a legitimate interest in ascertaining this information, such as the party officers above referred to or persons who have publicly announced their intention to become candidates for any office at the next following election, have the right to make such examination of said papers and records as is necessary to ascertain the names of all persons who have been assessed with poll taxes for the year 1946, and all persons who have paid their capitation taxes for said year and the two preceding years.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

ELECTIONS—Primary Election; Who is Authorized to Call the Same.

April 2, 1947.

HONORABLE M. W. ARMISTEAD, III
Secretary of the Commonwealth,
Richmond 12, Virginia.

My dear Mr. Armistead:

This is in reply to your letter of March 26, seeking my opinion as to the official or officials upon whom the duty is placed to call primary elections in localities where the direct primary method has been decided upon by the appropriate party officials.

§248 provides that:

"In case the discretion of nominating local candidates be vested in the local committees, then it shall be the duty of the chairman and secretary of such local committee to notify the Secretary of the Commonwealth of the action taken by them in such regard; and the Secretary of the Commonwealth shall thereupon order the holding of a primary election in any county, city, or other district of the state in which he is so notified that a primary is intended to be held."

This section therefore places this duty upon the Secretary of the Commonwealth. However, as your letter further indicates §248 has been partially superseded by chapter 285 of the Acts of Assembly of 1946, amending the Code of Virginia and adding to it, among others, §83a. This section as amended transfers all election law duties and powers of the Secretary of the Commonwealth to the newly created State Board of Elections. I am, therefore, of the opinion that it is the duty of the State Board of Elections to call primary elections in localities where the direct primary method has been decided upon by the appropriate local party officials, in cases where the said party officials have notified the Board that a primary is to be held.

The foregoing, however, is only one method provided for calling primary elections. §224 of the Code contains this provision:

"The primaries provided for in this chapter shall be held by three judges appointed for each party participating from members of that party, by the electoral boards of the respective cities and counties in the State, upon application made by the duly constituted authorities of the party or parties desiring to hold a primary under this law, ***."

In my opinion this provides an optional method for calling primaries in localities desiring same. The local party authorities may notify the appropriate local electoral boards or they may notify the Secretary of the Commonwealth. It seems to have been a fairly prevalent custom to use the method of giving direct notice to the electoral board.

Very truly yours,

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

ELECTIONS—Registrars: County Registrar May be Appointed Registrar of Town Precinct Located Within Said County Precinct.

June 20, 1947.

Mr. V. R. Shackelford, Jr., Secretary,
Orange County Electoral Board,
Orange, Virginia.

My dear Mr. Shackelford:

I have before me your letter of June 16, in which you request my opinion upon the question of the authority of your electoral board to appoint a person who is the registrar for the Orange Precinct in the County of Orange as registrar for the Town Precinct which is also located within the said County Precinct. Of course, in order to justify such an appointment, the registrar would have to be a resident of the Town of Orange.

Section 2995 of the Code contemplates that there shall be a separate registrar for each precinct in a town, but I can find no provision which would render the registrar of the county precinct ineligible to act as registrar of the town precinct under the circumstances described by you. If, however, there is more than one town precinct, I do not believe the registrar of the county precinct could act in more than one of the town precincts.

Inasmuch as the persons entitled to register on the books of the registrar of the town precinct must first have registered also on the books of the registrar of the county precinct, it seems to me very appropriate that the county registrar should likewise act as registrar in the town.

Sincerely yours,

Abram P. Staples,
Attorney General.

ELECTIONS—Purge of Registration Books: Fixing of Compensation of Registrar.

Honorabe A. Moore Butler,
Attorney for the Commonwealth,
Covington, Virginia.

My dear Mr. Butler:

This is in reply to your letter of September 5, in which you state that the Electoral Board of Alleghany County, acting in pursuance to section 107 of the Code, has directed that certain registration books in the county be purged. The Electoral Board reached an agreement with the registrar involved as to his compensation and has now presented the bill to the Board of Supervisors, and you ask my opinion as to whether or not it is mandatory on the Board of Supervisors Board.

I do not believe it is mandatory on the Board of Supervisors to pay the compensation agreed upon by the registrar and the Electoral Board in all cases. Of course, as a practical matter, it is always best to have the money appropriated by the Board of Supervisors for this purpose before the task is undertaken. The registrar in purging the books is performing a duty required of him by law and, in the absence of any compensation set by statute, he is entitled to make an agreement for pay for his services. However, the Board of Supervisors has a final word on the collection and disbursement of county funds. In this case they could be compelled to pay the registrar for his services on a quantum meruit basis, but I do not believe they are absolutely bound to pay such figure as the registrar and the Electoral Board may have agreed upon. In other words, it is incumbent upon the Board of Supervisors to pay him a reasonable amount, but, if they think the
agreed compensation is excessive, they may refuse to pay that part which they consider in excess of a reasonable figure.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

ESCHEATS—Inmate of Public Institution Dying Intestate Without Heirs; Disposition of Personal Effects.

May 13, 1947.

DR. GRANVILLE L. JONES, Superintendent,
Eastern State Hospital,
Williamsburg, Virginia.

My dear Doctor Jones:

I have your letter of May 10, in which you state that Mrs. Maude Webster, a patient, recently died intestate, apparently leaving no surviving relatives or heirs. You state that you have on hand some personal property which has been appraised at $183.50, and that Mrs. Paul A. Hobday, who was a close friend of the deceased, desires that the property should be turned over to her, and that she is willing to execute an indemnifying bond in the sum of $367 to protect any claim which may hereafter be asserted by any unknown relative who might later appear. You request my advice as to your authority to turn this property over to Mrs. Hobday upon these conditions.

It is my opinion that you do not have any authority to so dispose of this property. The general law is that, when a person dies leaving property, a personal representative should be appointed, or else the estate should be committed to the sheriff as ex officio personal representative unless some other person desires to qualify. I think the estate should be committed to the sheriff and he will have to determined what disposition should be made of the property. I do not think you have any authority at all as to its disposition.

I also call your attention to section 5275 of the Code of Virginia, which provides that if a person dies intestate without any next of kin who would be legal distributees the property shall accrue to the State.

If, therefore, Mrs. Webster has no kin persons living, it would be the duty of the personal representative to sell this property and turn the proceeds into the State Treasury.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ESCHEATS—Procedure for Recovery of Escheated Money.

September 23, 1946.

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

My dear Mr. Gilmer:

I am just in receipt of your file in reference to a claim presented by J. Royall Tippett, Jr., attorney of Baltimore, Maryland, in connection with a fund of $1204.44, which was paid on October 27, 1945, into the Treasury of the State by reason of the fact that there were no claimants to said fund. Mr. Tippett asks that you advise him whether or not, if a personal representative for Addie Rowzee should be appointed, the Comptroller would pay the fund to such personal representative.

It is my opinion that, under the provisions of section 6314 of the Code, the
Comptroller is not authorized to make any payment in excess of $200 in connection with funds of this nature, except pursuant to an order of the Circuit Court of the City of Richmond. I suggest, therefore, that you advise Mr. Tippett that you have no authority to make the payment except pursuant to such court order.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

ESCHEATS—Unclaimed Funds in Custody of Court Over Five Years.

HONORABLE CHARLES E. REAMS, JR.
General Receiver,
Culpeper, Virginia.

My dear Mr. Reams:

This is in reply to your letter of January 9th containing several inquiries with reference to §6311 of the Code as amended and re-enacted by chapter 223 of the Acts of Assembly of 1946. Your first question is:

"1. Where proceedings have been against non-resident defendants by order of publication, these non-residents having never answered or in any way appeared before the court, their present whereabouts being unknown. Are they to be considered as falling without the class? (Without known owner or claimant)."

It is my opinion that such persons are within the statute, and money so held is subject to its terms. The language of the statute is:

"Whenever any money has remained for five years in the custody or under the control of any court of this State without anyone known to the court claiming same the court shall, when the amount is one hundred dollars or more, cause a publication to be made once a week for four successive weeks in some newspaper published in the city or county in which the court is located or if there be none then in a newspaper having general circulation therein, setting forth the amount of the money, the source from which it was derived, in what court and in what suit or proceeding it is held, and in whose hands it is, and requiring all persons having any claim to it to appear before the court within such time after the completion of the publication as the court prescribes and establish their claim. If the sum be less than one hundred ($100.00) Dollars, the court shall direct same to be paid into the treasury of the State, and a proper voucher for the payment taken and filed among the records of the court."

And I believe this is meant to cover non-resident defendants proceeded against by order of publication whose whereabouts are unknown, and who have in no way appeared in the suit.

"2 In connection with sums less than $100.00, is it necessary to have publication required in this section before the court shall order the amount to be paid into the Treasury of the State?"

As I read the statute, publication is unnecessary where the amount of money is less than one hundred ($100.00) Dollars.

"3. Where the amount involved is $100.00 or more, time element and claimants provision being satisfied and publication having been made as required and no one appearing or making claim on the funds involved, is it then within the province of the court to order amounts in excess of $100.00 paid over to the Treasury of Virginia?"
I believe this question is answered by the succeeding section of the Code, §6312, which is as follows:

- "If no person appear and show title in himself the court shall order the money, after deducting therefrom the costs of such publication if such publication is made, and any other proper charges, to be paid into the treasury of the State and a proper voucher for the payments to be taken and filed among the records of the court."

Very truly yours,

ABRAM P. STAPLES,
Attorney general.

FOREST FIRES—Criminal Liability for Building or Leaving Unattended a Fire Under Certain Conditions.

February 28, 1947.

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

My dear Mr. Dean:

This letter will acknowledge receipt of your letter of February 25 making reference to a possible conflict between §545a and subsection (b) of §545 of the Code of Virginia as amended.

The hypothetical case posed by your letter is as to the right of a person to legally build a fire at one o'clock post meridian on March 5 within certain prohibited distances of a woodland or forest lands.

§545a which was added to the Code of Virginia by chapter 314 of the Acts of Assembly of 1930, p. 742 provides:

"Whoever shall build a fire in the open air, or use a fire built by another in the open air within one hundred and fifty feet of any woodland, brushland or field containing dry grass or other inflammable material, shall, before leaving such fire untended, totally extinguish it.

"Any person failing to do so shall be guilty of a misdemeanor and shall, upon conviction, be fined not more than one hundred dollars. Whenever it shall, be established that a forest fire originated from such fire, the person building or using such fire shall, in addition to the above penalty, be liable for the full amount of all costs incurred in suppressing the fire."

For our purposes the sole criminal sanction is here directed against leaving an untended fire without totally extinguishing it.

§545 in its present form was added to the Code by chapter 189 of the Acts of Assembly of 1940. Subsection (b) is as follows:

"During the period beginning March first and ending May fifteenth of each year, even though the precautions required by the foregoing paragraph shall have been taken, it shall be unlawful, in any county or portion thereof organized for forest fire control under the direction of the State Forester, for any person to set fire to, or to procure another to set fire to, any brush leaves, grass, debris or field containing dry grass or other inflammable material capable of spreading fire, located in or within three hundred feet of any woodland or brushland, except between the hours of four o'clock post meridian and twelve o'clock midnight."

The concluding paragraph of subsection (d) says:

"Subsection (b) of this section shall not become effective in any county of the Commonwealth unless and until the same shall have been approved by a majority vote of the Board of Supervisors or other governing body of said county."
This statute seems to be in the nature of a regulatory measure with added criminal penalties when necessary. The prohibition of subsection (b) is not operative until the Act has been approved by the local governing body, and the county or the relevant portion thereof has been organized for forest fire control under the direction of the State Forester. When these conditions have been met, it is then unlawful for any person to build the type of fire therein proscribed between March first and May fifteenth, except between the hours of 4:00 p.m., and midnight. §545a does not conflict with this.

It would, therefore, be unlawful to build the type of fire therein described in the counties which have met these conditions at 1:00 p.m., on March fifth.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

FOREST FIRES—Liability for Fire Fighting Costs Depends Upon Negligence of Person Causing Fire.

May 29, 1947.

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

My dear Mr. Dean:

This is in reply to your letter of May 26, 1947, in which you state:

"On March 19, 1947, a forest fire originated in the Jonesville Magisterial District of Lee County by reason of a tree falling across the REA power lines, breaking the wire which caused them to fall to the ground and through the ensuing short circuit a fire was set out.

"The REA power line company cannot, of course, be charged with criminal negligence. The question now arises as to whether the State Forester, in the name of the Commonwealth and of Lee County, can recover the fire suppression cost in the amount of $9.60 under the provisions of section 542-A, chapter 28, Code of 1936 (as amended in chapter 204, Acts of 1942), or some other section of the Code."

Section 542a of the Code provides in part as follows:

"Any person who negligently, carelessly, or intentionally without using reasonable care and precautions to prevent its escape, starts a fire which burns on forest-land, brush-land or waste-land, shall be liable for the full amount of all expenses incurred, both by the county and by the Commonwealth, for fighting or extinguishing such fire, all of which shall be recoverable by action brought by the State Forester in the name of the Commonwealth. ** ** *"

It is my opinion that before anyone can be held liable under this section for the cost of fighting fires the fires must have been due to such person's negligent or intentional actions. Since in your letter you indicate that the REA Power Line Company was not guilty of any negligence, it is my opinion that it cannot be held responsible in the case you mention. I know of no other statutory provision which would impose any liability upon it.

Very sincerely yours,

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

FORFEITURES—Gun Used in Disorderly Conduct is Not Subject to Confiscation. June 26, 1947.

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

My dear Mr. Hope:

This is in reply to your letter of June 24, 1947, from which I quote as follows:

“There has been produced in evidence before the Trial Justice Court of this County a pistol which has been involved and used in disorderly conduct on two separate and distinct occasions and the persons were fined and found guilty of such conduct, and on the last occasion I had requested the Trial Justice on behalf of the Commonwealth that this weapon be held. Neither the two persons who were involved in disorderly conduct were owners of the weapon, but it belonged to a third party. I instructed the Sheriff of this County, who is holding this weapon at this time, not to turn it over to the lawful owner at this time, and through her attorney, proceedings are being instituted against the Sheriff, demanding return of the pistol.”

You ask my opinion in the above matter with particular respect to the following sentence found in an earlier opinion of this office, to-wit: “I quite agree with you also that there is no authority for turning the weapon over to an individual.” 1940-41 Op. A. G. 52-53. That statement was made in answer to the following statement by Judge Meeks, to-wit: “Frankly, I do not know of any law that gives the Court the right to order a pistol, for example, found upon a man and with which he has committed murder, to take that gun or pistol and give it to any particular person.” Judge Meeks was of opinion that the weapon should be returned to the true owner, or the estate of the accused if he be punished capitally, and not to any other person, such as a police officer, and the above quoted sentence from my opinion was intended as a concurrence in his view of the matter.

I also refer you to a later opinion on the same subject found in 1934-44 Op. A. G. 40.

In answer to your specific inquiry, therefore, I am of the opinion that the pistol should be returned to its true owner, unless, of course, the prosecution is under Section 4534 of the Code for carrying concealed weapons, in which latter case the statute makes express provision for forfeiture. See 1944-45 Op. A. G. 75-76.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

FORFEITURES—Gun Used in Unlawful Hunting is Not Subject to Confiscation. September 6, 1946.

MR. HENRY RATLIFF,
Game Warden,
Grundy, Virginia.

My dear Mr. Ratliff:

This is in reply to your letter of September 4, asking for my opinion on section 51 of the Game, Inland Fish and Dog Code of Virginia (Chapter 247 of the Acts of the General Assembly of 1930, page 635). Specifically you wish to know, if you arrest a man hunting with a gun out of season or on Sunday, is the gun
under such circumstances an unlawful device within the purview of section 51, supra.

I am of the opinion that a gun under such circumstances, provided it could otherwise be legally used in season or not on Sunday, is not such an unlawful device. It has been my previous opinion in construing this section on a former occasion that it literally and expressly provides for the confiscation of only the inherently improper device and that, since the statute is one for the confiscation of private property, it should be strictly construed against the State and in favor of the citizen. Report of the Attorney General 1941-42, page 69. For that reason I do not believe a gun under the circumstances that you have narrated is subject to the penalties of this statute.

Very truly yours,

ABRAM P. STAPIES,
Attorney General.

FUNERAL DIRECTORS—Qualifications Necessary to Take Examination For License.

December 23, 1946.

Mr. F. C. Stover, Secretary,
State Board of Embalmers and Funeral Directors,
P. O. Drawer 109,
Strasburg, Virginia.

My dear Mr. Stover:

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

"We would like your opinion on the following question. Does section 1720a require that one first take an assistant funeral director's examination and serve two years as a licensed assistant funeral director before making application for funeral director's examination?"

"The following thought has been advanced several times, that a person could assist a funeral director two years (show same by affidavit) then be eligible to take the funeral director's examination."

The statutes primarily involved in your inquiry are sections 1720a and 1721 of the Code.

Section 1720a provides among other things that to secure a license as a funeral director a person must have "served as an assistant to a funeral director or undertaker for at least two years prior to being licensed * * * ." Section 1721 of the Code provides in part as follows:

"At least one member of every firm and the manager of each place of business conducted by any corporation that desires to engage in the business or practice of funeral directing, shall be a licensed funeral director, but no assistant, no member of any firm, and no officer or employee of any corporation shall engage in the care, preparation, disposal and burial of dead human bodies, or the management of burials, or the discharge of any of the duties of a funeral director, unless he shall be a licensed funeral director under the provisions of this chapter; provided, however, that an assistant or a member of a firm or an officer or employee of a corporation licensed as an assistant funeral director may perform any of the acts aforesaid. * * * ."

Construing these two sections together, I am of the opinion that to secure a license as a funeral director a person must have first been a licensed assistant funeral director for at least two years.

Very sincerely yours,

ABRAM P. STAPIES,
Attorney General.
FUNERAL DIRECTORS—Residence Qualifications Necessary.

April 23, 1947.

HONORABLE LANDON R. WYATT,
Member of House of Delegates,
Danville, Virginia.

My dear Mr. Wyatt:

This is in reply to your letter of April 19, 1947, in which you ask how long a person has to reside in Virginia in order to be able to secure a funeral director’s license.

Section 1720-a of Michie’s Code of Virginia provides in part as follows:

“* * *
No person not engaged in the practice or business of funeral directing or undertaking at the time this chapter takes effect shall be entitled to a license to engage in the practice or business of funeral directing or undertaking, unless he has served as an assistant to a funeral director or undertaker for at least two years prior to being licensed, is of a good moral character, is at least twenty-one years of age, and passes such examination as shows that he is possessed of a reasonable knowledge of sanitation and disinfection of bodies of deceased persons where death is caused by an infectious, contagious, or communicable disease, and has complied with all the requirements and regulations of the board applying to funeral directors and undertakers. * * *”

The statutes regulating the practice or business of funeral directing do not require that a person be a legal resident of the State of Virginia, but, in view of the provision requiring his place of business to be subject to inspection and other provisions of the statute, they have been construed by the Circuit Court of the City of Richmond as requiring non-residents of Virginia to have their funeral home or place of business located within this State before they are entitled to a regular funeral director’s license.

Section 1720-a of the Code also provides for the licensing of assistant funeral directors, and I have previously had the occasion to express the opinion that to secure a license as a funeral director a person must have first been a licensed assistant funeral director for at least two years.

Provision is also made by statute for the issuance of a reciprocal funeral director’s license to persons who possess a license as a funeral director from the State Board of Embalming or the State Health authorities of another State having requirements substantially equal to those of this State.

Very sincerely yours,

ABRAM P. STAPIES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Commission Has No Authority to Carry Advertising in its Publication.

May 29, 1947.

MR. CLYDE P. PATTON, Chief,
Division of Publications,
Commission of Game and Inland Fisheries,
7 North Second Street,
Richmond 13, Virginia.

My dear Mr. Patton:

This is in reply to your letter of May 14, 1947, in which you ask whether or not the Commission of Game and Inland Fisheries has the authority to carry advertising material in its magazine “Virginia Wildlife”.

I can find no statute authorizing the Commission to do so and it is, therefore,
my opinion that it does not have the authority to carry advertising material in its magazine. This would be in the nature of carrying on a business in competition with private enterprise and would not, in my opinion, be authorized in the absence of specific legislation permitting the same.

Very sincerely yours,

ABRAM P. STAPIES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Commission’s Immunity From Liability for Torts of Employees.

May 27, 1947.

Mr. I. T. Quinn, Executive Director,
Commission of Game and Inland Fisheries,
7 North Second Street,
Richmond 13, Virginia.

My dear Mr. Quinn:

This is in reply to your letter of May 23, 1947, in which you state:

"The game wardens, employed by the Commission of Game and Inland Fisheries and performing their duties under the direction of the Commission through the Executive Director and the District Supervisors, travel in privately owned automobiles.

"In the event such employee of the Commission, on official duty in the use of his automobile should, by accident or otherwise, injure any person or the property of another, would this Commission be liable for such damages?"

It is well settled in Virginia that the Commonwealth cannot be sued in tort for the negligence of its employees. Since the Commission of Game and Inland Fisheries is but an agency of the State, it would not be liable for damages under the circumstances mentioned in your letter. The individual game wardens, however, would be personally responsible for injuries caused by their negligence.

Very sincerely yours,

ABRAM P. STAPIES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Filling Vacancies on Commission; Length of Term.

September 4, 1946.

Honorable Jesse W. Dillon,
Ex-Officio Secretary to the Governor,
Governor’s Office,
Richmond, Virginia.

My dear Mr. Dillon:

This is in reply to your letter of August 30, in which you request my opinion as to the terms for which appointments should be made to fill two memberships on the Commission of Game and Inland Fisheries, the old terms having expired June 30, 1946. In your letter you quote the statutory provisions on the subject, which provide that the appointment shall be for a term of one to six years, but that the term of no more than two members may expire in any one year.

I note from the Report of the Secretary of the Commonwealth, 1944-1945, that the terms of two members will expire in the years 1947, 1948, and 1949, and the term of one member will expire June 30, 1950. In my opinion, under the statute it is optional with the Governor to make the term of one of the new
appointees expire June 30, 1950, or he may make the terms of either one or both of them expire June 30, 1951, or June 30, 1952, in his discretion.

Sincerely yours,

ABRAM P. STAPIES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Special License Necessary to Hunt Bear and Deer in Certain Counties.

HONORABLE DUNCAN M. BYRD,
Trial Justice for Bath County,
Warm Springs, Virginia.

My dear Mr. Byrd:

I am in receipt of your letter of November 1, with regard to the necessity of a landowner obtaining a special stamp to hunt bear or deer in Bath County. Chapter 32 of the Acts of 1946, to which I refer you, expressly provides that it shall be unlawful for any person to hunt bear or deer in Bath County without having obtained the special stamp required by the statute. This is a special Act applicable to Bath, Highland and Rockbridge Counties and, in my opinion, clearly overrides the exception contained in section 3305(19) of the Code (Michie, 1942) mentioned by you. In other words, under chapter 32 of the Acts of 1946, it is my opinion that all persons hunting bear or deer in Bath County, including landowners hunting on their own lands, must secure the special stamp required by the statute.

Very sincerely yours,

ABRAM P. STAPIES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Eligibility for Resident Hunting—Fishing License Depends Upon Residence and Not Ownership of Realty.

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

My dear Mr. Hart:

I am in receipt of your letter of July 2, in which you enclose communication from Mr. Worth H. Storke, Clerk of the Circuit Court of Prince William County, in which he asks if the following describe persons are entitled to resident fishing

“A man has owned a farm in Prince William County for, say, eight or ten years, and has been operating said farm, but has himself been employed in the State of Maryland, for the past three or four years and has returned to said farm each week-end during that period of time. Is he entitled to County and State Resident License to hunt and fish?”

Section 3305(22) of the Code (Michie, 1942) defines resident for the purpose of securing resident licenses to hunt and fish. It is therein provided that a person “who has been a bona fide resident of the county for six months next preceding the date of application for license in said county” is a resident. It does not appear that the above described person has been actually residing in Prince William
County for six months preceding the date of his application for license, and, if Mr. Storke has stated all of the facts as to this person's residence, I am of the opinion that he is not entitled to a resident license.

The second case is

"Residents of Lake Jackson Hills, in the County of Prince William (a subdivision and mainly summer resort) feel that they have the right to obtain county hunting and fishing licenses, due to the fact that they own their lot there, the majority of whom are only there for week-ends, holidays and vacations, and as we feel really residents of Washington, D. C. as most of them live there."

I am again of the opinion that the persons above described, who only spend weekends, holidays, and vacations, in Prince William County, are not actual residents of the county within the meaning of the statute, and, therefore, are not entitled to resident licenses.

I must add that, if any of the persons described in Mr. Storke's letter are retaining their domiciles in Prince William County and are qualified voters of the county they are entitled to resident licenses under paragraph (b) of section 3305(22) above mentioned.

Sincerely yours,

ABRAM P. STAPIES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Issuance of Hunting—Fishing Licenses by County to Residents of City Depends Upon Population of City as Disclosed by Last U. S. Census.

Miss R. Angeline Matthews, Deputy Clerk,
Circuit Court of Henry County,
Martinsville, Virginia.

My dear Miss Matthews:

This will acknowledge receipt of your letter of August 31, stating that at the July, 1946, term of your court the City of Martinsville annexed certain adjacent territory from Henry County, which will in all probability raise its population from the 1940 figure of 10,080 to something like 16,000 people. You then state:

"I would appreciate it if you would give as the ruling of the issuing of county hunting-fishing license to the citizens living in the City of Martinsville after September 1, 1946."

It is not entirely clear to me just what your problem is, but section 22 of the Game, Inland Fish and Dog Code of Virginia (Chapter 247 of the Acts of the General Assembly of 1930, page 634 et seq.) as amended and re-enacted by Chapter 24 of the Acts of the General Assembly, Extra Session 1936-37, page 65 et seq. provides in part as follows:

"The following persons shall be entitled to a county license to hunt, trap or fish in the county of which they are residents, or of which they are legal voters, or in which they are stationed or located, or to a State resident license:

"(f) Residents of cities of less than fifteen thousand population according to the last preceding United States census, the limits of which are wholly within the county wherein the license is applied for."
According to the last preceding census, this would allow you to issue Henry county hunting and fishing licenses to residents of the City of Martinsville, and you are wondering whether or not this increase will place Martinsville in the 15,000 class, will deprive you of the right of granting such licenses.

Until there is an official U. S. census establishing the population of Martinsville at a new figure, I believe you have the power to continue to issue Henry county hunting and fishing licenses to residents of the City of Martinsville.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Remuneration for Unassessed Poultry Killed by Dogs.

HONORABLE EUGENE W. CHELF,
Commonwealth’s Attorney for Roanoke County,
Salem, Virginia.

My dear Mr. Chelf:

This is in reply to your letter of April 15, 1947, in which you request my opinion upon whether or not a party is entitled to be paid compensation, under section 3305(75) of the Code, for his poultry killed by dogs when the party has not listed his poultry for taxation and the same have not been assessed for taxes.

Section 3305(75) of the Code provides in part as follows:

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

In view of this statutory provision, it is my opinion that the person is entitled to compensation for fowls killed by dogs, even though the same have not been assessed for taxation.

Very sincerely yours.

ABRAM P. STAPLES,
Attorney General.

GAME, INLAND FISH AND DOG CODE—Game Warden Not Authorized to Search Private Premises Without Warrant.

MR. I. T. QUINN, Executive Director,
Commission of Game and Inland Fisheries,
7 North Second Street,
Richmond 13, Virginia.

My dear Mr. Quinn:

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

"It will be greatly appreciated if you will give me your opinion as to whether or not a game warden or other law enforcement officer, authorized under the Virginia statute to inspect dogs to determine whether or not they are properly licensed, can go about the premises of a dog owner
without first procuring his permission, or in lieu thereof obtain a search warrant for such purpose."

Section 3305(16) of the Code deals with the powers of game wardens and names certain places such as offices, restaurants, etc. that may be entered without warrant when the game warden has reason to believe that a person arrested for violating the provisions of the hunting and fishing laws has concealed any wild bird or fish therein. But it expressly provides that a dwelling house may not be searched without warrant.

Section 4822d makes it unlawful to search without a warrant except that game wardens may, without a search warrant, enter certain places such as freight and passenger depots, warehouses, passenger and freight cars, etc. for the purpose of police inspection.

Therefore, in view of section 3305(16) and the above section, which does not include a dwelling house and the premises around such a house in the list of places that may be searched without a warrant, it is my opinion that a game warden must either obtain permission from the dog owner or obtain a search warrant before he can go about the premises of a dog owner to determine whether or not a dog is properly licensed.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

GOVERNOR—Power to Remove Political Disabilities.

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

My dear Governor Tuck:

This is in reply to your request, transmitted to this office verbally by Mrs. Towill, for my opinion as to whether you have the power to remove political disabilities of a person convicted of a felony in the District of Columbia.

Section 73 of the Constitution gives to the Governor the power to remove political disabilities consequent upon conviction for offenses without specifying whether such convictions are under the laws of this State or some other jurisdiction. Section 82 of the Code of Virginia prohibits a person from voting who has been convicted of a felony either within or without this State. It is my opinion that, since political disabilities are imposed by the laws of the State of Virginia upon persons who have been convicted in other jurisdictions, the Governor of this State possesses the power to remove the same under section 73 of the Constitution. This power, of course, would extend to the removal of only those political disabilities imposed by virtue of the laws of this State, and such action taken by the Governor would not have the effect of removal of any disability in another State arising by virtue of the laws of the jurisdiction in which the person was convicted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
HAMPTON ROADS SANITATION DISTRICT—Fixing of Salaries of Employees; Fixing of Amount of Bond Securing Bank Deposit of Commission.

June 23, 1946.

HONORABLE REID W. DIGGES, Manager,
Hampton Roads Sanitation District Commission,
329 Flatoiron Building,
Norfolk 10, Virginia.

My dear Mr. Digges:

I have your letter of July 10, in which you inquire whether or not the Hampton Roads Sanitation District Commission has the authority to fix salaries of its officers and employees, and also the salaries applicable to any position which it may establish.

The provisions of the Sanitation Act on this subject must be held to have been modified or repealed to the extent that they are inconsistent with the "Virginia Personnel Act," Chapter 370, page 563 of the Acts of 1942. This Act by its terms authorizes the action which has been taken with respect to the Commission's employees as related in your letter. If a position has been established and the salary applicable thereto has been fixed by the Governor, as Chief Personnel Officer, I do not understand that the regulations require that the salary of a person appointed to fill a vacancy shall be reclassified unless it is desired to place such new employee in a salary higher than the minimum applicable to the classification in which the position has been placed. These are matters of detail, however, which you will have to work out with the Director of Personnel or the Governor.

You also inquire whether or not it is permissible for the Commission to agree with a bank which is a depository for funds of the Commission to reduce the amount of government bonds held as security for the bank deposit as the amounts of deposits are reduced from time to time. The depository, you state, desires to withdraw these bonds in excess of the amounts of the deposits.

This, I think, is a permissible practice. However, after the Commission begins active operations and the deposits fluctuate materially from day to day, it would seem that the amount of the security should be fixed at a sum sufficient to cover the maximum amount which may be reasonably anticipated to be deposited.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

HIGHWAYS—Grade Crossings of Railways: Procedure for Elimination Thereof.

February 27, 1947.

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

My dear Mr. Mullen:

You inquire if the Department of Highways may, by the Commissioner, give the initial notice required by law to the railroad company of its intention to replace inadequate existing structures at grade crossings and eliminate some existing grade crossings and submit the matter to the Corporation Commission proceed with the work and enter suit against the railroad company after the work is completed for its proportionate share of the cost.

The procedure for the construction of overhead and underpass crossings
of railroads and elimination of grade crossings is outlined in Chapter 178 Acts approved March 27, 1934, Virginia Code section 3974a. This section provides the procedure briefly as follows:

1. The State Highway Commissioner shall notify in writing the railroad company that funds have been allocated for the payment of the State's portion of the cost of the proposed work and shall submit plans and specifications of the proposed work.

2. If an agreement is reached, the railroad company shall provide equipment, material, and construct the project according to the plans and specifications.

3. If an agreement is not reached, the railroad company may within 20 days after receiving the notice from the State Highway Commissioner file a petition with the State Corporation Commission setting out its objection to the proposed work. The Commission shall then hear and determine whether or not the existing structure is dangerous to or insufficient to take care of the traffic on the highway.

4. If the railroad company is not satisfied with the plans and specifications submitted by the State Highway Commissioner, the company may, within 60 days after receipt of said plans and specifications, or in the event of a hearing before the State Corporation Commission as to the danger and insufficiency of such structure within 30 days after the entry of the order of the Commissioner, file a petition with the State Corporation Commission setting out its objections to the plans and specifications. The Commission shall then hear and determine and approve the plans submitted by the State Highway Commissioner or other plans in lieu thereof.

5. Upon completion of the work, the railroad company shall file an itemized statement of the cost of the work, and the State Highway Commissioner shall file with the railroad company an itemized statement of the cost of the work done by him which cost shall be paid as provided by said statute.

There are two questions to be determined by the State Corporation Commission: (1) Whether or not the existing structure is dangerous or insufficient to take care of the traffic on the highway; (2) Which plans and specifications are to be approved. After the plans and specifications are so approved, the statute provides "and it shall thereupon be the duty of the railroad company to provide all equipment and materials and construct, widen, strengthen, redesign, relocate or replace, as the case may be, the overhead or underpass crossings * * * ." From the foregoing language, it may be seen that the statute imposes a duty upon the railroad company to construct the project, however, this duty is not imposed until the terms of the statute have been strictly complied with by the Highway Commissioner. In the event the railroad company fails or refuses to do the work after completion of the proceedings before the State Corporation Commission, the Commissioner may then take appropriate proceedings before the said Commission to compel the railroad company to comply with the orders of the Commission.

I am of the opinion that the Department of Highways cannot proceed with the work before an agreement has been entered into with the railroad company or before the proceedings before the State Corporation Commission have been completed; that if the State Highway Commissioner proceeded with the work before an agreement is entered into with the railroad company or before the proceedings are completed before the State Corporation Commission, it would not be a valid exercise of its police powers and would be a taking of property within the meaning of the Fourteenth Amendment of the Federal Constitution without due process of law. This view is supported by the case of Southern Railway Company v. Commonwealth, U. S. 54, S. Cit. 148, which was decided prior to the 1934 amendment of section 3974a.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
INSANE PERSONS—Where to be Held Pending Adjudication of Sanity.

April 7, 1947

Mr. Walter B. Gentry, City Sergeant,
15th and Marshall Streets,
Richmond 19, Virginia.

My dear Mr. Gentry:

This is in reply to your letter of March 31, 1947, in which you ask for my opinion as to whether the Sergeant of the City of Richmond is required by law to receive and take custody of a person suspected of being insane between the time of his arrest by a city police officer and the time the question of his sanity is determined by a commission under section 1017 of the Code of Virginia.

In your letter you state that in Richmond the City Sergeant does not receive custody of persons arrested by local police officers upon charges of felonies or misdemeanors until ordered to jail by one of the police justices, such persons being retained in the custody of the local police officers at one of the three police stations until actually committed to jail.

Section 1017 of the Code provides that a judge, justice of the peace or trial justice who suspects any person to be insane, or upon written complaint, shall issue his warrant ordering such person to be brought before him and shall summon two physicians, who with the judge or justice, shall constitute a commission to inquire into the sanity of such person. The statute is silent as to what should be done with the person when his condition makes it necessary that he be taken into custody pending the convening of the commission. Section 1020 provides that, if such person is found by the commission to be insane, he shall be ordered to be delivered to the custody of the sheriff of the county or the sergeant of the city, to be kept and cared for by him until he can be delivered to a hospital or colony for the insane.

Such persons are not criminals and it is clear from sections 1020 and 1020-a of the Code that they should not be held in jail, even after commitment, unless no other suitable place is available and it is necessary that they be confined in jail pending delivery to a hospital for the insane.

I find no provision in the statute requiring the City Sergeant to hold such persons in custody in the city jail prior to their commitment. Unless required to do so by the charter or ordinances of the City of Richmond, it is my opinion that when you are not the arresting officer you do not have to take custody of such persons until ordered to do so by a court or justice. Though not required to receive them, I think you would be justified in doing so if no other suitable place of detention is available and actual restraint is necessary to protect the individual and the public from harm. I, of course, am unable to say whether the three police stations you mention are or are not adequate for the detention of such persons.

In your letter you also ask whether you and your deputies are vested with the powers of a conservator of the peace. In view of section 2992 of the Code, providing that the sergeant of a city shall exercise the same powers that a sheriff exercises in his county, it is my opinion that you and your deputies are vested with the powers of a conservator of the peace.

Very sincerely yours,

Abram P. Staples,
Attorney General.
INSANE PERSONS—Osteopath is Eligible to Serve as Physician on Lunacy Commission.

HONORABLE HUMES J. FRANKLIN, Esq.
Justice of the Peace for Augusta County, Waynesboro, Virginia.

My dear Mr. Franklin:

This is in reply to your letter of June 2, 1947, in which you ask whether a duly licensed osteopath can serve as one of the physicians in a lunacy commission.

As you point out in your letter, section 1017 of the Code dealing with lunacy commissions provides simply that two licensed physicians shall be summoned to serve on the commission. While osteopaths do not have exactly the same status as regular physicians, they are under the control and supervision of the State Board of Medical Examiners and are required to pass an examination before this Board before receiving a certificate. As you will see from section 1612 of the Code, this examination is the same as that given regular physicians except that the subject "practice of osteopathy" is substituted for the subject "practice of medicine" and includes the subjects of neurology and psychiatry. As defined by section 1609, the term "practice of medicine" means the treatment of human ailments, diseases or infirmities by any means or method, while the term "practice of osteopathy" means the treatment of human ailments, diseases or infirmities by any means or method other than surgery or drugs. While the two branches of the healing arts are not identical, it is my opinion that, since an osteopath must be schooled in neurology and psychiatry and may treat diseases of the mind, he may be appointed as one of the physicians to serve on a lunacy commission.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE PERSONS—Superintendent of Hospital Required to Receive Persons Committed by Order of Court.

DR. JOSEPH E. BARRETT, Commissioner,
Department of Mental Hygiene and Hospitals,
309 North 12th Street,
Richmond 19, Virginia.

My dear Doctor Barrett:

I have your letter of September 23, in which you request my opinion upon the authority of the Superintendent of the Central State Hospital, of the Superintendent of the Southwestern State Hospital, in connection with their departments for the criminal insane, to decline to admit a person who has been committed by a court of competent jurisdiction for observation and report by the institution as to the mental condition of such person.

When an order of the court directs the superintendent of the institution to accept a patient for admittance for observation and report, it should not be arbitrarily disobeyed by the superintendent. If the superintendent feels that the conditions at his institution are such that he is unable to admit the patient, he should immediately take the matter up with the judge of the court and explain the situation, and undertake to agree with the judge upon some solution of the problem.

If the superintendent should arbitrarily decline to admit the patient, he
might be guilty of contempt of court, and be subjected to fine or imprisonment.

For this reason, I suggest the above course of action.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

INSANE PERSONS—Commitment of War Veteran to Veteran's Administration Facility Outside Virginia.

April 8, 1947.

DR. JOSEPH E. BARRETT,
Commissioner of Mental Hygiene and Hospitals
309 North 12th Street,
Richmond 19, Virginia.

My dear Doctor Barrett:

This is in reply to your letter of March 31, referring to §1020 of the Code of Virginia as amended, and asking my opinion as to various phases of it.

First, you state that a lunacy commission in Fairfax County recently committed a veteran to a Veterans' Administration Facility at Perry Point, Md., and you ask my opinion as to whether or not a lunacy commission in Virginia may commit a veteran to a VA facility outside Virginia.

Sub-section (d) of §1020 as amended and re-enacted by Chapter 55 of the Acts of Assembly of 1944 provides:

"Whenever it appears that the person so adjudged to be insane, feeble-minded, epileptic or inebriate is a veteran eligible for treatment in a Veterans' Administration Facility, the judge or justice may, upon receipt of a certificate of eligibility from the Veterans' Administration Facility concerned, commit the person to the Facility regardless of whether the person is or is not a citizen of this State. Any veteran who has been heretofore, or hereafter is committed to a State hospital, or colony, or otherwise, who is eligible for treatment in a Veterans' Administration Facility may, with the written consent of the manager of the Facility, or, any veteran here-tofore or hereafter committed to a Veterans' Administration Facility, if he be a resident of this State, who is otherwise eligible for treatment in a State hospital or colony, may, with the written consent of the State Hospital Board, be transferred to the Facility, or to the State Hospital or colony, as the case may be, by order of the superintendent of the State hospital, or colony or otherwise, or by order of the manager of the Facility, as the case may be, or in either such event, by order of the judge or justice who committed the person."

As you can observe from this section it does not authorize commitments to facilities outside of Virginia, nor does it restrict commitments to the facilities within Virginia.

In a similar case where a veteran resident of Arizona was committed to a VA facility in Oregon and then sought his release on habeas corpus in a Federal court, the court said:

" * * * The process of the State of Arizona does not run beyond its borders. There the authority of its courts fails also. The agents of that state have no inherent authority to hold a person in custody in Oregon. The custodians of petitioner here are acting either by authority of the United States or they have no authority. * * *" In re Ross 48 F. Supp. 815, 816 (1942).

On the authority of this case, I think it could be said that commitment to
an institution outside of Virginia under a Virginia lunacy warrant would not be binding in the other state, and it would be necessary to hold another lunacy commission and have a second commitment.

However, it appears that remedial legislation has partially changed this result. In 1942, the National Conference of Commissioners on uniform state laws, probably anticipating this type of case, promulgated the Uniform Veterans' Guardianship Act. Sub-section 2 of §18 of this act provides:

"The judgment or order of commitment by a court of competent jurisdiction of another State or of the District of Columbia, committing a person to the Veterans Administratron, or other agency of the United States Government for care or treatment shall have the same force and effect as to the committed person while in this State as in the jurisdiction in which is situated the court entering the judgment or making the order; (and the courts of the committing State, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in sub-section (1) of this Section with respect to persons committed by the courts of this State. Consent is hereby given to the application of the law of the committing State or District in respect to the authority of the chief officer of any facility of the Veterans Administration, or of any institution operated in this State by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.)"

This Act has been adopted in Maryland. See 1943 Supplement to Flack's Annotated Code of Maryland (1939), Article 65 §76. In view of this fact, I am of the opinion that the commitment by the Fairfax Commission to the Facility at Perry Point, Maryland, is legally effective in Maryland. Other states in which this Act has been adopted are:

"Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, South Dakota, Tennessee, Utah, Vermont."

It therefore follows that a lunacy commission in Virginia may commit a veteran to the VA facility in any of these states.

You next state that this veteran was later transferred to the VA hospital (McGuire's Hospital) at Richmond, Virginia, and ask whether or not McGuire's Hospital has the authority to hold this patient under the original commitment. I am of the opinion that the original commitment is sufficient to hold this person at McGuire Hospital. The purposes of our statutes seems to be to put these facilities on the same plane as our own state institutions, with power to transfer inmates from one to the other, and I think this power should be extended to an institution outside the state performing these services for residents of the state.

Your last inquiry is:

"If at a later date it is determined that this patient is not eligible for care in a Veterans' Administration Hospital but is a legal resident of Virginia and eligible for care in a state hospital in Virginia, could I, as the authorized agent of the State Hospital Board, consent to or authorize his transfer to a state hospital in Virginia?"

The statute makes this transfer permissible with the written consent of the State Hospital Board. Since this seems to be a routine administrative matter, I think it would be appropriate for the State Hospital Board by resolution to delegate to you the authority to consent to these transfers.

Very truly yours,

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

JUDGMENTS AND EXECUTIONS—Clerk of Circuit Court Not Authorized to Issue Execution on Judgment of Civil or Police Justice.

June 12, 1947

HONORABLE M. H. WILLIS,
Clerk of Circuit Court,
Fredericksburg, Virginia,

My dear Mr. Willis:

This is in reply to your letter of May 29, 1947, in which you state that you have received in your office an abstract of judgment rendered in the Civil and Police justice Court of Fredericksburg which you have indexed and docketed in the Judgment Lien Docket in your office. You ask if you can issue execution on the abstract or should you have the original judgment in your office.

Section 3105 of the Code, which deals with the procedure in Civil and Police Justice Courts, provides that the civil and police justice rendering any judgment shall issue a writ of fieri facias thereon after ten days from the rendition thereof and may from time to time renew such writ either before or after the expiration of one year from the date of judgment. Section 3107 provides that all papers connected with any of the proceedings before such justice, except those that are removed on appeal, shall be indexed, filed and preserved by him.

While Section 4987J, dealing with procedure before trial justices, provides that the clerk of the circuit court may issue executions on an abstract of judgment rendered by a trial justice and docketed in the circuit court, I find no similar provision in the statutes dealing with civil and police justices.

Sections 6030 and 6031 in Chapter 250 of the Code, which deals with warrants for small claims and which is made applicable to civil and police justices, except in so far as the procedure is modified by Sections 3097 et seq., required justices of the peace to send an abstract of their judgment and all papers in each case to the clerk of the circuit or corporation court. They also provide that, on any execution not returned and renewed by the justice within one year, the clerk of such court could issue further executions as if the judgment on which it issued had been rendered in court. Since, in the case of a civil and police justice, the papers are filed in his office and he may renew executions issued by him either before or after one year from the date of the judgment, I do not believe that the procedure prescribed by Sections 6030 and 6031 for the issuance of further executions by the clerk of the circuit court are applicable in the case of judgments rendered by such civil and police justices.

It is my opinion, therefore, that all executions on such judgments and renewals thereof should be issued by the civil and police justice and not by the clerk of the circuit court. If there are provisions of the Charter of the City of Fredericksburg prescribing a different procedure, or if you have in mind other statutory provisions which may affect this question, I will be glad to give the matter further attention.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JURISDICTION—Authority of State Police Where Mines Have Been Seized by Federal Authorities.

December 4, 1946

COLONEL C. W. WOODSON, JR., Superintendent,
Department of State Police,
P. O. Box 1299,
Richmond, Virginia.

My dear Colonel Woodson:

Replying to your letter of November 25, in which you inquire as to the jurisdiction of the State Police in protecting life, limb and property in the vi-
cinity of the coal mines taken over by the Federal Government, I beg to advise
that, while I know of no expressed judicial decision covering this question, such
jurisdiction seems to me to be extremely doubtful.

The government has taken possession of the mines under the provisions of
the Smith-Connally Act, which is an exercise of the war powers of the United
States. Such powers are usually regarded as exclusive of any State action
which could possibly conflict or interfere therewith. I believe that the State
Police would have jurisdiction to perform such acts as they may be requested
to perform by the proper Federal authorities, but, in the absence of such re-
quest or at least express permission, I would not advise encroaching upon the
property over which the Federal Government is now exercising jurisdiction un-
der its war powers.

If the State Police are charged with the duty of executing a warrant for
the arrest of any person on the mine properties which would include not only
the mine itself, but the other properties acquired in conjunction therewith, I
would suggest that such officer confer with the superintendent in charge of the
mines with respect to the execution of the warrant.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Disposition of Incorrigible
Offenders.

HONORABLE ARTHUR W. JAMES,
Commissioner of Public Welfare,
Travelers Building,
Richmond 19, Virginia.

My dear Mr. James:

This is in reply to your letter of August 6, in which you state:

" * * * The State Board of Public Welfare wishes to know if it may,
after an appropriate period of study and care, return those juvenile offenders
who have proved to be beyond control in the industrial schools to the courts,
thereby replacing on the courts responsibility for their further control."

It appears to me that section 1918 of Michie’s Code of 1942 contains the
answer to this problem. The second paragraph of said section is to this effect:

"If at any time, after thorough investigation or trial of its various dis-
ciplinary measures, the court of (or) the judge thereof is convinced that any
delinquent child fourteen years of age or over brought before it under the
terms of this chapter, cannot be made to lead a correct life, and cannot be
properly disciplined under the provisions of this chapter, the said child shall
then be proceeded against as if he were over the age of eighteen years, and
may be committed to the county jail, or to any city jail or police station
pending further proceedings, or admitted to bail."

Thus, if the Commissioner of Public Welfare feels that the juvenile offenders
are incorrigible or cannot be properly disciplined under this system, he should
bring this fact to the attention of the juvenile court making the original com-
mitment. The judge of said court should then set a date for a hearing, at which time
the Commissioner of Public Welfare or his representative could present his side
of the case, and also the juvenile offender would be present and given an oppor-
tunity to present such facts as he desired. If the judge of the juvenile court after
this hearing was then satisfied that the various corrective measures under the juvenile system were unavailing, the defendant could then be proceeded against and subjected to regular criminal procedure.

Very truly yours,

ABRAM P. STAPIES,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Disposition of Incorrigible Female Prostitutes Under Age of Eighteen.

HONORABLE ARTHUR W. JAMES,
Commissioner of Public Welfare,
Richmond 19, Virginia.

My dear Mr. James:

Before me for consideration is your letter of February 25th in which my opinion is sought on the authority of a Juvenile and Domestic Relations Court to hear the case of a juvenile, and under stated conditions to deal with him as if he were an adult offender.

It appears that the Judge of the Juvenile and Domestic Relations Court of Danville has recently had before him three girls under eighteen years of age on the complaint that they had been engaging in prostitution. The Judge committed the girls to the State Department of Public Welfare as delinquent children, but he has serious doubts that they would be amenable to the corrective process of the Juvenile set-up, and you have suggested the possibility to him of treating them as adult offenders and committing them pursuant to §4548-g of the Code of Virginia, as amended.

Your letter does not indicate the present location of these girls, but I assume that they are still in Danville. That the Court may reconsider its own order seems fairly clear. §1910 provides in part:

"Any order made by the Court * * * shall be subject to modification or revocation from time to time, as the court may deem to be for the welfare of such child. * * *"

However, I am further of the opinion that the Judge of the Juvenile and Domestic Relations Court has no authority to utilize the provisions of §4548-g in the case of these girls. That section (added to the Code of Virginia by chapter 277 of the Acts of Assembly of 1946) says:

"Any female convicted, by any court or justice in this State, of prostitution or being a keeper or inmate, or frequenter of a house of ill-fame, prostitution or assignation, or for soliciting for immoral purposes, of associating with or consorting with persons of ill repute, of vagrancy, of contributory delinquency or neglect or dependency, may, in lieu of the jail sentences or fines provided for such offenses, be committed to the control and supervision and direction of the State Board of Public Welfare for an indeterminate period of not less than three months nor more than three years, and said board may recommitt such females to a State institution or to such other institutions in this State as may be approved by it as being suitable for the proper care of such females, and as being equipped to give medical treatment to such of them as may be diseased, and industrial training to such of them as may be in need thereof. * * *"

But the Judge of the Juvenile and Domestic Relations Court is powerless to convict these children of the offense of prostitution. In Mickens v. Commonwealth, 178 Va. 273, 279, the Court said:
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"* * * * No power is given to the juvenile courts to convict any child of any crime, either misdemeanor or felony, or to commit any child to any penal institution. Such court may only adjudge a child a delinquent and commit him, not to a penal institution, but to the State Board of Public Welfare, which board is given power to make proper disposition of the child."

This conclusion is buttressed by the Act itself. The concluding sentence of §1905 is:

"No adjudication or judgment upon the status of any child under the provisions of this chapter shall operate to impose any of the disabilities ordinarily imposed by a conviction, nor shall any such child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction."

As to what disposition should have been made of these girls, you are familiar with the concluding paragraph of §1918, which is:

"If at any time, after thorough investigation or trial of its various disciplinary measures, the court of (or) the judge thereof is convinced that any delinquent child fourteen years of age or over brought before it under the terms of this chapter, cannot be made to lead a correct life, and cannot be properly disciplined under the provisions of the chapter, the said child shall then be proceeded against as if he were over the age of eighteen years, and may be committed to the county jail, or to any city jail or police station pending further proceedings, or admitted to bail."

When the judge of the Juvenile and Domestic Relations Court is "so convinced," the regular criminal procedure would then take over. It would be necessary for the routine warrant of arrest to issue, and the matter could then be disposed of by the police justice of the City of Danville.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

JUVENILE AND DOMESTIC RELATIONS—Trial Justice Not to Grant Consent to Adoption of Juvenile.

HONORABLE ROBERT B. DAVIS,
Civil and Police Justice,
Bristol, Virginia.

My dear Mr. Davis:

This will acknowledge receipt of your letter of July 30, in which you ask if you have the power in cases where you are awarding the custody of delinquent, dependent or destitute children to the State or local Department of Public Welfare to provide in the custody order that the State or local Department of Public Welfare is granted the authority to sign a written consent that the child or children may be adopted.

It would appear to me this point is adequately covered in the adoption statute. See section 5333d, 1944 Supplement to Michie's Code of 1942. The Commissioner of Public Welfare is given the power to consent there in any condition of fact not covered by the statute. I do not believe any such provision should be included in your order awarding custody.

Very sincerely yours,

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

JUVENILE AND DOMESTIC RELATIONS—Who May Be Designated as Visitorial Agent to Home of Child Pending Adoption.

February 27, 1947.

HONORABLE ARTHUR W. JAMES, Commissioner
Public Welfare,
Richmond 19, Virginia.

My dear Mr. James:

This is in reply to your letter of February 25, seeking my opinion as to the interpretation of a portion of the adoption statutes, §§5333-a through 5333-1 of the Code of Virginia as amended. Your particular problem is with reference to subsection (b) of §5333-e. It provides:

"If the child is legally the child by birth or adoption of one of the petitioners, or if the child has been placed in the home of the petitioner by a child placing agency and such agency certifies to the court that, the child has lived in the home of the petitioner continuously for a period of at least one year next preceding the filing of the petition, and has been visited by a representative of such agency at least once in every three months during each year, and if the court is of the opinion that the entry of an interlocutory order would otherwise be proper, the court may omit the probationary period hereinafter provided for and the interlocutory order, and enter a final order of adoption."

The factual situation which you apparently have in mind is that a child placing agency in Richmond places a child in a home in Norfolk. For the period of one year the statute requires visitation, and you seek my opinion as to whether or not the phrase "a representative of such agency" is restricted to employees of the Richmond child placing agency or whether or not it may be construed broadly to include among others, welfare workers in Norfolk with the same training and qualifications.

As before indicated, the subsection with which we are dealing provides a method of elimination of the probationary period of one year between the interlocutory order and the final order of adoption as provided in §§5333-f and 5333-g. In other words, where the child has been in the home for the one-year period under similar visitorial surveillance, for the requisite one year the court may dispense with the interlocutory order and proceed to a final order of adoption. I do not believe that the statute should be narrowly and literally construed only to embrace an employee of the child placing agency within the phrase "a representative of such agency." Support for this view can be drawn from the context of the Act. When the adoption follows the regular procedure with the entry of the customary interlocutory order, the statute then provides:

"After the entry of an interlocutory order of adoption, the Commissioner shall cause the child to be visited in the home of the petitioner, at least once during each period of three months prior to the entry of the final order of adoption, by an agent of the State Department of Public Welfare or of a local board or department of public welfare or by an agent of a child placing agency, or, if the petitioner has moved outside of the State, by a representative of a public welfare agency or of any agency approved by the public welfare authorities, of the State, territory or country into which the petitioner has moved. The Commissioner shall make to the court a written report of his findings made pursuant to such visitations within fifteen days after the expiration of one year from the date upon which the interlocutory order was entered."

If the persons enumerated in the above sections are qualified for visitation duties after an interlocutory order, I do not see why they would not be equally qualified for such duties if the requisite time had elapsed without the entry of an interlocutory order.
I am, therefore, of the opinion that the phrase "representative of such agency" should be construed to include an agent of the State Department of Public Welfare, or of a local board of public welfare or an agent of a child placing agency when such person is designated as its representative by the original child placing agency. As I see it, all the law desires is that this visitatorial surveillance be carried out by trained and qualified personnel and not that there shall be a legal nexus between the personnel making the visits and the original placing agency. The personnel enumerated above are for these duties to be considered fungible. The interpretation which I have made does no violence to this principle.

Very truly yours,

ABRAM P. STAPIES,
Attorney General.

LABOR LAW—Employment of Boys Between Ages of Fourteen and Sixteen.

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

June 20, 1947.

My dear Mr. Dovel:

In your letter of June 17, you refer to section 1808m of Michie's Code, and ask an opinion as to whether boys between the ages of fourteen and sixteen, who have received proper employment certificates, may be employed by drug stores back of soda fountains, grocery stores and other retail stores where employment is not dangerous.

Section 1808m provides, among other things, that "... no boy under sixteen ... shall be employed ... in any scaffolding or construction work, brick or lumber yard, or retail, cigar or tobacco store, or in any theatre, concert hall, cabaret, carnival, floor show, pool hall, bowling alley or place of amusement or in any hotel, restaurant, roadhouse, curb service place, or steam laundry." Other sections 1808b, 1808c, and 1808d, allow children between fourteen and sixteen to work certain hours upon the procurement of certificates of employment and physical fitness.

It seems, under these sections, that boys from fourteen to sixteen may work anywhere, except in those places specifically prohibited by 1808m.

The only thing in 1808m which could be construed as forbidding such persons to work in drug stores, grocery stores and other retail stores where employment is not dangerous would seem to be the prohibition against work in "retail, cigar or tobacco store."

I do not think that language prohibits the type of employment to which you make reference. I do not think this prohibits boys from fourteen to sixteen from working in retail stores where the sale of cigars and tobacco is incidental to the main business conducted.

Whether the sale of cigars and tobacco is incidental to the main business conducted or not is a question of fact in each case. In the absence of more detailed information as to the nature of any particular store and its degree of departmentization, I cannot express any opinion as to any particular case. As to the numerous arrests in and around Luray, this office has a policy of never expressing an opinion as to any pending case, and, therefore, this is not intended as a comment upon the merits of any case now before the courts.

Very sincerely yours,

ABRAM P. STAPIES,
Attorney General.
LABOR LAW—Legality of Placement Fee Charged by Employment Agencies.

HONORABLE JOHN HOPKINS HALL,
Commissioner of Labor and Industry,
Richmond, Virginia.

My dear Mr. Hall:

This is in reply to your letter of February 7th in which you seek my opinion with reference to the practical construction of a portion of §1803 of Michie's Code of 1942.

The pertinent language is:

"...... Where a registration fee is charged for filing or receiving application for or obtaining employment or help, said fee shall in no case exceed the sum of three dollars......"

You state that it is the common practice among employment agencies to charge a registration fee from $1.00 to $3.00, and if the agency is successful in securing employment for the applicant, an additional placement fee is charged, usually equal to one week's salary or wages. You ask my opinion as to whether or not the quoted language above does not limit the total charge of the employment agency to a sum not in excess of $3.00.

As you have indicated in your letter, the language is possibly susceptible of that construction, but I am of the opinion, upon viewing the whole statute, that the $3.00 limitation is not applicable to the so-called placement fee.

The statute regulating employment bureaus, §§1803-1806 of Michie's Code of 1942 grew out of chapter 155 of the Acts of Assembly of 1910, p. 242. §3 of that statute, which was the predecessor of the present §1805, provided:

"It shall be unlawful for any person, firm or corporation, or any person employed or authorized by such person, firm or corporation to hire or discharge employees, to receive any part of any fee or any percentage of wages or any compensation of any kind whatever, that is agreed upon to be paid by any employee of said person, firm or corporation to any employment bureau or agency for services rendered to any such employee in procuring for him employment with said person, firm or corporation."

Under this provision it was apparently lawful to make a charge for placement, and there was no maximum charge for a registration fee.

These statutes were amended and reenacted by chapter 168 of the Acts of Assembly of 1916, and what is now §1805 was changed to read as follows:

"It shall be unlawful for any person, firm or corporation, or any person employed or authorized by such person, firm or corporation to hire or discharge employees, to receive any part of any fee or any percentage of wages or any compensation of any kind whatever, that is agreed upon to be paid by any employee of said person, firm or corporation for any employment with said person, firm or corporation."

The language of this section leads me to the conclusion that placement fees are looked upon as legal, but it is illegal for the employment agency to split any such fee with the employer or any of its agents having the power to hire and fire. The provision setting a maximum charge for registration fees was first inserted in 1916, and I believe it was the intention of the legislature that this maximum was to be applicable only to a so-called initial registration fee. The fact that this practice has prevailed among agencies so long lends strength to this construction.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
LITERARY FUND—Joint Loan to Several Localities Jointly Not Authorized.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

I refer to our recent correspondence, in which you state that the City of Hampton, Elizabeth City County, and the town of Phoebus wish to participate in the cost of the construction of a gymnasium as an addition to the Hampton High School. You state that the title to the Hampton High School is vested in the school board of the City of Hampton and desire to know if the State Board of Education can approve a literary fund loan made to these political subdivisions jointly for the construction of this gymnasium.

I have examined the sections of the Code dealing with literary fund loans, and am of opinion that they do not contemplate a loan from the literary fund to two or more political subdivisions jointly. I, therefore, do not think that such a loan can be made.

However, you have subsequently advised me that the school board of the City of Hampton is willing to convey undivided interests in this gymnasium, and the land on which it is located, to the school boards of Elizabeth City County and the town of Phoebus. If this is done, I am of the opinion that separate loans may be made from the literary fund to each of the three political subdivisions, and, if the matter is handled in this way, it may be that the desired objects can be accomplished.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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LOBBYING—Persons Who Receive No Compensation for Their Services Need Not Register as Lobbyists.

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

My dear Mr. Dillon:

I am in receipt of your letter of November 27, in which you inquire if members of the Junior League of Richmond are required to register under the provisions of sections 312-a to 312-i of the Code (Michie, 1942), which sections deal with lobbying before the General Assembly.

Registration is required only of persons "employed to promote or oppose in any manner the passage by the General Assembly of any legislation." Mr. W. Gibson Harris, Attorney for the Junior League, states in his letter to you that the members of the League who may oppose or promote the passage of legislation engaged in this activity purely voluntarily and receive no compensation therefor. It seems to me plain from this fact and others set out in Mr. Harris's letter that members of the League are not "legislative counsel" or "legislative agents" within the meaning of section 312-a and are, therefore, not required to register under section 312-b.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
LOST PROPERTY—Disposition of When Found In Capitol Grounds.

Mr. D. V. Chapman, Jr., Director,
Division of Grounds and Buildings,
312 Finance Building,
Richmond, Virginia.

My dear Mr. Chapman:

This is in reply to your letter of March 21, 1947, in which you state that insofar as possible you have articles lost within the buildings or grounds under the jurisdiction of your Division delivered to your office, where they are recorded and held until claimed by the owner. You request my opinion as to the length of time such property should be held and the appropriate disposition of the same in the event it is not claimed.

There is no statute governing the disposition of such property. In the case of articles found by private individuals and delivered by them to employees of your Department, it is my opinion that you would be justified in returning the same to the finders if they are not claimed by the owners within a reasonable time. This would apply to the camera which you state was left on the fender of an automobile parked in the Capitol Square and was found by the owner of the car. In such cases, I suggest that you take the name and address of the person to whom the property is delivered so that you can advise the owner if he subsequently inquires about the property.

As to property which is not claimed by either the owner or the finder, it is my opinion that you may dispose of the same as you deem proper after a reasonable time. If you consider it advisable, it may be well to hold unclaimed articles having a substantial value until legislation directing the method of disposition can be enacted.

Very sincerely yours,

Abram 1'. Staples,
Attorney General.
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its lien against third parties whose negligence caused the injury to the patient or from proceeding against the employer of the patient under the Workmen's Compensation Law, but any amount received by the Hospital from such sources shall be credited upon the amount of the note.

You also ask if the Hospital impairs its right to collect under the Workmen's Compensation Law by assigning compensation cases to private physicians and leaving it to them to make the necessary reports to the employer or his insurance company.

As long as the necessary reports and statements for services furnished are submitted on behalf of the Hospital as well as the physician, the rights of the Hospital are not prejudiced. However, unless for practical reasons the Hospital considers it best to submit its statement through the private physician, I think the better practice would be to submit the same directly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MEDICAL COLLEGE OF VIRGINIA—Status of President as a Member Ex Officio of College Committees.

April 11, 1947.

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

My dear Dr. Sanger:

This is in reply to your letter of March 31, 1947, in which you state that, under the by-laws of the Board of Visitors of the Medical College of Virginia, the President of the College is ex officio a member of all committees of the Board and Faculty. You ask whether the President should be considered as a member of the committees in order to make a quorum.

It is my opinion that a person who, by virtue of his holding some office, is made ex officio a member of some board or committee is entitled to serve on such board or committee with the full rights and powers of any other members. He should, therefore, be counted in making a quorum. I find nothing in the statutes pertaining to the Medical College that provides otherwise in the case of the President of the College who is ex officio a member of all committees of the Board and Faculty.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

MOTOR VEHICLE LAW—Independent Contractors Hauling U. S. Goods Are Liable For "For Hire" License Tax.

July 18, 1946.

COLONEL C. W. WOODSON, JR.
Superintendent,
Department of State Police,
Richmond, Virginia.

My dear Colonel Woodson:

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

"At present on the highways of the Commonwealth, almost daily, house trailers which are the property of the Federal Government are being trans-
ported from the various localities of shipyards and other Federal installations to other points in the United States.

"Most of this transportation is furnished by trucking companies which may be licensed for "FOR HIRE" hauling; however, part of such hauling is done by private owners of trucks or passenger cars which are not licensed for "FOR HIRE" hauling. Some trucks load one trailer on the body of the truck and tow another. Passenger cars and light trucks tow trailers. Since the trailers belong to the Federal Government, but are towed and hauled by citizens or trucking companies, it is requested that you let us have an opinion as to whether such hauling is a violation in any way of the Motor Vehicle Code of Virginia."

Assuming that the operators of the motor vehicles to which you refer are independent contractors and not employees of the Federal government, I am of the opinion that the fact that they are towing trailers belonging to the Federal government does not relieve them of their liability to the "FOR HIRE" license. In other words, the mere fact that the property which is being hauled by a private owner of a truck or passenger car belongs to the Federal government does not relieve such private owner from the requirements of the Motor Vehicle Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

MOTOR VEHICLE LAW—Reciprocity With West Virginia Respecting Licenses of Persons Living in One State and Working in the Other.

November 8, 1946.

Mr. R. E. Dyche,
Trial Justice,
Covington, Virginia.

My dear Mr. Dyche:

I am in receipt of your letter of October 31, in which you quote the following from the agreement between Virginia and West Virginia, relative to the operation of private passenger cars by residents of the respective states:

"Residents of either State employed within the reciprocating State and who retained their residence in their home state, returning thereto each day or each week-end shall be allowed to operate their private passenger cars within the reciprocating State for the full period of registration."

You desire to know whether this agreement as applied to a particular individual who works in Virginia but maintains his residence in West Virginia continues indefinitely so long as such resident of West Virginia continues to hold the West Virginia license tag for his car and a West Virginia operator's license.

In my opinion your question must be answered in the affirmative. That is to say, a resident of West Virginia who works in Virginia but returns to his home in West Virginia each day or each week-end may operate his private passenger car in Virginia without a Virginia license tag or a Virginia operator's license so long as such person has a West Virginia license tag and a West Virginia operator's license. I might add that this is the construction placed upon the agreement by the Division of Motor Vehicles.

Obviously, the question of whether or not any particular individual is a resident of West Virginia must be determined by the court in the light of the facts in each case.

Sincerely yours,

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

MOTOR VEHICLE LAW—School Buses to Stop Off The Highway If Safe To Do So.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
State Board of Education,
Richmond, Virginia.

My dear Mr. Miller:

This will acknowledge receipt of your letter of July 19, which I shall quote:

"On several occasions the question has arisen relative to school buses stopping, on the traveled portion of the highway, for the purpose of taking on or discharging pupils.

"I shall appreciate having your opinion relative to the legal construction to be put on Section 86(b) of the Motor Vehicle Code of Virginia with reference to school buses."

Subsection b of section 86 of the Motor Vehicle Code of Virginia [section 2154(133) Michie's Code of 1942] provides:

"No truck or bus or part thereof shall be stopped on the traveled portion of any highway for the purpose of taking on or discharging cargo or passengers unless the operator cannot leave the traveled portion of the highway with safety."

This statute applies to trucks and buses generally and would, therefore, seem to include school buses. This statute was before the Court of Appeals in Webb v. Smith, 176 Va. 235, 131 A. L. R. 558, a civil action for damages. There the court said:

"** the statute does not require the operator of a school bus to leave the highway under any and all circumstances before stopping to take on and discharge school children. When the condition of the weather, the highway and the surrounding circumstances render it unsafe so to do, such operators are permitted by the express terms of the statute to stop on the traveled portion of the highway."

Thus, as a general rule, school buses must stop off the traveled portion of the highway. The only exceptions are those justified by the circumstances such as narrated above or similar ones.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Bonds Not Required of Board Members.

HONORABLE WILLIAM SHANDS MEACHAM,
Director of Parole,
Department of Corrections,
Richmond, Virginia.

My dear Mr. Meacham:

I am in receipt of your letter of July 1, in which you ask if members of the Virginia Parole Board and members of the Virginia Board of Pardons and Reprieves should be required to furnish bond for the faithful performance of their duties.

Neither of the Acts creating these Boards, chapter 218 of the Acts of
Assembly, 1942, and chapter 73 of the Acts of the Extra Session of 1945, respectively, requires members of these Boards to give bonds for the faithful performance of their duties, nor is there any other general law which has the effect of requiring such members to give bonds. I am, therefore, of the opinion that no such bonds are required.

If any member or employee of the Board handles or disburses public funds, I am of the opinion that the Board would be authorized to require such member or person to give bond in such amount as to it may appear proper.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


November 1, 1946.

MR. CHARLES P. CHEW,
Official Administrator,
Interstate Parolee Compact,
Virginia Parole Board,
Richmond, Virginia.

My dear Mr. Chew:

To follow up our office conference of October 29, I shall attempt to state the facts of the case as submitted by you and give you my opinion on the legal matters involved therein.

In September 1941, a 19-year-old negro youth named Clifton Oliver who had previously been living with his mother in Richmond went to Newark, New Jersey with his father, where the latter resided. His parents had been separated for some time prior thereto. Some time in 1942, Oliver was convicted of a felony against the laws of New Jersey and committed under an indeterminate sentence to one of its penal institutions. From your correspondence I gather that this conviction gave the New Jersey authorities supervision over Oliver until July 1, 1956. On December 3, 1943, Oliver was paroled by the New Jersey authorities, and under a written agreement executed that day, it was stipulated that Oliver would be allowed to leave the State of New Jersey and make his home with his mother in Richmond, Virginia. He further agreed to come under the parole supervision of the Virginia authorities, and when instructed by the parole department, he would return to the State of New Jersey. The agreement also contains this:

"4. That I hereby waive extradition to the State of New Jersey, and also agree that I will not contest any effort to return me to the State of New Jersey."

On November 14, 1944, Oliver was convicted in the Hustings Court of the City of Richmond of the offense of Housebreaking and sentenced to confinement in the Virginia State Penitentiary for a term of three years. This conviction, of course, constituted a violation of his New Jersey parole. After allowance of the statutory deduction for good conduct, Oliver has completed his term of confinement in the Virginia Penitentiary, and is now being held in the Rockbridge County jail at Lexington pending arrangements to return him to New Jersey for violation of his parole. Some question has arisen with reference to the mechanics of returning Oliver to New Jersey, and you desire my opinion as to whether or not it is necessary to go through the customary interstate extradition proceedings to effect this return.

By the Act of June 6, 1934, Public Law 293, 73rd Congress, 48 Stat. 909, 18 USCA 420, it is provided:
"The consent of Congress is hereby given to any two or more states to enter into agreements of contract for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such crimes and compacts.

"The right to alter, amend or repeal this Act is hereby expressly reserved."


"That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State: Provided, however, that if at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense."

This language is broad enough to meet the instant case and would seem to control it, but the question naturally arises as to whether or not this provision is in conflict with the Federal Constitution and Statutes for an interstate rendition. The Federal Constitutional provision is as follows:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." See also 5278 Revised Statutes, 18 USCA 662, implementing this constitutional provision.

As far as I can ascertain this precise point has arisen in only one case. In Re Tenner 20 Cal., 2d 670 128 P. 2d 338 (1942). There a convict from the State of Washington was paroled and allowed to go to California, provided he would come under California parole authority, which he agreed to do. Later, Washington revoked his parole and sought his return to that State, which Tenner contested in habeas corpus, contending that the only way he could be returned was through extradition proceedings, and that the parolee supervision statute was invalid, because in conflict with the United States Constitution. The contention of the parolee was rejected by the court, one Justice dissenting. The opinion contained this language:

"The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to the extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to
the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly, the parolee detained under the interstate compact has the right to complain by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked to claim that he may only be removed by the method of his choosing."

Of course, a decision on this point involves a Federal question; and the final authority on all Federal questions is the Supreme Court of the United States. It is regretted that the instant case was not appealed there, and until that court passes on the question, the problem will never be finally set at rest.

An Ohio Court of Appeals in dealing with a similar extradition problem said:

"It must be conceded that state enactments which are inconsistent with the federal rendition law would be unconstitutional. On the other hand, the enactment of the federal rendition law in no way prevented the states from either enacting auxiliary legislation whereby the federal rendition machinery might more easily function or enacting laws which set up a simpler system of interstate rendition, provided that such laws in no way interfere with the duty constitutionally imposed upon asylum states to honor requisitions where certain prerequisites are met by demanding executives. It is submitted that the only instance in which a state law could be regarded as inconsistent with the constitutional provision would be where such state law lessened or detracted from this constitutional duty. If, by compact, two states provided for some simple unconventional procedure for the return of fugitives such compact would not be said to interfere in any way with the duty of the governor of an asylum state to return a fugitive in the event that such fugitive is demanded, as under traditional rendition machinery by the governor of a demanding State. A rule to the effect that food may be passed without command from the head of the table is not inconsistent with a rule that it must be passed when so commanded." Culbertson v. Sweeney 70 Ohio App. 344, 350 44 N. E. 2d 807 (1942).

In view of these authorities, I am of the opinion that the parolee, Oliver, can be returned to New Jersey without the necessity of interstate extradition proceedings. The only facts that need be established are his identity, and the identity of the New Jersey agent who seeks him.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Authority of The Governor to Remove Political Disabilities of Pardonee.

HONORABLE WILLIAM M. TUCK,
Governor of Virginia,
State Capitol,
Richmond, Virginia.

Dear Governor Tuck:

This will acknowledge receipt of your letter of March 5 in which you state that on July 9, 1940, Governor Price granted a conditional pardon to one Joe Swindell upon the condition that he "remain out of Virginia." Swindell has
complied with this condition and is now living at Elizabeth City, North Carolina, and appears to have rehabilitated himself in society. He now petitions for a restoration of his citizenship, and you ask my opinion as to whether under existing laws you have the power to grant his petition and if so whether or not Swindell would have the right to return to Virginia.

Swindell was convicted of robbery in April 1932, by the Corporation Court of Norfolk and sentenced to confinement in the penitentiary for eighteen years. Senate Document No. 2 p. 96, Senate and House Documents, Virginia 1942.

§73 of the Virginia Constitution was changed in 1944 so as to allow the General Assembly to set up a pardon board with power to commute capital punishment, grant reprieves or pardons in misdemeanor cases and grant reprieves or pardons in felony cases. Such power or powers when granted would be exclusive. The General Assembly did just this by chapter 73 of the Acts of Assembly, extra session 1945, said Act taking effect on June 1, 1945.

This left unimpaired another right conferred upon the Chief Executive by §73.

"* * * To remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this constitution."
The disability thus removable is the one prescribed by §23 of the Constitution:

"* * * The following persons shall be excluded from registering and voting: * * * persons convicted after the adoption of this Constitution, either within or without this State, of treason or of any felony * * *."

Thus, to remove the political disabilities of Swindell would not entitle him to vote, inasmuch as he no longer is a resident of Virginia. It is difficult to see what right a removal of political disabilities would confer upon him, unless it might probably qualify him to vote under the laws of North Carolina.

In 39 Am. Jur. p. 566, this is said of conditional pardons:

"While a pardon on condition subsequent may sooner or later render the convict a free man, it is not a remission of his guilt, and all the disabilities attending a conviction remain."

I am, therefore, of the opinion that you have the authority under existing constitutional and statutory provisions to remove the political disabilities incurred by Swindell because of his felony conviction, but that the same will not affect a pardon previously granted to him on condition that he remain out of Virginia.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PARDON AND PAROLE—Supplemental Pardon Removing Certain Conditions of Original Pardon is Proper.

April 9, 1947.

HONORABLE ARTHUR W. JAMES,
Commissioner of Public Welfare,
Richmond 19, Virginia.

My dear Mr. James:

For some time I have had under consideration your letter of March 27 with reference to Arthur Lewis Tyson and Elijah Jones, two colored boys, now in the custody of the Virginia Manual School for Colored Boys at Hanover.

It appears that each of these youths has been convicted of felonies and sentenced to the penitentiary. In each case the facts were presented to Governor Darden who issued a conditional pardon to each boy. The language of the
pardons is somewhat similar, so I shall quote a portion of it from the pardon of Tyson:

“In view of the facts presented to me in connection with this case and this boy's age—fourteen years—and upon the recommendation of the Parole Board, I am granting him a conditional pardon upon the express condition that he is immediately transferred to the Virginia Manual Labor School for Colored Boys, Hanover, Virginia, to be subject to the rules and regulations of that institution until he is twenty-one years of age and upon the further condition that at the age of twenty-one years, he will be returned to the penitentiary, unless otherwise directed by the Governor of Virginia and upon the further condition that should he fail to comply with the penal laws of the Commonwealth, this pardon shall be null and void and he will be returned to the penitentiary to serve the remainder of his sentence.”

As you know, the power to grant pardons in felony cases is now vested in the State Board of Pardons and Reprieves. The Constitution does not expressly provide for conditional pardons, but this has been held an incident to the right to grant absolute pardons. These boys are now being held pursuant to the terms of a conditional pardon. I can see no constitutional objection to the granting of another conditional pardon to grant additional privileges to the accused and ameliorating his original punishment pro tanto. Whether or not this should be done in this particular case is, of course, a question of policy, but I can see no question as to the legality of such a procedure.

The question of procedure would depend upon the rules and regulations of the Board of Pardons and Reprieves. I presume that all that would be necessary would be for Jones and Tyson to make application for a removal of these restrictions by a further conditional pardon.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC CONTRACTS—State Agency Cannot Agree to be Bound by Arbiter's Award.

April 16, 1947.

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

My dear Major Youell:

This is in reply to your letter of April 9, 1947, in further reference to the question of arbitration with the firm of R. Stuart Royer in connection with the water project at the State Farm.

You refer to the fact that all of the contracts you have made with the architects and engineers stated that the relationship between the owner and the engineer is as defined in the “Manual on the Working Relationship Between Private Architects and Engineers and the Commonwealth of Virginia” which contains the following provision:

“Whenever any dispute as to any fact may arise between the representatives of the State and any Architect or Engineer, an effort to settle such dispute by arbitration shall be made before resorting to litigation. For the purposes of such arbitration, the State shall select one arbiter, the Architect or Engineer shall select one arbiter, and the two arbiters shall select a third arbiter.”

You ask if, in view of what I had to say in my letter of April 8, 1947, regarding the arbitration of disputes covering the amount of a debt due from the
State, these contracts have improperly contained the clause referring to the Manual.

While, as stated in my letter of April 8, it is my opinion that State officers do not have the authority to enter into an arbitration agreement concerning claims against the State under which the finding of the arbitrators will be final and binding on both parties, I do not consider section 12.23 of the Manual, quoted above, an illegal provision of State contracts. This section merely provides that an effort to settle the dispute by arbitration shall be made and expressly recognizes that, if the findings of the arbitrators are not accepted, resort may be had to litigation. It does not provide that the finding of the arbitrators will be binding upon the State.

While an agreement that disputes between the State and architects will be referred to arbitrators in an effort to settle the disputes and reach an agreement on the basis of their recommendations is, in my opinion, valid, I cannot approve an arbitration agreement providing that the finding of the arbitrators is to be binding upon the State as proposed by Mr. Royer.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC CONTRACTS—When Proposed Contract Need Not Be Submitted to Bidding; Futility. State Agency Not Authorized to Make an Indemnity Promise.

July 17, 1946.

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

My dear Major Youell:

This will acknowledge receipt of your letter of July 10, enclosing a proposed contract between the Chesapeake & Ohio Railway Company and the Department of Corrections. The contract seems to be the standard form used by the railway company for constructing industrial spurs or side tracks, and the proposed contract is to cover such a siding of 860 feet at the State Industrial Farm for Women in Goochland County. Your inquiry is as to whether or not such a contract may be executed on behalf of the Department of Corrections without requiring bidding as provided by section 5779(1) of Michie's Code of 1942, and also whether or not a bond should be required of the railway company before undertaking this work.

Your letter states that the railway company is doing this work on an actual cost basis, since the profit to it will be derived from freight revenues in the future. This seems to fall within the category of routine industrial services provided by a rail carrier. It also appears a reasonable inference that there is no other railroad near the State Industrial Farm for Women, and no other person would be interested in undertaking this work on the same basis as the Chesapeake & Ohio Railway.

I am of the opinion that such a contract as this does not come within the purview of the statute to which you have referred. It is reasonable to assume that no one else would be interested in bidding upon this particular type of work, certainly not on an actual cost basis. Therefore, it would serve no useful purpose to go through the formality of advertising for bids only to follow the letter of the statute. For the same reason, I am of the opinion that the contract does not require a bond.

I call your attention to clause 11 of the contract, in which the industry (State Board of Corrections) agrees to indemnify and hold harmless the railway company from loss, damage, or injury, from any act or omission of the
State, its employees or agents to the person or property of either of the parties hereto and their employees, or any other person or corporation, while on said side track. There is a further provision for joint liability in case of joint or concurring negligence. Since the State is not liable for the torts of its officers and agents the State Board is without any authority to agree to indemnify the Railroad Company for loss due to same. This provision of the contract should therefore be deleted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—When Invoices May be Presented to Comptroller for Payment Before Actual Receipt of Shipped Goods.

March 26, 1947.

MR. ROBERT B. HOGAN,
Business Manager,
State Industrial Farm For Women,
Goochland, Virginia.

My dear Mr. Hogan:

This is in reply to your letter of March 17, 1947, in which you state that the Division of Purchase and Printing has entered into an agreement with the Lehigh Portland Cement Company for the furnishing of cement to your institution which agreement specifies that a ten-cent per barrel discount will be allowed for payment in fifteen days from the date of invoice. You state that you have received these invoices from three to seven days after they are dated and then have had to wait for several days for the shipment to actually reach you. You asked if you would be within the limits of law to certify to the Comptroller the invoices covering the billing of cement upon receipt of the bill of lading from the carrier.

It is my opinion that you would be entirely justified in certifying the invoices to the Comptroller upon satisfactory evidence that the goods had been delivered to the carrier for shipment to you. For this reason, I think that it would be proper for you to certify the invoices to the Comptroller upon receipt of the bill of lading from the carrier since this will enable you to take advantage of the discount allowed which you might be unable to do if you waited until the goods had been delivered by the carrier.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Deposit Thereof in Savings Accounts; Purchase of U. S. Government Bonds.

April 18, 1947.

HONORABLE W. E. BAGWELL,
Deputy Treasurer of Northampton County,
Eastville, Virginia.

My dear Mr. Bagwell:

This is in reply to your letter of April 14, 1947, in which you state that you have certain funds which the Board of Supervisors has designated to be deposited on savings accounts at one per cent per annum in local banks. You ask whether this will be legal under the Virginia statutes.
REPORT OF THE ATTORNEY GENERAL

If the funds are such as are not needed for current expenditures and the banks in which they are to be deposited have been authorized to act as depositories for county funds, as provided in section 350 of the Tax Code of Virginia, I can see no legal or practical objection to depositing the funds on savings accounts. However, I think the deposit agreement with the banks should provide that in cases of emergency the funds may be withdrawn without the usual notice required in connection with savings accounts. I do not think that public funds should be placed on deposit under conditions where they would not be subject to immediate withdrawal in case this would be necessary.

You also request my opinion as to whether the County Treasurer has the right to purchase U. S. Government bonds when authorized by the Board of Supervisors.

I call your attention to Chapter 15 of the Acts of Assembly, Extra Session of 1942, (section 2741a2 of Michie's 1946 Cumulative Supplement to the Code of Virginia), which provides that so long as a state of war exists between the United States and any foreign power the Board of Supervisors of any county may by resolution authorize and direct the Treasurer of the county to purchase out of any monies available in the general fund or in any sinking fund or in any special funds of the county bonds or other evidences of debt of the United States of America. The amount of such purchases is to be prescribed in the solution directing the purchase.

I have previously expressed the opinion that a state of war exists until there has been a ratification of the treaty of peace or a proclamation of peace. It is my opinion, therefore, that the County Treasurer has the right to purchase U. S. Government bonds when authorized by the Board of Supervisors to do so.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC FUNDS—Service Charges Upon Public Accounts.

May 22, 1947.

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

My dear Mr. Latane:

This is in reply to your letter of May 15, 1947, in which you ask if banks have the authority to make a service charge on official checks drawn by the clerk of a court in disbursement of accounts.

I know of no statute which would prohibit banks from making this service charge and, in my opinion, the charge may be imposed if the same was provided for in the deposit agreement under which the account was accepted.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC HOSPITAL—Joint Committee of Town and County Have No Authority to Sell Hospital and Divest Proceeds to a Different Hospital.

June 20, 1947

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

My dear Mr. Butler:

This is in reply to your letter of June 17, in which you request my opinion upon the authority of a commission created jointly by the Board of Supervisors of Alleghany County and the Council of the Town of Covington under the
provisions of Chapter 344 of the Acts of 1946. You state that the commission so created has already purchased a hospital, together with the equipment therein, and that the funds for said purchase have been and are being raised by public subscription and a large part of the purchase price has been donated.

In my opinion, the Act above referred to does not contemplate that the commission created pursuant thereto shall have any authority to sell a hospital which has been established by appropriations of the county or town, or both, or by contributions made pursuant to solicitation of the general public. Such appropriations and solicitations have been made or donated for the specific purpose of acquiring the particular hospital in question, and it would be a complete change in the purpose for which the money was acquired by the commission to permit the sale of the hospital and divert these funds to the acquisition of some other and different hospital or purpose.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility: Member of Electoral Board Does Not Vacate Office Ipso Facto by Accepting Appointment as Postmaster.

May 27, 1947.

HONORABLE LEVIN NOCK DAVIS, Secretary,
State Board of Elections,
3 State Capitol,
Richmond 12, Virginia.

My dear Mr. Davis:

This is in reply to your letter of May 27, in which you request my opinion upon the question whether or not a person who is a member and secretary of a county electoral board, who is appointed as a third or fourth class postmaster in his county, will vacate his office as member and secretary of said board by accepting such appointment.

Section 84 of the Code provides for the appointment of members of the electoral board, and contains this provision:

“No person, nor the deputy of any person, holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board or a registrar or judge of election.”

In Section 86 of the Code relating to the appointment of registrars there is a provision to the effect that the acceptance by a registrar of any other office, either elective or appointive, except that of precinct judge of election, during his term of office shall ipso facto vacate the office of registrar.

In Section 84, there is no provision that the acceptance of an office or post of profit or emolument under the United States Government will ipso facto vacate the office. The prohibition in section 84 seems to be limited to the appointment of a person already holding such an office or post, and I do not believe it can be said that the acceptance of such a post during the term of office would necessarily vacate same.

Sincerely your,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICES—Compatibility: Conditions Under Which Federal Employee May Also be Employed by State.

March 18, 1947.

HONORABLE LEWIS PRESTON COLLINS,
Lieutenant-Governor of Virginia,
Marion, Virginia.

My dear Mr. Collins:

This is in reply to your letter of March 15, 1947, in which you request my opinion upon whether there is any prohibition against the appointment as assessor of real estate under section 242 of the Tax Code of any individual who is employed by the Agricultural Adjustment Administration and receives compensation.

While section 290 of the Code of Virginia provides that no person shall be capable of holding any office of honor, profit, or trust under the Constitution of Virginia who holds any office or post of profit, trust, or emolument under the government of the United States, or who is in the employment of such government, it also contains the following provision:

"* * * The provisions of this section and of any other statute having the effect of prohibiting a State, county or municipal officer or employee from accepting or holding an office, post, trust or emolument under the government of the United States shall not be effective, as to such persons in the armed forces of the United States or as to any State, county or municipal officer or employee accepting or holding an office, post, trust or emolument under the government of the United States when the compensation attached to such post, office, trust or emolument does not exceed the sum of twelve hundred dollars a year, or to any such officer or employee who receives twelve hundred dollars or less a year from the State, county or municipality, during such period as the present state of war exists between the United States and any foreign power."

I have had occasion to rule previously that a state of war exists until the necessary treaties of peace have been ratified. Therefore, if the person to be appointed under section 242 of the Tax Code receives less than $1200 a year either from the Federal Government or from the State, county or municipality, there is no prohibition against his appointment.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICES—Compatibility: Member of Town Council Ineligible to Serve as Judge of Election.

May 27, 1947.

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

My dear Mr. Banner:

This is in reply to your letter of May 23, 1947, in which you ask whether or not a member of the Town Council of Lebanon, Virginia, is eligible for appointment as a judge of a general election, at which election the said party is not a candidate.

Section 149 of the Code provides that "no person shall act as a judge or clerk of any election who is * * * holding any elective office of profit or trust in the State, or in any county, city, or town thereof * * *." In view of this provision, it is my opinion that a member of a Town Council is not eligible to serve as judge of an election.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC OFFICES—Compatibility: Trial Justice (Appointed) May Serve as Judge of Election.  

Judge J. S. Andrews,  
Trial Justice,  
Pearisburg, Virginia.  

My dear Judge Andrews:  

I have your letter of October 23, in which you request my opinion upon the question whether or not the fact that you are a Trial Justice of Giles County would render you ineligible to act as a judge of election while you are holding said office.  

Section 149 of the Code provides that no person holding an elective office of profit or trust shall be eligible to act in the capacity of judge or clerk of election. However, the trial justice is not, in my opinion, an elective office within the meaning of the statute, but is appointed by the Judge of the Circuit Court of his county. It is my view that the words "elective office" as used in this section refer to an office elected by the qualified voters and not one appointed as above indicated.  

Sincerely yours,  

Abram P. Staples,  
Attorney General.  

PUBLIC OFFICES—Compatibility: Registrar May Hold the Appointive Position of Police Justice.  

Mr. Marvin L. Gray, Secretary,  
State Board of Elections,  
Richmond 12, Virginia.  

My dear Mr. Gray:  

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

"Mr. R. A. Jackson, the registrar of the City of Harrisonburg is also holding the office of Police Justice for the city. This is an appointive position.  

"Section 1 of Chapter 178, page 122, of the election laws reads:  

"'The electoral board of any city of the second class, or of any city of the first class having a population of less than fifteen thousand according to the United States census latest preceding, may at any time, in its discretion, appoint a general registrar for such city, who shall be a discreet citizen and a resident of the city for which he is appointed, and such registrar shall not hold any office, by general election, during his term. Said registrar shall hold office for four years from the first day of May next following his appointment, and until his successor is duly qualified, except as hereinafter provided.'  

"Please advise me whether or not Mr. Jackson is holding his job illegally. This office has received a complaint in this case."  

You have correctly quoted section 1 of chapter 178 of the Acts of 1936, as amended. In view of the fact that the office of Police Justice of Harrisonburg is an appointive position, I am of the opinion that Mr. Jackson may legally hold the office of Police Justice as well as that of General Registrar of Harrisonburg.  

Very sincerely yours,  

Abram P. Staples,  
Attorney General.
PUBLIC OFFICES—Compatibility: Trial Justice of County May Serve as Mayor of Town.

HONORABLE CHARLES G. STONE,
Commonwealth's Attorney,
Fauquier County,
Warrenton, Virginia.

My dear Mr. Stone:

I have your letter of June 23, which I quote in full as follows:

"I shall appreciate a ruling on whether the Trial Justice of this County would be prohibited under Section 2702 of the Code from also holding at the same time the office of Mayor of Warrenton, to which he has been recently elected, effective September 1st.

"The statute is rather broad where it employs the expression, 'if any person shall be elected or appointed to two or more offices except as herein provided', etc."

Section 2702, in my opinion, does not have any application either to the office of Trial justice, or that of Mayor of a town. The language quoted in the second paragraph of your letter is followed by the following:

"* * * his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, and if any person while holding any of such offices shall be appointed or elected to any other office, his qualification in such office shall thereby vacate any of the above offices he then holds, except as provided as above."

The section does not enumerate or mention the office of Trial Justice or the office of Mayor of the town, and, in my opinion, has no application to the situation referred to in your letter.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICIALS—Commonwealth's Attorney Not Allowed to Act as Insurance Broker Respecting Insurance Procured by Board of Supervisors; Can Act With Respect to School Board.

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

My dear Mr. Goodman:

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

"I write to ask your opinion as to whether or not a Commonwealth's Attorney, who is agent for insurance companies, writing fire insurance, would be allowed to write insurance policies for the School Board of Montgomery County, on their school property, as well as write insurance policies on county property given by the Board of Supervisors."

Section 2707 of the Code provides in part that no paid officer of a county "shall become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors * * * of the county * * * ." The placing of insurance on county property generally, as distinguished from property of the School Board, is in the hands of the Board of Supervisors, and I, there-
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fore, think that section 2707 would have the effect of prohibiting the Attorney for the Commonwealth, who is a paid officer of the county from being financially interested in insurance contracts on such property.

As to the placing of insurance on school buildings, this comes within the authority of the School Board and I am, therefore, of the opinion that section 2707 would not prohibit the Commonwealth's Attorney from being interested in insurance contracts on such buildings, nor does there seem to be anything in section 708 of the Code, which prohibits certain school officers and teachers from being interested in contracts relating to schools, which would prohibit the Commonwealth's Attorney from being interested in insurance contracts on school buildings.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICIALS—De Facto Official Not Entitled to Salary of Office Until Declared De Jure.

August 23, 1946

HONORABLE C. H. MORRISSETT, Acting Chairman,
State Compensation Board,
Richmond, Virginia.

My dear Mr. Morrissett:

This is in reply to your letter of August 14, 1946, in which, among other things, you state the following:

"The Compensation Board at a recent meeting requested me, as Acting Chairman of the meeting, to communicate with you with respect to the situation which exists in the county of Dickenson involving certain officers with whom the Compensation Board has to deal, to-wit, the treasurer, the Attorney for the Commonwealth, the commissioner of the revenue and the sheriff.

"You are doubtless aware that in July, 1946, the Circuit Court of Dickenson County decided certain election contests. The decision of the court declared null and void the election of the then incumbents in the offices above mentioned, as well as certain other offices, and then the Circuit Court of Dickenson County proceeded to fill the vacancies which were declared to exist in such offices.

"It so happens that Judge A. A. Skeen, of the Circuit Court of Dickenson County, duly certified to the Supreme Court of Appeals that it was improper for him to hear and determine the election contests, whereupon Chief Justice Preston W. Campbell designated the Hon. Joseph L. Cantwell, Jr., Judge of the Corporation Court of the City of Bristol, to preside in the Circuit Court of Dickenson County, beginning the 3rd day of January, 1944, 'in the place of the Honorable A. A. Skeen, Judge of said court, who deems it improper for him to preside in the hearing of certain cases pending in said court, as shown by order entered therein.'

"After declaring the election of certain officers of no effect, the Circuit Court of Dickenson County, the Hon. Joseph L. Cantwell, Jr., Judge, presiding, proceeded to fill the vacancies in the offices involved, stating that it was acting under Section 136 of the Code of Virginia.

"The filling of the vacancies in this manner is being contested by certain parties and relief is being sought in the Supreme Court of Appeals. As I understand it, the relief prayed for is based on the contention that Judge Cantwell had no right to act under Section 136 of the Code of Virginia in the filling of these vacancies, but that Judge Skeen was the proper..."
Judge to fill these vacancies, the latter being the regular Judge of the Circuit Court of Dickenson County and the former being substitute Judge to hear and determine the election contests.

"The Compensation Board is confronted in a very practical way with the following problem: The newly appointed officers are filing salary and expense accounts with the Compensation Board and are asking payment of the State's share out of the State treasury. The Compensation Board is uncertain whether it should certify these accounts to the Comptroller or not, pending final action by the Supreme Court of Appeals, and the object of this letter is to seek your advice on this point.

"It is my view that these newly appointed officers are at least de facto officers.

"It is my understanding that there is no appeal from the decision holding the election void (Code of Virginia, Section 268). This means that the old officers would have no claim for compensation even if the Supreme Court of Appeals were to hold that the newly appointed officers were without right to their respective offices. The dissatisfied parties are not attempting to appeal from the decision of Judge Cantwell in holding the election void, but are asking the Supreme Court of Appeals for a writ of prohibition. It appears also that a proceeding is being instituted in the Circuit Court of Dickenson County asking for a writ of quo warranto. The idea is that the appointments made by Judge Cantwell should be thrown out and that Judge Skeen should make the appointments.

"Thus the whole matter comes to this: Should the Compensation Board, for the time being, approve for payment the salary and expense vouchers of the officers who were appointed by Judge Cantwell and certify the same to the Comptroller for payment of the State's share out of the State treasury? Or, should the Compensation Board withhold its approval and certification of such expense vouchers pending further developments?"

The situation which is presented to the Compensation Board by the facts stated in your letter seems to me to be on all fours with that which confronted the State Comptroller in the case of Norris vs. Gilmer, 183 Va. 367. In that case, the Comptroller was in doubt as to the eligibility of Honorable Robert O. Norris to fill a vacancy then existing in the membership of the State Corporation Commission by reason of the fact that at the time of his appointment by the Governor, or just immediately prior thereto, he was a member of the State Senate. The Comptroller, therefore, in view of the fact that he entertained such doubt, declined to issue a warrant for the payment of the appointee's salary as a member of the Commission. Thereupon Mr. Norris filed in the Supreme Court of Appeals of Virginia an original petition for a writ of mandamus to compel the Comptroller to issue a warrant for his salary for services theretofore rendered by him as a member of the State Corporation Commission. I quote the following from the opinion of the Court in that case as particularly apposite to your problem:

"If the position of the Comptroller be sound and the petitioner's appointment be void ab initio, then the petitioner is merely a de facto officer and is not entitled to the salary attached to the office. 43 Am. Jur., Public Officers, sec. 498, pp. 237, 238, and authorities there cited. That mandamus is an appropriate remedy to test the question thus raised is well settled. 35, Am. Jur., Mandamus, sec. 245, pp. 19, 20; Roanoke v. Elliott 123 Va. 393 414, 96 S. E. 819" (183 Va., at pages 370-371).

The quoted language seems to me to clearly provide the answer to the question you have propounded. If Judge Cantwell did not have authority to appoint the Dickenson County officers, then they are merely de facto officers, and, under the language of the Court above quoted, are not entitled to the salaries attached to their offices.
I have been unable to find any decision in Virginia relating to the personal liability of the members of the State Compensation Board if they should certify for payment a salary which it is later determined the officer is not entitled to receive, where, at the time of such payment, the question of the payee's title to the office is actually involved in litigation in the courts.

Under the circumstances, it is my view that the Compensation Board should follow the precedent set by the Comptroller in the Norris Case, and withhold its certification of compensation until the question of the right of the officers to receive payment has been finally determined.

The Supreme Court of Appeals meets at Staunton on September 9. If there is any doubt in the mind of any of these officers that the present pending proceedings will not result in a prompt determination of his rights, he can undoubtedly secure an early adjudication thereof by filing in that Court a petition for a mandamus against the members of the Compensation Board.

It seems from the provisions of the Appropriation Act of 1946, page 787, that the administrative decision of the right of each of these officers to be paid by the State for official services rests with the Compensation Board. The Comptroller has no discretion to refuse payment of any items of compensation certified to him for payment by this Board. It would seem, therefore, that a petition for a writ of mandamus against the Compensation Board or its members would be an appropriate proceeding to secure a speedy adjudication of the question.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC OFFICIALS—Term of Office Does Not End Until a Successor Has Qualified; Omitted Elections.

HONORABLE H. M. DINSMORE, Mayor,
Town of Ridgeway,
Ridgeway, Virginia.

My dear Mr. Dinsmore:

This will acknowledge receipt of your letter of August 29, the first two paragraphs of which I shall quote:

"We did not have an election in the Town of Ridgeway to elect a Mayor and Councilmen last June at the required time due to the fact that no one filed to run.

"Will you please give us a ruling on the legality of the present Mayor and Councilmen's transactions for the town, beginning September 1, 1946?"

Section 33 of the Virginia Constitution provides in part as follows:

"All officers, elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

Under this provision service after September 1, 1946, is as much a part of the term of office of the incumbents as service prior to that time. All of the official acts performed by the Council and Mayor after September 1, 1946, and before their successors have qualified are just as legal and binding as those performed before that date. Owen v. Reynolds, 172 Va. 304 (1939).

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
PUBLIC WELFARE—Use of Funds Obtained Under Legacy.

May 19, 1947

HONORABLE HUGH B. MARSH,
Commonwealth's Attorney for Fairfax County,
Fairfax, Virginia.

My dear Mr. Marsh:

This is in reply to your letter of May 5, 1947, in which you state that a resident of Fairfax County has died leaving by his will a certain sum of money to the Fairfax County Welfare Board without any conditions or restrictions in connection with the gift. In reference to this matter you further state:

"The Fairfax County Welfare Board desires to deposit whatever it receives from the estate of Mr. Harrison to a separate and distinct account, and the said Welfare Board desires to know whether or not it can designate the beneficiaries of this fund. In other words, if the Board sees fit to help to educate some of the children that it now has under its care and custody beyond public high school, can this be done, or, if the Welfare Board was to determine that it would use this fund in connection with hospitalization of children beyond the powers given it by the State and County for the purpose of expending money, could it do this?"

I find no provisions of statute which would govern the expenditure of such funds by local Boards of Public Welfare. Since the funds are not derived from governmental appropriations, I see no reason why they cannot be deposited in a special account separate from the Board's regular funds and be expended for such purposes as may be compatible with the intention of the testator.

I, of course, am unable to express any definite opinion upon what specific purposes could be said to be within the intention of the testator. In view of the fact that no conditions or restrictions were placed upon the gift by the will, it would appear that any purpose which could be said to be within the general functions of the Welfare Board would be proper. In my opinion, the use of the fund for purposes for which governmental appropriations have not been specifically made would not be objectionable so long as the purposes can be said to be within the general functions of the Welfare Board.

While a mere extension of its normal welfare work beyond appropriations made to the Board would be proper, I do not think that the Board should use the fund for purposes beyond the general scope of its duties, for the testator, in leaving the fund to the Welfare Board without specific instructions that the fund be used otherwise, apparently intended it to be used by the Board for its general welfare work.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Situation Where Locality Spends Money in Excess of Allotment Approved by State Welfare Board.

August 15, 1946

HONORABLE ARTHUR W. JAMES, Commissioner,
Department of Public Welfare,
Travelers Building,
Richmond 19, Virginia.

My dear Mr. James:

I have given careful thought and consideration to the questions raised in a letter to you from Mr. W. L. Murphy, Superintendent of the Norfolk County Department of Public Welfare, which letter you quote in full as follows:
"Our financial statement for the month of June 1946, a copy of which is attached, shows an expenditure of $3684.40 in excess of the allotments approved by your Department. These funds were spent to meet the minimum needs of persons and families residing in Norfolk County who applied to this Agency for assistance and were found to be eligible in accordance with the eligibility standards as set up for the various categories by the Public Welfare Acts of 1938 as amended by later Acts of the General Assembly.

"We wish to call your attention to Part II, Section 7, entitled 'General Provisions and Appropriations', Paragraph No. 97 (1904(60)) 'Local Appropriation', which indicates that it is mandatory that such sum or sums of money which shall be sufficient to provide for the payment of public assistance, shall be appropriated each year by the Board of Supervisors Part II, Section 7, Paragraph No. 98 (1904(61) 'Reimbursement of localities by the State for Old Age Assistance, Aid to Dependent Children and General Relief' indicates very clearly that the Commissioner shall monthly reimburse the County a definite percentage of the local money expended for providing such assistance.

"In view of this we are asking the usual reimbursement on the amount involved."

Your letter to me is accompanied by other correspondence between your office and Mr. Murphy, and also other papers which show pertinent financial transactions relating to the subject, and these I will refer to.

It appears that pursuant to the provisions of the Virginia Public Assistance Act of 1938, as amended, and pursuant to appropriations made by the 1944 General Assembly, allocations of funds for the fiscal year 1945-1946 were made by the State Board of Public Welfare to Norfolk County for old age assistance, aid to dependent children, general relief and administrative expense. These allocations, or some of them, were increased or supplemented from time to time during the year. However, the Norfolk County Welfare Department expended out of funds provided by its Board of Supervisors a sum which, if matched by the State Welfare Commissioner, would exceed the amounts allocated to this county for matching purposes. In the light of this situation you request my opinion upon the three questions hereinafter set forth.

1. If the State Board is possessed of funds which are available for such matching and which can be so applied without depleting funds allocated to and needed by other localities, is it the mandatory duty of said Board to increase the allocations to Norfolk County to reimburse it for the excess expenditures?

The answer to this question requires consideration of the general provisions of the Public Assistance Act viewed as a whole. The 1938 Act appropriated out of State funds $1,538,000 for carrying out its provisions, including the matching and reimbursement of the localities for specified percentages of their expenditures for assistance and relief. The 1944 Appropriation Act appropriated for said purposes out of State funds $1,725,000 for each year of the biennium and out of federal funds $2,000,000 for each year. Section 65 of the Act imposes upon the Commissioner of Public Welfare the mandatory duty of reimbursing the localities "to the extent of one dollar of State money for each sixty cents of local money expended for old age assistance, aid to dependent children and general relief," and also for not less than fifty per cent and not more than sixty-two and one-half per cent of administration costs properly incurred. This mandatory duty, however, is qualified by section 69, which requires general relief funds to be allocated to the localities, either upon a basis of population or of need in the discretion of the Board. The Board has likewise exercised the broad general powers conferred upon it by section 4 of the Act by customarily allocating each year to the counties and cities funds for old age assistance, aid to dependent children and administrative costs. These allocations may lawfully be, and frequently have been, changed from time to time during the year as conditions justify or require. Section 65 of the Act expressly limits the
amount of county and city reimbursements which the Commissioner may make by providing that claims therefor "shall be paid out of funds appropriated by the State and funds received from the federal government for the purposes of this Act."

With respect to the first question above set forth, in view of the statutory provisions referred to, it is my opinion that, if the State Board has funds which have been appropriated to it and can be used as a supplemental allocation to Norfolk County without impairing or depleting needed allocations to other counties or cities, the Board has no discretion in the matter but it is its duty to make the changes in its allocations necessary to reimburse Norfolk County in full or to the extent of the available funds. It will then become the duty of the Commissioner to disburse such funds in accordance with the amended allocations.

2. The second question raised by your letter is whether the State Board may, in its discretion, increase its allocations of funds to Norfolk County by decreasing allocations previously made to other localities which are needed by them to properly discharge the duties imposed upon them by the Act.

I am of opinion that the Board does not possess this discretionary authority. Each county and city is entitled to rely upon the receipt of the funds allocated to it, and where the Board of Supervisors or City Council has appropriated to its Welfare Department the money necessary to match such State allocations and local conditions require the expenditure of all available money, the funds so allocated cannot be diverted to other localities. Of course, if the funds allocated are not matched by an appropriation in any particular locality, or if it develops that the expenditure of the amount allocated to it is not necessary to meet its needs, its allocation may be reduced correspondingly and the excess funds otherwise allocated.

3. The third question, and the principal one raised by Mr. Murphy's letter, is whether the said Virginia Public Assistance Act imposes upon the State a legal liability to reimburse Norfolk County on the established matching basis, for expenditures made in excess of its allocations, even though sufficient funds for the purpose have not been appropriated by the General Assembly.

Mr. Murphy calls attention to the following provision of section 65 of the Act:

"The commissioner shall monthly reimburse each county and city to the extent of one dollar of State money for each sixty (60) cents of local money expended for old age assistance, aid to dependent children, and general relief, under the provisions of this act."

The same section, however, also contains the following provision:

"Claims for reimbursement shall be presented by the local board to the commissioner, and shall be itemized and verified in such manner as the commissioner may require. Such claims shall, upon the approval of the commissioner, be paid out of funds appropriated by the State and funds received from the federal government for the purposes of this act, to the treasurer or other fiscal officer of the said county or city."

It is clear from the provision last quoted that the amount of the reimbursements contemplated by the Act, and which the Commissioner is thereby authorized or required to make, is limited to the funds appropriated for that purpose by each succeeding General Assembly, plus such funds as may be received each year from the federal government. Furthermore, if this Act should be construed as imposing a liability upon the State to make reimbursement for any funds a county or city might expend for the purposes therein set out without regard to its allocations or the funds appropriated by the General Assembly, it would run afoul of section 184-a of the Constitution of Virginia. This section prohibits the contracting of such a liability by or in behalf of the State unless same is approved by the qualified voters of the State expressed at a
general election. No such approval has been given the Public Assistance Act.

Mr. Murphy calls attention to the provision in section 64 of the Act requiring the governing body of each county and city to "appropriate such sum or sums of money as shall be sufficient to provide for the payment of public assistance, including cost of administration, under the provisions of this Act."

His position is that this imposes a mandatory duty on the local governing body to appropriate whatever funds are necessary to provide assistance or relief to all persons in the county who are eligible to receive it under the prescribed standards. But this duty to appropriate money is restricted to such sums as the State Commissioner of Public Welfare has available funds to match under the provisions of the Act. This is made clear by paragraph (d) of section 7, which provides that each local welfare board shall submit quarterly to its governing body a budget containing an estimate of the amount of money needed to carry out the provisions of the Act. It is significant in this connection that the Act provides that this budget, before being submitted, must be approved by the State Commissioner of Public Welfare. This officer could not properly approve a budget larger than an amount he will be able to match. The Board of Supervisors is obviously under no duty to appropriate more than this approved budget calls for. Therefore, the obligation imposed by the Act on the county to provide money is commensurate with and corresponds to the amount of the funds available to the State Commissioner for matching same.

It is my opinion, therefore, that the General Assembly did not intend by this Act to impose any such liability upon the State beyond the amounts appropriated by each session of the General Assembly, and, further, that any Act which did impose any such liability would be, in that respect, unconstitutional.

Yours very truly,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Recovery From Estate of Recipient of Welfare to be Apportioned to State and Federal Authorities in Same Ratio as Grant Made.

HONORABLE ARTHUR W. JAMES
Commissioner of Public Welfare
Department of Public Welfare
Travelers Building
Richmond, Virginia

My dear Mr. James:

I am in receipt of your letter of January 8th in which you refer to the distribution of amounts recovered from recipients of old age assistance or their estate. You point out that this matter is covered by section 1904(19) of the Code (Michie 1942) which reads as follows:

"The local board shall pay into the treasury of its county or city all amounts received from any recipient of assistance, or from his estate. The net amount so received shall be prorated between the said county or city, the State and the United States in the same proportion that the respective governments shall have contributed towards the payment of assistance in such county or city during the period represented by such recovery. When such net amount is prorated, the portions so set aside for the State and the United States shall be paid into the State treasury; from the amount so paid into the State treasury there shall be promptly paid to the United States, so long as such payment shall be required as a condition for financial participation by the United States in the plan for old age assistance provided for by this chapter, one-half of the net amount so collected by the local board."
You further state that when this section was enacted the amount paid by
the United States in cases of old age assistance was 50 per cent of the total,
but since that time the amount of the contribution of the United States has
been increased to 66 2/3 per cent. Your inquiry is, in view of the provisions
of the quoted section, in cases of recoveries from recipients of old age assis-
tance whether or not the United States may be apportioned more than 50 per
cent.

It is plain from a reading of the section that it was the primary intention
of the General Assembly in cases of recoveries that the amounts recovered
should be distributed between the local, State and Federal governments in pro-
tortion to their respective contributions. It is likewise plain that the provision
in the last portion of the section that one-half of the amount should be paid
to the United States was inserted because at the time the section was enacted
the United States was contributing one-half of the amount of assistance. Now
that the United States is contributing 66 2/3 per cent of the amount of assist-
tance, the provision that one-half of the amount recovered be paid to the United
States can not be reconciled with the provision that the recoveries should be
distributed in proportion to the amounts contributed by the participating govern-
ments. It is a well recognized rule of statutory construction that when a statute
contains conflicting provisions that construction should be adopted which will
give effect to the intention of the legislature. My conclusion is, therefore, that
distribution of recoveries of old age assistance should be prorated between the
said governments in the proportion in which they participated in the original
grants, and that if the contribution of the United States was more than 50 per
cent in any case the payment to that government should be increased accord-
ingly.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

PUBLIC WELFARE—Settlement of Claim Against Estate of Recipient of
Public Welfare.

HONORABLE DANIEL WEMOUTH,
Commonwealth's Attorney for Northumberland County,
Heathsville, Virginia.

My dear Mr. Weymouth:

This is in reply to your letter of April 11, 1947, regarding a notice of claim
against the estate of a deceased recipient of old age assistance which has been
recorded by the Northumberland County Public Welfare Board pursuant to
section 1904 (18) of the Code. You state that the amount of the claim is far
in excess of the value of a small piece of land owned by the deceased and that
if a creditor's suit were filed, the Board would do well to net about one-third
of the claim. You ask whether the Board has authority to settle the claim for
approximately one-half of the amount thereof and have the notice on the rec-
ords in the clerk's office marked satisfied.

I am sending you herewith a copy of an opinion dated April 18, 1944, which
I gave to Dr. William H. Stauffer, then Commissioner of Public Welfare, in
which I stated that the State Board of Public Welfare had authority to pre-
scribe regulations covering such compromise settlements. It is my understand-
ing that the State Board has adopted regulations covering this matter providing
that the proposed settlement be first submitted to it for approval. I suggest
therefore, that the local Superintendent advise the State Board of the facts
concerning the proposed settlement and request approval of the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
RECORDATION—Agricultural Chattel Deeds of Trust.  

September 18, 1946.

HONORABLE H. B. McLemore, JR., Clerk,  
Circuit Court of Southampton County,  
Courtland, Virginia.

My dear Mr. McLemore:

This is in reply to your letter of September 12 seeking my opinion on two questions:

First, is there a recordation tax on agricultural chattel deeds of trust filed pursuant to chapter 178 of the Acts of the General Assembly of 1946? In my opinion, there is no recordation tax on such instruments. The statute laying this tax is section 121 of the Tax Code and it provides for such a tax on various instruments which are admitted to record. The statute providing for agricultural chattel deeds of trust states that such instruments are filed for docketing in the clerk's office and there are retained for future public inspection. The noun recordation implies that the instrument is spread upon or copied into the record books, whereas that is not done with respect to agricultural chattel deeds of trust and, therefore, they are not subject to the recordation tax of section 121 of the Tax Code.

Second, is it mandatory for the clerk to docket all agricultural deeds of trust filed pursuant to this Act in the above mentioned book, or if the person so desires can they be recorded in the miscellaneous lien docket?

Subsection (h) of the statute provides in part:

"The clerk of the circuit court in each county shall maintain a separate book to be known as the 'Agricultural Chattel Deed of Trust' in which he shall docket each instrument filed pursuant to this act * * * ."

In view of the plain language of the statute, it is my opinion that it is mandatory for the clerk to docket such instruments in said book.

Very truly yours,

ABRAM P. STAPLES,  
Attorney General.

RECORDATIONS—Agricultural Chattel Deeds of Trust.  

January 10, 1947.

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

My dear Mr. Powell:

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

"The new section of the Code No. 6454-a relative to the docketing of chattel deeds of trust upon livestock, poultry, farm machinery, etc. seems to have been a most troublesome law to the Clerks in Virginia.  

"In many instances chattel deed of trust on livestock, etc. are presented for recordation and the person presenting the same for recordation prefers that they be recorded in the Miscellaneous Lien Book instead of having them docketed in the Agricultural Chattel Deed of Trust Book.  

"Is this section mandatory, or if the person so desires, is it permissible to record the aforesaid chattel deeds of trust in the Miscellaneous Lien Book?"
Section 6454-a of the Code as enacted by chapter 178 of the Acts of 1946 provides in sub-section (h) thereof that the clerk "shall maintain a separate books to be known as the 'Agricultural Chattel Deed of Trust' in which he shall docket each instrument filed pursuant to this Act **.*" In view of the use of the word "shall" in the quoted language, I can see no escape from the conclusion that the chattel deeds of trust filed pursuant to the section must be docketed in the Agricultural Chattel Deed of Trust Book.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Crop Liens Need Not Be Acknowledged as Pre-Requisite to Docketing.

HONORABLE S. B. BARHAM, JR., Clerk
Circuit Court of Surry County,
Surry, Virginia.

My dear Mr. Barham:

This is in reply to your letter of December 20, asking my opinion as to whether or not crop liens executed pursuant to §6452 of the Code must be witnessed or acknowledged before being docketed in your office.

The statute in question merely provides that the agreement shall be in writing, signed by both parties etc., and shall be docketed in the Clerk's Office in a book to be known as "crop lien book." There is no requirement for recordation in the literal sense of that term. Since the requirement with reference to acknowledgments is generally confined to instruments, etc., which are literally admitted to record, that is, spread upon the record books, I do not believe such a requirement is applicable to instruments which are merely docketed.

For that reason I am of the opinion that crop liens are not required to be acknowledged or witnessed.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Chattel Deed of Trust Covering Crops and Livestock.

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

My dear Mr. Switzer:

This will acknowledge receipt of your letter of July 27, with reference to agricultural chattel deeds of trust as provided by chapter 178 of the Acts of 1946.

Specifically your problem is:

"If a deed of trust is given on real estate which, however, includes certain livestock or growing crops, whether the instrument shall be recorded in the deed book only or shall it also be docketed under said chapter 178?"

The Act in question does not seem to provide the answer. Section 3393 of the Code reads in part:
If a deed, deed of trust, mortgage, contract or other writing, conveys, relates to, or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens."

There is no provision requiring instruments under this new statute to be recorded in the miscellaneous lien book, but I believe it would be the safer practice to record the type of instrument you refer to in the deed book and also docket it under this new statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Procedure for Executing Marginal Releases Where Deed of Trust Covers Several Parcels.


HONORABLE HELEN D. CLEVENER, Clerk
Circuit Court of Henrico County,
Richmond, Virginia.

Dear Miss Clevenger:

This is in reply to your letter of December 31, seeking my opinion concerning marginal releases of deeds of trust. Your letter states:

"I have had some discussion relative to partial marginal releases where the deed of trust covers a number of parcels of land. It seems to me under Section 6456 (second paragraph) that when a specified parcel of land is to be released, the note should be produced before the Clerk with the notation on the back that a specified amount has been paid and the described parcel of land is released and signed by the noteholder; otherwise, what proof would I, as Clerk, have that the amount had been paid and what authority to permit the attorney for the lien creditor to execute such marginal release."

The applicable provision of §6456 of the Code provides:

"It shall be lawful for any such lienor, upon the payment to him of a satisfactory part of the debt secured by the lien, to make a marginal release of any one or more of the separate pieces or parcels of property covered by such lien, where the instrument creating the lien includes two or more separate and sufficiently described pieces or parcels, which partial release, or satisfaction, may be accomplished in manner and form hereinbefore in this section provided for making marginal releases, and when made in conformity therewith, such partial satisfaction or release shall be as valid and binding as a proper release deed duly executed for the same purpose."

Upon mature consideration, I agree with your practice that the note should be produced before the Clerk with a notation on the back that a specified amount has been paid before the marginal release is formally executed. In this way you are assured as to who the note holder is and also future transferees are protected with respect to any part payments.

Very truly yours,

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

RECORDATIONS—Reports of Commissioners in Chancery to Examine Settlements of Receivers and Special Commissioners.

October 10, 1946.

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

My dear Mr. Kiser:

I have your letter of October 3, 1946, in which you request my opinion upon the procedure to be followed by the clerk with respect to the recordation of the report of the commissioner in chancery appointed by the court to examine and verify settlements of receivers and special commissioners.

Under the statutes referred to, the commissioner in chancery is required to file his report of his examination and the papers in the cause in which the matter is pending, and also to present the same to the court. I concur in your views that the clerk is not required to record this report until it has been approved by the court. It might be that the court will require certain amendments to be made therein.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

RECORDATIONS—Where Final Settlements of Special Commissioners in Chancery to be Recorded.

January 14, 1947.

HONORABLE JESSE D. CLIFT, Clerk
Circuit Court of Martinsville,
Martinsville, Virginia.

My dear Mr. Clift:

This is in reply to your letter in which you state the following:

"For sometime past it has been the practice of the Court of the seventh Judicial Circuit, where Special Commissioners are appointed to sell real estate and etc., to have recorded as a part of the final decree (the final settlement), and we find this procedure most satisfactory.

"Under Section 6289 of the Code of Virginia as amended in 1946, it requires the accounts of Special Receivers and Special Commissioners be approved by a Commissioner in Chancery and recorded in a book entitled "Settlement of Receivers and Commissioners" as provided in section 6283.

"It is our desire to continue this practice and we will appreciate very much your opinion as to whether or not it is permissible to do so, only as to settlements of Special Commissioners."

§6294 of the Code as amended and re-enacted by chapter 223 of the Acts of Assembly of 1946, provides:

"* * * The Clerk of every such court shall procure, at the expense of his county or corporation, a book, to be called 'Settlements of Receivers and Commissioners', wherein he shall record such reports when approved by the court, * * * ."

In view of this provision, I believe it was the intention of the legislature that the accounts of special commissioners should not be recorded as a part of the final decree in the chancery order book, but when approved by the court
as outlined in the new statute should be indexed and recorded in the new book entitled “Settlement of Receivers and Commissioners.”

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


August 16, 1946.

Dr. L. J. Roper,
State Health Commissioner,
Richmond 19, Virginia.

Dr. L. J. Roper,

This will acknowledge receipt of your letter of August 13, with reference to chapter 164 of the Acts of the General Assembly of 1946, which is an Act regulating refrigerated locker plants and providing standards of sanitation for the same. See Acts 1946, page 241. You indicate you have had a number of inquiries concerning this Act and would like to know whether or not it is in conflict with section 1554-i of Michie's Code of 1942 prohibiting physicians, etc. from issuing certificates of freedom from venereal diseases except in general examinations and marriage license certificates.

The 1946 Act to which you refer requires food handlers, etc. in said refrigerated locker plants to have a health certificate that they are free from contagious or infectious diseases, which certificate is based upon examination of a physician duly accredited by the State Board of Health. Without saying directly whether or not there is a conflict between the two, I think I can resolve your doubts by saying that the 1946 Act is in no way qualified or restricted by the previous statute. In other words, if there is a conflict, the 1946 Act is to that extent a repeal of the prior enactment and applies with all of its force and vigor.

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

SANITARY DISTRICTS—Status of Incorporated Town Lying Within Proposed District.

March 10, 1947.

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

My dear Mr. Marsh:

This is in reply to your letters of March 4 and March 5, 1947, in which you state that under the provisions of section 1560-m of Michie's Code of Virginia a petition has been presented to the court requesting the creation of a sanitary district in Fairfax County. You state that attached to the petition is a metes and bounds description of the area to be included in the proposed district, within the confines of which is located the incorporated town of Vienna. You ask whether or not the law excludes an incorporated town when a sanitary district is created under the terms of section 1560-m et seq. of the Code.

The statute makes no specific reference as to the inclusion or exclusion of incorporated towns. I agree with you that, if the inhabitants of an incorporated town included within the description of the proposed district desire that the town
be excluded, they should proceed under section 1560-n of the Code, which reads in part as follows:

"Any person interested may answer the said petition and make defense thereto; and if upon such hearing the court, or the judge thereof in vacation, as the case may be, be of the opinion that any property embraced within the limits of said proposed district will not be benefitted by the establishment of such district, then such property shall not be embraced therein."

Under this provision the court can consider all matters bearing upon the question of whether or not the town will be benefitted by the establishment of the district and can determine whether or not it should be embraced therein.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Approval of School Board Expenditures by Board of Supervisors Necessary.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

On April 15, 1947, you sent to me a copy of a letter you had received from Mr. W. R. Beazeley, Division Superintendent of the Alleghany County Public Schools, in which he stated:

"The Boiling Spring District of this County has retired all its bonds and is free of all debts. The Board of Supervisors plans to discontinue the District levy for the coming fiscal year, but this leaves a balance of approximately $6500 which is unencumbered."

Mr. Beazeley asked whether this $6500 could be legally spent for architect fees to plan additional school buildings in the District, and you request my opinion upon this matter.

Section 656 of the Code of Virginia provides that county school boards shall have authority to incur only such costs and expenses as are provided for in their budget, without the consent of the tax-levying body. It is my opinion, therefore, that, unless the budget of the School Board included an item for architects' fees for the planning of additional school buildings in the Boiling Spring District, the $6500 referred to by Mr. Beazeley cannot be spent for this purpose without first securing the approval of the Board of Supervisors.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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

My dear Mr. Whitehead:

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

"The School Board of Pittsylvania County is the owner of about four acres of land in the Town of Chatham, which has heretofore been used for school purposes, however, several years ago the building burned on the property and a new building was constructed at another location and the property is no longer used by the School Board.

"The School Board has been approached, and is considering donating this land, or selling the same at a very nominal consideration to a nonprofit organization on which is to be constructed a building as a memorial for World War Veterans, and which building will be used as a public recreation building and auditorium.

"The question has been raised as to whether or not the County School Board can convey this property for this purpose under the statute, or whether it would have to be sold.

"The second question which was raised, is whether or not the School Board can convey this property to the Board of Supervisors of Pittsylvania County, either as a gift or at a very nominal consideration.

"I would appreciate very much your giving me the facts, and your advice on this so I can advise the Board."

The disposition of real estate belonging to a county school board is controlled by sections 678 and 2723 of the Code, to which I refer you. Under section 2723 the school board may sell and convey real estate of the character you mention subject to the approval and ratification of such sale by the circuit court of the county or by the judge thereof in vacation. And under section 678 the school board may sell property not exceeding $500 in value after advertising for not exceeding ten days or by appropriate handbills posted in accordance with the section.

I know of no authority which the school board has to give away its real estate.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Appointment of Substitute Clerk or Agent of School Board; Not Authorized. June 11, 1947.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

My dear Mr. Bennett:

I have your letter of May 29, which I quote as follows:

"As a result of a conference with Mr. John D. Meade, superintendent of schools of the City of Petersburg I received the following letter from him dated May 27, 1947:

"Under provisions of Chapter 58, page 82, Acts of the Assembly for
1946, there is no provision made for the appointment of an acting clerk or an
acting agent in the event of the illness or absence of the clerk or agent of
the School Board. In accordance with my conversation with you today, I
am requesting that you seek for me the opinion of the Attorney General as
to whether or not it is legal for the School Board to name an individual to
act in the event of the absence of the clerk and to name an individual to act
in the event of the absence of the agent of the Board, these individuals to be
named by the Board at the same time it names the Clerk and agent. Also I
would appreciate your having the Attorney General render an opinion on
whether or not the same individual could be appointed to act in either the
absence of the clerk or in the absence of the agent. Please understand that
I assume that this individual would be bonded in the amount the Board felt
to be necessary. Your kindness in making every effort to obtain this infor-
mation for me in time for our School Board meeting Wednesday, June 4, at
4 p.m. will be appreciated very much.

“I should appreciate it very much if you would give me your opinion with
respect to the following questions:

1. Could the School Board—under the provisions of Chapter 58, page
82, Acts of 1946—appoint an individual as acting agent to serve when the
agent who will be appointed under that chapter is absent for any reason?

2. Does the School Board have the power to appoint an acting clerk
who would have the authority and could fulfill the duties of the clerk in the
event of absence of the clerk?

3. Could the School Board appoint one individual to act in the dual
capacity of agent or clerk in the absence of either the regular agent or
clerk?”

In my opinion, the answer to all three of these questions is in the negative,
for the reason that the effect of the action proposed would be to appoint a sub-
stitute officer in advance, and the statute makes no provision for the appointment
of such a substitute. Statutes relating to some of the public officers, such as that
of trial justice, do provide for the appointment of substitutes to act in the event
of the absence or incapacity of the regular officer. In the absence of such
statutory provision, I do not believe that a substitute officer can be appointed.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—State Board of Education has No
Authority to Alter Law Prescribing Minimum Eligible Age for Admis-
sion to School

April 23, 1947.

HONORABLE R. C. HAYDON,
Assistant Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Haydon:

This is in reply to your letter of April 23, 1947, in which you state that Mr.
G. Tyler Miller, Superintendent of Public Instruction, desires my opinion upon
whether the State Board of Education has the authority to provide by regulation
that a child may enter the primary grades at the opening date of school if he be-
comes six years of age at a later date during that session. You quote a resolution
of the State Board providing that in the discretion of local School Boards any
pupil may be considered six years of age at the opening of the school if he will
reach his sixth birthday before the first day of November, and you ask if this
regulation is legal.
Section 682 of the Code provides in part as follows:

"*** Persons six years of age may be admitted to primary grades and persons under six years of age to such kindergartens as may be established by the local school authorities and operated as a part of the public school system ***."

In view of the provisions quoted above, it is my opinion that a child cannot be admitted to the primary grades until he is six years of age, and that the State Board of Education has no authority to alter this provision by regulation.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Bonded Indebtedness of a Town Does Not Become Debt of The County.

HONORABLE STIRLING M. HARRISON,
Acting Commonwealth's Attorney,
Leesburg, Virginia.

My dear Mr. Harrison:

This is in reply to your letter of August 17, concerning the legality of the proposed action of the Board of Supervisors of Loudoun County in assuming a school bonded indebtedness of the Town of Leesburg. Enclosed with your letter is one addressed to you by the Honorable O. L. Emerick, Division Superintendent of Schools of Loudoun County, setting forth various relevant facts which he desires brought to your and my attention in this matter.

The gist of his argument seems to be that, since school districts were abolished by a 1922 statute and the various district properties transferred to the county school boards, following which county schools have been operated as an entity irrespective of district lines, this indebtedness should be considered an indebtedness of the entire county, and that it is entirely proper that the Board of Supervisors should assume payment of the same without a vote of the people, as required by section 115-a of the Virginia Constitution. His argument is a very fair and plausible one. However, I do not believe it controls the instant case as I shall attempt to point out hereafter.

This particular bond issue is treated at great length by chapter 15 of the Acts of the General Assembly of 1922, page 17 et seq., this statute being amended and re-enacted by chapter 189 of the Acts of 1922, both Acts being emergency ones. The Act abolishing district school boards and transferring their functions to county school boards, effective September 1, 1922, is chapter 423 of the Acts of 1922. Section 4 of that Act provides in part:

"*** But nothing in this act shall be construed as affecting the administration of the public school system in any city or in any town now constituting, or which may hereafter be constituted, a separate school division in pursuance of law.

"*** Nothing in this act shall be construed to affect the present plan of levying district as well as county school taxes nor to affect the obligations of any district for bond issues for school purposes or other debts peculiar to that district."

At that time the Town of Leesburg was a separate school district by virtue of chapter 280 of the Acts of Assembly of 1895-96, page 317. This Act was amended and re-enacted by chapter 36 of the Acts of 1922. This condition seems to exist even at the present time, for chapter 316 of the Acts of 1944, amending and re-enacting section 653-a(2), provides in part:
REPORT OF THE ATTORNEY GENERAL

"*** All special school districts and special town school districts except special school districts for the town of Leesburg of Loudoun county ***, which are hereby preserved, are hereby expressly abolished ***." (Italics supplied)

All of these statutes manifest a continuing purpose to leave the Town of Leesburg as a special school district, separate and apart from the others. Cf. Town of Leesburg v. Loudoun County School Board, 181 Va. 279 (1943). This I think is an answer to Mr. Emerick's argument about the consolidation of the districts.

Of course, the constitutional provision to which I have been referring has only been effective since 1928 and, if there is any statute prior to the effective date of this constitutional provision allowing the county to assume this indebtedness, it would certainly prevail. Subsequent to 1928 I do not see how this indebtedness could become an obligation of Loudoun County without following the provisions of this section. This does not mean, however, that the Board of Supervisors could not make payments on this obligation out of its current budget for any one fiscal year.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Surplus From Bond Issue to Build New School May be Used to Repair Old Building on School Grounds.

August 26, 1946.

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

My dear Mr. Butler:

This is in reply to your letter of August 22, in which you state:

"Sometime prior to 1940 a bond issue in the sum of one hundred and fifty thousand dollars ($150,000.00) was voted for the erection of a new high school in the Town of Covington, Virginia. This fund was matched by P. W. A. fund of the federal government (I do not know the ratio). The two funds were then pooled and the building was constructed. A surplus of approximately three thousand dollars ($3,000.00) remained in said fund after said construction."

It further appears that there is a brick dwelling house located on the school lot and the School Board wishes to use it in connection with the original building for school purposes. You desire my opinion as to whether or not the surplus of $3,000 from the bond issue can be used for renovation and improvement of the brick dwelling house.

If the brick dwelling house is a school project, as it appears to be, and if it is to be used in connection with the high school, I see no objection to using the surplus from this bond issue for such purpose.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS AND SCHOOL BOARDS—Five Acres Within a City is Maximum Area Which May Be Condemned for Joint City-County School.

December 24, 1946.

HONORABLE C. TYLER MILLER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of December 23rd stating:

"I would appreciate receiving a letter from you giving your opinion as to whether or not a county and a city can condemn over five acres in a city for a joint school."

The concluding clause of §669 of Michie's Virginia Code of 1942 is to this effect:

"* * * but no parcel of land thus condemned shall exceed fifteen acres for any one school in a county, nor five acres in a city."

It is my opinion that this provision controls and that five acres is the maximum which may be condemned within a city for a joint county-city school.

Prior to 1942, the five-acre limitation was applicable to both county and city schools. By virtue of chapter 68 of the Acts of 1942, §669 was amended, "So as to permit condemnation in counties of parcels of land not exceeding fifteen acres."

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—No Added Compensation for Members Serving On Joint County Committee.

May 19, 1947.

MR. PAUL HOUNSHELL,
Division Superintendent of Schools,
Culpeper, Virginia.

My dear Mr. Hounshell:

This is in reply to your letter of May 9, 1947, in which you state that the counties of Culpeper, Orange, Madison and Rappahannock have agreed to operate a joint high school under the provisions of section 670 of the Code, as amended in 1946, and that a joint committee for the control of this school, composed of a member of the School Board of each of said counties, has been set up pursuant to regulations adopted by the State Board of Education under that Code section.

You ask whether provisions can be made in the budget set up for the operation of the joint school for the payment of salaries and travel expenses to the members of the joint committee and to the clerk of the committee. As you point out in your letter, each member of the committee receives a salary from his individual Board. The question is whether they can be compensated for the additional time and expense in acting for the jointly owned school, which is financed by appropriations from the respective Boards.

Such committees of joint control do not have the same legal status as regular School Boards, as they are simply committees composed of representatives from the respective Boards which act on behalf of said Boards in connection with the management and control of the jointly owned school. Since neither the statute nor the regulations of the State Board contain any express provision regarding the payment of compensation or expenses to the members of the
committee, it is my opinion that the committee does not have the authority to fix and set up in the budget for the joint school the amounts they will be paid. Moreover, under section 653a1 of the Code, County School Boards are limited to one hundred and eighty dollars per year as the annual salary that can be fixed for members of the Board. While the services performed by a member of a School Board as a member of a joint committee for control of a jointly owned school may impose additional duties upon him, they are performed as a member of his individual Board. Section 653a1 also allows each School Board to pay mileage to each member for each day he is in attendance upon meetings of the Board not to exceed five cents per mile. While meetings of the joint committee for control are not strictly meetings of each individual Board, the members meet on behalf of their respective Boards and are performing duties for their Boards. It is my opinion that each individual Board may, in its discretion, consider meetings of the joint committee as meetings attended on its behalf by its respective member and reimburse him for his mileage out of its funds.

Since the regulations of the State Board of Education authorize the employment of a person not a member of the committee, as a clerk, it is my opinion that the committee can fix the salary of said clerk, which can be set up in the budget for the joint school as a part of the administrative costs of the same.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Board of Supervisors May Cause a Referendum to be Had Before Approving Loan From Literary Fund.

January 7, 1947.

MR. MACON F. FEARS,
Division Superintendent of Schools,
Victoria, Virginia.

My dear Mr. Fears:

I am in receipt of your letter of December 30, from which I quote as follows:

"Lunenburg County is approaching the stage where an application for a literary fund loan of $300,000 will be presented to the Lunenburg County Board of Supervisors, and there is a possibility that this application may not be approved by them. The Supervisors are of the opinion that an obligation of this size should be decided by the voters of Lunenburg County. I am writing to ask your opinion in regard to the Lunenburg County Board of Supervisors allowing the School Board to borrow $300,000 from the literary fund should a majority of voters vote for a bond issue for this amount."

If the Board of Supervisors desires to have a referendum for its guidance in approving or disapproving the application for a loan from the literary fund. I know of nothing to prohibit the Board from directing that such a referendum be held. However, it is within the discretion of the Board to approve an application for a loan from the literary fund without such a referendum.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS AND SCHOOL BOARDS—No Authority Possessed by Division Superintendent to Approve Teacher in Denominational School.

October 2, 1946.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

This will acknowledge receipt of your letter of September 26th asking my opinion as to whether or not a Division Superintendent of Schools has the responsibility of approving a teacher for a denominational school being operated in his area. It appears that the teacher in question does not have the qualifications prescribed by the State Board of Education for a teacher in the public schools, and does not hold a Virginia teaching certificate.

The question arises by virtue of the compulsory attendance law, Section 683 of the Code of Virginia as amended, the first paragraph of which is:

"Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the seventh birthday and have not passed the sixteenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualification prescribed by the State Board of Education and approved by the division superintendent in a home, and such child, or children, shall regularly attend such school during the period of each year the public schools are in session and for the same number of days and hours per day as in the public schools."

The antecedent of the compulsory attendance law in its present phraseology was Chapter 381 of the Acts of Assembly of 1922, pp 641 et seq. It said:

"Section 1. Every parent, guardian, or other person in the State of Virginia, having control or charge of any child, or children, who have reached the eighth birthday and have not passed the fourteenth birthday, shall send such child, or children, to a public school or to a private, denominational or parochial school or have such child or children taught by a tutor or teacher in a home, and such child, or children, shall attend regular such school during the period of each year the public schools are in session and for the same number of days as in the pubh schools."

In the school law revision of 1928 (Chapter 471 Acts of Assembly of 1928 pp. 1186 et seq.) this act was repealed, but its language was carried over in Section 683 of the Code as amended.

The clause which we are now construing was then added to the law, it being placed immediately after "tutor or teacher" and before "in a home."

Since "a tutor or teacher in a home" was an alternative to a private, denominational or parochial school, I cannot see how the amendment was intended to reach those institutions.

A literal reading of the statute in question indicates that the teacher-qualification provision is applicable only to a tutor or teacher in a home. I cannot spell out of it an intention on behalf of the legislature to give the Division Superintendent and the State Board of Education power over private, denominational or parochial schools. I realize that it is a very commendable objective to see that children who attend private, denominational or parochial schools shall receive instruction at the hands of persons who are equally as well qualified as those holding teacher positions in the public school, but I do not believe we can attain that end through a construction of the compulsory attendance law.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
SCHOOLS AND SCHOOL BOARDS—Evidence Necessary to Show That Locality is Matching Increased Salary of Teachers.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
State Board of Education,
Richmond 16, Virginia.

My dear Mr. Miller:

This is in reply to your letter of February 25th seeking my opinion as to the meaning of a portion of an Act approved January 18, 1947, appropriating additional State funds for public schools. The portion of this Act now in question is as follows:

"No county or city shall receive funds allocated to it under this item of this Act until the school board of such county or city has certified to the satisfaction of the State Board of Education that such county or city has provided an increased amount from local funds for increasing the salaries of teachers and/or other instructional personnel which amount shall be not less than thirty per cent (30%) of the amount made available for such county or city under the provisions of this item of this Act."

Your inquiry is:

"Does this provision for local matching funds require that a supplemental appropriation for teachers' salaries be made to the local school board by the Board of Supervisors or City Council, or will this condition be met if the school board provides the additional matching funds for teachers' salaries from a surplus in the school funds or by transfers from other unexpended items of the current school budget?"

I am of the opinion that this Act has been complied with when the local school boards provide such funds from existing surpluses or unexpended items in current budgets.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—County Not to Withhold Funds From Town Which Leases Private Property to Provide Extra Space Necessary.

HONORABLE H. P. BURNETT,
Commonwealth's Attorney for Grayson County,
Galax, Virginia.

My dear Mr. Burnett:

This is in reply to your letter of April 3, 1947, in which you state:

"The present school building in the Town of Fries, this County, is inadequate to take care of all the school children, and the officials of the Town have requested me to get an opinion from you as to whether State and County school funds could be withheld from the Town if the Town should provide for some extra class rooms in a privately owned building near to but not adjoining the school building."

I find no statutory provision under which State and County school funds can be withheld from the Town because it provides extra class rooms in a privately owned building when that is necessary to adequately take care of the
school children of the Town. In my opinion, such action furnishes no ground for withholding such funds.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Calculation of Amount Due by County to Town School District.

HONORABLE ROY C. THOMPSON,
Commonwealth's Attorney for Washington County,
Abingdon, Virginia.

My dear Mr. Thompson:

In your letter of May 16, 1947, you state that the town of Abingdon is a separate school district within Washington county and that a number of pupils living in the county outside of the town go to school in the town district. You ask whether, in computing the amount to be paid by the county to the town for the schools in the district, all pupils attending the town district school, including pupils coming from outside of the district, should be considered or whether only those pupils who actually live in the town school district should be counted.

Section 653a3 of the Code, among other things, provides:

"* * * and the county treasurer shall pay over to the town treasurer a proportionate amount of all school funds determined by the ratio of the average daily attendance for the preceding school year in the town district and in the county."

It is my opinion that under this provision the actual number of pupils attending the town district school should govern and that those pupils coming from outside the district should be counted in determining the ratio of the average daily attendance in the town district and in the county.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Separate Town School District Cannot be Abolished by Action of Town.

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

My dear Mr. Thompson:

This is in reply to your letter of March 26, 1947, in which you state that the Town of Abingdon is a separate school district and that it proposes to borrow $75,000 from the State Literary Fund to construct a new school building for colored children. You also state that some consideration is being given to the question of abolishing the separate school district. You ask, if the separate school district is abolished, would the Literary loan remain the obligation of the Town of Abingdon or will it become an obligation of the Washington County School Board.

Section 653-a-2 of the Code authorizes towns of not less than 1000 population to become a separate school district, but I find no statutory authority for a
town which has once made such election to revoke such action, even with the consent of the State Board of Education. It is my opinion, therefore, that the Town of Abingdon cannot be abolished as a separate school district in the absence of further legislation. Since this is so, the problem as to whether the Literary loan would become the obligation of the County School Board cannot arise at this time.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Magisterial District Not Eligible To Be a School District.

HONORABLE G. TYLER MILLER,
Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

This is in reply to your letter of March 28th enclosing copy of a letter to you from the Honorable A. S. DeHaven, Superintendent of Schools of Northampton County. It appears that various citizens of Cape Charles and of Capeville Magisterial District, in which Cape Charles lies, have petitioned the County School Board of Northampton County to set up Capeville as a separate unit for school purposes, pooling their funds and resources and operating their schools. Mr. DeHaven takes the position under §653a2 of Michie's Code of 1942 that the county school board has no legal authority to act on this petition, and you request my opinion in the matter.

§133 of the Virginia Constitution is in part:

" ** Each magisterial district shall constitute a separate school district, unless otherwise provided by law and the magisterial district shall be the basis or representative on the school board of such county or city, unless some other basis is provided by the General Assembly; ** ."

To use the language of this provision it has been "otherwise provided by law." By chapter 423 of the Acts of Assembly of 1922, the original predecessor of §653a2, district school boards were abolished and their powers and duties were transferred to the county school boards.

In speaking of this statute, the Court of Appeals said in Gilbert v. County School Board, 137 Va. 109, 113:

"Its real object was to emphasize the abolition of the separate school districts as units of administrative operation and the establishment for that purpose of county school boards."

The short of the matter is simply this: Constitutionally a magisterial district could be a separate school district, but the legislature has not seen fit to so make it. Cf §653a2. Until the General Assembly so authorizes, it is my opinion that Capeville Magisterial District cannot be a separate school district for the purposes of operation of schools lying within same.

Very truly yours,

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

SCHOOLS AND SCHOOL BOARDS—Levy of Tax by Incorporated Town Which However is Not a School District.

March 27, 1947.

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

My dear Mr. Butler:

This is in reply to your letter of March 20, 1947, in which you request my opinion upon whether the last paragraph of section 698 of the Virginia Code as amended by the Acts of 1946, which authorizes the governing body of incorporated towns to levy a tax for school purposes, applies to any town or whether it applies only to towns constituting a separate school district for the purpose of maintaining and operating schools:

This provision of section 698 reads as follows:

"The governing body of any incorporated town in the State is authorized to levy an additional tax on all the property in the town, subject to local taxation, at such rate as it may deem proper, but in no event more than one dollar on the one hundred dollars of the assessed value of property in the town subject to taxation by the local town authorities, for the support and maintenance, and capital outlay of the public schools in the town; or, in lieu of such levy, the governing body may make a cash appropriation out of the general town levy of an amount not more than the maximum amount which would result from the school levy for the support and maintenance of the public schools in the town. Nothing herein shall be construed as raising or abrogating any maximum tax rate limit provided in any city charter."

The language of the statute is broad enough to include any incorporated town in the State and contains no provision indicating that it is applicable only to towns constituting a separate school district. It is my opinion, therefore, that it applies to any incorporated town whether or not the same be a separate school district.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Title to School Abandoned by a Town School Board.

December 17, 1946.

HONORABLE ERNEST W. GOODRICH,
Attorney for the Commonwealth,
Surry, Virginia.

My dear Mr. Goodrich:

This is in reply to your letter of December 13, from which I quote as follows:

"A number of years ago a school was erected in the town of Claremont with funds raised by a special bond issue to be repaid by a special levy in the town of Claremont and in a special school district outside the corporate limits of the town. The town had at that time its own school board.

"Subsequent to that the County School Board took over the operation of the Claremont School. At the present time the building is not being used for school purposes at all, the children being transported to Surry.

"The question arises as to who owns the Claremont School property.
From an examination of section 676 of the Code it is my conclusion that the title to this property vested in the County School Board by operation of law at the time the County School Board took over the operation of the school.

"In view of the fact that the Claremont School District was somewhat of a hybrid set-up, consisting of the town and a part of the magisterial district adjoining the town, there may be some doubt as to whether the term 'district' as used in section 676 covers this type of district."

After considering section 676 of the Code I agree with the conclusion reached by you. It seems to me plain from this section that the title to all public school property of the county, unless inconsistent with the grant or devise of any particular property, was vested by operation of law in the County School Board by the amendment of the section in 1928.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Tuition; When Chargeable.

MR. F. E. DEHAVEN, Superintendent,
Radford City Schools,
Radford, Virginia.

My dear Mr. DeHaven:

Your letter of May 29 asks if tuition can be charged where a child attends a public school under the following circumstances. His home is in Eastern Virginia, but he has been in Radford attending school this school session. His parents live in Eastern Virginia, but he has an uncle in Radford, with whom he has lived during the school session. The uncle, a Doctor, has been giving him medical treatment which he is unable to obtain at home, and has agreed to assume the full responsibility and support of the child. The child has been listed as a dependent of the uncle with the Bureau of Internal Revenue.

If there has been a permanent change in the care and custody of this child from his parents to the uncle, then the child can attend the public schools where the uncle resides without any tuition charge. But if this is just an arrangement whereby the child spends the school session with the uncle and then returns to the parents, then tuition should be charged.

Whether this is a permanent change or a temporary arrangement is a question of fact. Dr. Dean’s letter seems to indicate there has been a permanent change, and he is, in reality, taking the place of the parents of this child. If this is correct, then you may not charge any tuition.

Very sincerely yours,

ABRAM P. STAPLES.
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Town May Charge Tuition of County Resident Even Though He Owns Real Estate in Town.

HONORABLE G. TYLER MILLER, Superintendent of Public Instruction,
Richmond, Virginia.

My dear Mr. Miller:

This will acknowledge receipt of your letter of August 22, concerning an inquiry you have from Mr. K. P. Birkhead, Division Superintendent of Washington County. His problem is this:
"There has been a question raised off and on for many years, if people living outside of the town of Abingdon but owning property in the town of Abingdon have the right to send their children to the Abingdon schools without paying tuition charges. Abingdon constitutes a separate town district."

In answering your opinion, I am assuming that the Town of Abingdon, with the approval of the State Board of Education, was constituted a separate school district not for the purpose of representation on the County School Board, but for the purpose of being operated as a separate school district under a Town School Board as provided in section 653a2.

It would appear to me that the answer to this matter is contained in sub-section (d) of section 672 of the Code, which provides:

"*** the school board of a town constituting a separate school district and operated by a school board may charge, under regulations prescribed by the State Board of Education, tuition for pupils from any district of the county or from another county attending high school in said town provided such charge shall, in no case, exceed the actual per capita cost for instruction and maintenance in the high school department ***."

I have been able to find no statute which prescribes a property ownership qualification. In the absence of such, I do not believe that the ownership of property by a person residing without the town would entitle such person to send his children to school within the town school districts.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SCHOOLS AND SCHOOL BOARDS—Tuition Not to be Charged by City for Non-Resident Pupil Attending School Operated by State College Located Therein.

February 19, 1947.

Mr. F. E. DEHAVEN, Superintendent,
Radford City Schools,
Radford, Virginia.

My dear Mr. DeHaven:

This is in reply to your letter of February 14, 1947, concerning the McGuffey Training School, which is a part of Radford College, a teacher training institution.

You state that Radford College maintains this school on the campus for 160 elementary school children from the first grade through the sixth grade. The College maintains the building, pays for all the upkeep and four of the teachers. The School Board of the City of Radford pays the salaries of three teachers.

You further state that the City of Radford charges tuition for all pupils attending its schools who live outside the corporate limits of the city. You ask whether the city has a legal right to charge tuition for those pupils attending the McGuffey Training School, since the city pays the salaries of three of its teachers.

In your letter you do not set forth the terms of the agreement or arrangement between the College authorities and the city under which this school is operated, but I judge that children living in Radford may attend the school free of charge and that the city pays the salaries of three teachers in order to secure an adequate teaching staff. I assume that your question as to the right of the city to charge tuition concerns only those pupils living outside of the city.
If I am correct in assuming that this school is operated by Radford College, which you say maintains the building and pays all the upkeep and four of the teachers, I see no basis for the city to charge tuition for school children attending this State institution. Though the city pays the salaries of three teachers, it benefits in that school facilities are furnished children residing within the city.

If the facts are not as I understand them to be or the agreement between the city and the College authorities contains provisions affecting this matter, I will be glad to hear from you and to consider this matter further.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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SCHOOLS AND SCHOOL BOARDS—Tuition Not to be Charged by City for Non-Resident Pupil Attending School Operated by State College Located Therein.

March 26, 1947.

MR. F. E. DeHAVEN, Superintendent,
Radford City Schools,
Radford, Virginia.

My dear Mr. DeHaven:

This is in reply to your letter of March 20, 1947, in further reference to the charging of tuition for out of city pupils who attend the McGuffey training school.

While the City of Radford has the right to charge tuition to pupils attending its own schools who are not residents of the City, I do not believe that the City can directly charge tuition for such pupils who attend the McGuffey training school, which is operated by Radford College, a State institution.

It may be that the College itself could do this or require the County to participate in the expenses of the school as is done by the City of Radford.

If this is not done, I think that the City would be clearly justified in asking that children residing within the City be given preference in attending the school since the City is paying the expenses of three of the teachers. This is a matter which should be worked out by agreement between the City and the College.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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SENTENCE AND PUNISHMENT—Convict to be Eligible for Credit for Good Behavior Must Have Been Sentenced to Actually Serve One Year or More.

February 21, 1947.

HONORABLE W. FRANK SMYTH, Jr., Superintendent,
Virginia State Penitentiary,
Richmond, Virginia.

My dear Mr. Smyth:

This is in reply to your letter of February 13, 1947, from which for convenience I quote as follows:

"At the last session of the Legislature Section 5017 was amended to allow prisoners serving twelve months or more to earn good time credit."
"Quite frequently we receive orders sentencing prisoners to the Penitentiary for one year, or felon prisoners to the State Convict Road Force for twelve months, and the order suspends six months or a portion of the sentence. Most of the felon cases on the State Convict Road Force are required to serve out some fine and cost, unless such fine and cost have been paid.

"I would like for you to advise me if these sentences of twelve months or one year where part of the sentence is suspended are entitled to earn good time, credit on the portion of the sentence left to be served."

The pertinent provision in Section 5017 of Michie's Code of Virginia reads as follows:

"Every person who *** is convicted of a felony and sentenced to confinement for a period of one year or more *** shall, for every twenty days (he serves) *** be allowed a credit of ten days upon his total term of confinement *** (for good behavior) ***."

The pertinent feature of this statute is that the person claiming credit must have been sentenced to confinement for a period of one year or more. Where the court suspends such portion of a sentence as to reduce the amount actually to be served to less than a year, it cannot be said that the prisoner has been sentenced to confinement for a year. He has actually been committed to your custody for less than a year. Therefore, I am of the opinion that such prisoner is not entitled to the credit specified in this section of the Code.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
“When a person convicted of an offense, and sentenced to confinement therefore in the penitentiary, is received therein, if it shall come to the knowledge of the Superintendent of the Penitentiary that he has been sentenced to like punishment in the United States prior to the sentence he is then serving, the Superintendent shall, etc. * * *.”

From the wording of this statute, it is my opinion that both of the cases which you have set out in your letter come within its purview and each offender described therein could be awarded additional confinement under §5054.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

SENTENCE AND PUNISHMENT—Duty of Superintendent of Penitentiary Where Order of Commitment Appears Contrary to Law.

February 18, 1947.

HONORABLE W. FRANK SMYTH, JR., Superintendent,
Virginia State Penitentiary,
Richmond, Virginia.

My dear Mr. Smyth:

This is in reply to your letter of February 13, 1947, in which you enclose an order from one of our circuit courts sentencing the defendant to a term of “Twelve months at hard labor on The State Convict Road Force * * * and without any allowance for good behavior.” You then state:

“Section 5017, of the Virginia Code, allows all prisoners the privilege of earning one-third time off for good behavior, and I would like for you to advise me on cases of this kind if I should follow the law or the instructions of the Court.”

It is not the province of the Superintendent of the Penitentiary nor of the Attorney General to question the legality of an order of court of this type. If the order is void in part, upon which matter I express no opinion, the law affords a remedy to the defendant by way of appeal, or by habeas corpus, and it is a matter for the courts to determine. The duty of the Superintendent of the Penitentiary is to carry out the order of the court, which is the law of the case at hand, unless and until it is modified or set at naught by some additional court order.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SHERIFFS—Fees Collected as Administrator of Estate Subsequent to January 1, 1943, May be Retained.

September 12, 1946.

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

My dear Mr. Carter:

This is in reply to your letter of September 10, stating that you have been appointed administrator of an estate in the City of Martinsville and wish to
know, since the abolition of the fee system for compensating sheriffs and sergeants, whether or not you must turn in your fees for acting as said administrator.

In reply I shall quote a portion of an opinion on this matter rendered by this office to Honorable L. McCarthy Downs, then Auditor of Public Accounts, under date of February 6, 1943:

"I have expressed the opinion that all compensation received by the sheriff for the performance of any act which it is his duty as sheriff to perform, which in my opinion would include his duty as ex officio administrator of an estate committed to the sheriff pursuant to the statute, must be paid over to the county treasurer in accordance with the statute. While technically this may not come under the original definition of 'fees', this word has been used in connection with the administration of the fee system in Virginia to embrace all forms of compensation received by the so-called fee officers. Most of the compensation received by the treasurers and commissioners of revenue has been on a percentage or commission basis, yet they have been generally considered to be fees as that term is used in connection with the fee system.

"You will note that the fee system of compensation for sheriffs is abolished and the sheriffs shall hereafter be compensated for their services on a salary basis. In my opinion, the effect of this statute is to prohibit the sheriff from retaining as his own property any compensation received for performing his official duties other than the salary allowed to him by the Compensation Board, or by the Court on appeal therefrom."

Therefore, it is my opinion that, if you were appointed administrator of this estate pursuant to section 5374 of the Code and subsequent to January 1, 1943, (the effective date of the Act abolishing the fee system for sheriffs and sergeants), you are not entitled to retain your fees for services performed as said administrator.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

SOIL CONSERVATION COMMITTEES—Immune From Tort Liability.

May 19, 1947.

Mr. Verne R. Hillman, Executive Officer,
State Soil Conservation Committee,
Blacksburg, Virginia.

My dear Mr. Hillman:

This is in reply to your letter of May 10, 1947, in which you ask if the State Soil Conservation Committee or the local Soil Conservation Districts organized under Chapter 394 of the Acts of Assembly of 1938 can be held liable for damages in actions based upon tort.

These agencies are State agencies and in my opinion the immunity of the State from liability for damages for the torts of its agents is fully applicable to them. Of course, each private individual employed by such agencies is liable for his own torts, and a number of State agencies have carried liability insurance covering equipment operated by their agents for the purpose of furnishing protection to their employees and to the public. This is a matter of policy determined by the respective agencies involved.

Very sincerely yours,

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

STATE BOARD OF HEALTH—Purposes for Which Appropriation May be Spent.

HONORABLE EDWARD O. McCUE, JR.,
Member of the House of Delegates,
Richmond, Virginia.

My dear Mr. McCue:

This is in reply to your letter of January 17, in which you request my opinion upon the question whether or not the State Board of Health may utilize the sum of $500,000, or a part thereof, for each year of the present biennium which was appropriated in the 1946 general appropriation act under the title of "Item 321½." The purpose of this appropriation is thus expressed in the act:

"For expansion of local health units, medical examinations of school children, and for local control and eradication of tuberculosis...$500,000."

"It is provided, however, that the items for which this appropriation is expended shall be first approved in writing by the Governor; * * * ."

You will observe that, while the language above quoted clearly states the various objectives in view, it does not restrict the expenditure of the funds to any particular method of accomplishing the desired objective.

In my opinion, the proper interpretation of the item is that it confers authority upon the State Board of Health to expend the funds in any reasonable manner, which, in its judgment, is best calculated to accomplish the purpose expressed or any one of them. One of the purposes expressed is to carry out local control and eradication of tuberculosis. If in some localities this purpose can be best accomplished by expending the funds for sanatorium treatment of tuberculosis patients, and, if the Governor concurs in that view of the State Board of Health and expresses in writing his approval of that method of accomplishing the desired purpose, the funds could be properly used in accordance and conformative therewith.

As above indicated, the appropriation act does not undertake to specify any particular means or methods for exercising local control and accomplishing the eradication of tuberculosis, but leaves the particular method to be adopted to the State Board of Health, subject to the approval of the Governor.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE BOARD OF PHARMACY—No Authority Conferred on State Board of Pharmacy to Revoke Pharmacy Licenses.

MR. A. L. I. WINNE, Secretary,
Board of Pharmacy,
400 Travelers Building,
Richmond 19, Virginia.

My dear Mr. Winne:

This is in reply to your letter of June 28, in which you state that the State Board of Pharmacy, after notice and an opportunity to be heard, revoked the pharmacy license of Garland's Drug Store No. 2, 1102 Loudoun Avenue, N. W., Roanoke. This establishment was owned by W. D. Garland and M. C. Allen, neither of whom is a registered pharmacist. It further appears that upon visits to this establishment by the Board's inspector Mr. M. C. Allen, one of the owners, was in the prescription department preparing certain prescriptions
at the time. The question has now been raised by legal counsel for the two owners as to the authority of the Board of Pharmacy to revoke the license of a pharmacy as distinguished from the license granted to a registered pharmacist or assistant pharmacist.

The provision for registration of pharmacies was first enacted as an amendment to section 1674 of the Code by Chapter 464 of the Acts of the General Assembly of 1924. This statute contains no provision permitting revocation for cause of this pharmacy permit. Prior to that time the law provided for licenses to pharmacists and assistant pharmacists, and section 1677 of the Code provided for the terms and conditions under which their licenses could be revoked. This last mentioned statute seems to be the only one conferring upon the Board the power to revoke any licenses it has issued.

As originally enacted it was not intended to cover revocation of pharmacy licenses, for such licenses were not at that time authorized by law. It has not been amended since the 1924 statute providing for registrations or licenses. I do not believe the language of the statute is such that *ex vi termini* it would be broad enough to give the power to the Board without an amendment and re-enactment.

A general statement of the applicable law is to this effect:

"A license granted by the Board under statutory authority cannot be revoked by such Board in the absence of statutory authority or some provision in the license itself for revocation **." (33 Am. Jur. p. 382.)

I am, therefore, of the opinion that in the absence of specific statutory authority the Board of Pharmacy does not possess the power to revoke a pharmacy license as distinguished from the license granted to a pharmacist or assistant pharmacist.

Your letter makes reference to Regulation 12, which has been adopted pursuant to the new State Code of Administrative Law. Section 5b of the Administrative Agencies Act provides in part:

" ** nor shall anything in this act be construed to empower any agency to promulgate any rules other than those authorized by the statute creating the agency, **." (Chapter 160 of the Acts of 1944, page 202.)

This indicates that the Board of Pharmacy cannot adopt a regulation exercising powers which the legislature has not conferred upon it. The fact that the Board cannot revoke the pharmacy license does not impair its authority to aid in the prosecution of any violation of the penal provisions of the statute.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Position is Not Jeopardized by Continued Service in Army After End of Hostilities but Before End of War.

August 27, 1946.

Dr. Walter S. Newman, Vice-President,
Virginia Polytechnic Institute,
Blacksburg, Virginia.

My dear Dr. Newman:

This is in reply to your letter of August 24, the facts of which I shall attempt to summarize as follows:

A member of your faculty was given a military leave of absence to serve with the armed forces during the present war. At one time he contemplated securing a permanent commission in the regular army and, in order to be eligible
for consideration for the same, he agreed to stay in the army until July, 1947. He was not successful in securing a permanent commission in the regular army, but remains in service at this time by virtue of his agreement so to do until July, 1947, and is not willing to resign his present army position and return to your institution. Your problem is whether or not you are required to hold this place open for him until his agreement to serve in the army has expired.

As you doubtless know, the re-employment safeguards of the Federal Selective Training and Service Act do not have a mandatory application to the States or their political subdivisions. The relevant portion of the Federal statute is as follows:

"(C) if such position was in the employ of any State or political subdivision, thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay." 50 U. S. C. A., App. 308-b.

I construe this to be nothing more nor less than a pious resolution expressing the sentiments of the Congress of the United States.

Our State statute on this subject, chapter 363 of the Acts of the General Assembly of 1918, p. 540 (section 291-b of Michie's Code of 1942) is as follows:

"Be it enacted by the general assembly of Virginia: No State, county, or municipal officer or employee shall forfeit his title to office or position or vacate the same by reason of engaging in the war service of the United States; and any such officer or employee who voluntarily or otherwise enters such war service may notify the officer or body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office or position during the period of his war service; and the officer or body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in war service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting.

"All acts or parts of acts in conflict herewith are hereby repealed; and an emergency existing for this act, it shall take effect from its passage."

My conclusion from this is that the public office or employment is held open so long as "the regular officer is engaged in war service."

As you well know, the United States is still in a state of war and men are still being daily inducted into the military service. Our State statute prescribe no limitation as to when a person's war service shall cease and, in the absence of such, I believe your faculty member is still engaged in war service and, therefore, his position should be held open for him. I realize that this works a hardship upon you, but I see no escape from it until the Legislature sees fit to amend the 1918 Act.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

STATE EMPLOYEES—Leave of Absence to Attend Army Reserve School Not Authorized.

March 27, 1947.

COLONEL C. W. WOODSON, JR., Superintendent,
Virginia State Police,
Richmond, Virginia.

My dear Colonel Woodson:

This is in reply to your letter of March 20, 1947, in which you state that an employee of your Department who holds a First Lieutenant's Commission in
the United States Army Reserve has applied and been accepted by the United States Army for training in one of its service schools for a three months period starting April 7. You ask whether or not he is entitled to a military leave of absence under the provision of chapter 360 of the Acts of the General Assembly of 1918 (section 291-b of Michie's Code of Virginia).

The statute to which you refer provides that no State employee shall forfeit his position or vacate the same by reason of engaging in the war service of the United States. It is my opinion that a person who simply applies and is accepted for training in an Army service school for a definite three months period is not engaged in the war service of the United States within the meaning of that statute and is, therefore, not entitled to the military leave of absence provided for by the statute.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY DEPARTMENT—Condemnation Proceedings; Requisites of Order of Publication.

May 23, 1947.

MR. JAMES C. MARTIN
Attorney at Law,
612 Boxley Building,
Roanoke, Virginia.

My dear Mr. Martin:

I have your letter of May 20, with reference to the order of publication in the condemnation proceedings brought in Giles County on behalf of the State Highway Department, in which is involved the question of the necessity for stating in the affidavit for the order of publication the last known post office address of the defendants covered by the order, or a statement to the effect that the last post office address was not known.

Section 1969j(2) provides for the procedure in condemnation proceedings instituted by the State Highway Commissioner. In so far as pertains to an order of publication, it is dependent upon certain other sections. In this respect, it is provided:

"* * * the publication shall in other respects conform to sections 6043, 6069, 6070."

For instance, section 1969j(2) standing alone does not provide where or by whom the notice shall be posted, and does not provide for the mailing of the same to the last known post office address. It is dependent upon section 6070 to supply such information.

The highway statute is intended to simplify the procedure where an order of publication is necessary and states three grounds upon which an order of publication may be issued:

1. If the tenant or owner be not a resident of this State; or,
2. Cannot with reasonable diligence be found therein; or,
3. If it appears by affidavit that his residence is unknown.

These three grounds are not dependent upon either of the sections referred to. An affidavit to the effect that any of the three grounds exist is sufficient compliance with the statute for the issuance of an order of publication.

It is true that section 6069 concludes with the following language:

"* * * Every affidavit for an order of publication shall state the last known post office address of the defendant against whom publication is asked, or if such address is unknown, the affidavit shall state that fact."
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This, however, is not necessarily applicable in a condemnation proceeding by the Department of Highways because the section under which they proceed (1969j(2)) provides:

" * * * or if it appear by an affidavit that his residence is unknown, he may be proceeded against by an order of publication, which order, however, need not be published more than once a week for two consecutive weeks, and shall be posted not less than ten days previous to such application."

Therefore, reference to other sections is not necessary in this connection. This question has not been before the Supreme Court of Appeals of Virginia.

I am of the opinion that an affidavit filed pursuant to section 1969j(2) for an order of publication is sufficient compliance with the statute. However, since there is apparently some reason for a different interpretation, it would be a safer practice to also include in the affidavit the language of section 6069 as above quoted, i.e., to state the last known post office address, and, if such address is unknown, state that fact.

Of course, any party who appears and participates in the proceedings before the commissioners cannot complain of any defect in the order of publication, but will be deemed to have waived same by such appearance.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY DEPARTMENT—Procedure for Allocation of Funds Where a County Elects to Become a City.

HONORABLE J. A. ANDERSON, Commissioner,
Department of Highways,
Richmond, Virginia.

My dear General Anderson:

This is in reply to your letter of November 21, 1946, concerning a matter which will arise if Arlington County becomes incorporated as a city. You request my opinion upon the following question:

"When the State makes an allocation of funds for constructing highways in a county and the county, in the midst of construction, becomes a city, must the unexpended allocation be changed and future expenditures be based on the changed conditions?"

Chapter 367 of the Acts of Assembly of 1946 provides that an election may be held in Arlington County to determine whether the county shall be incorporated as a city of the first class and provides a charter for the city if the voters decide in favor of such incorporation. It contains no special provision regarding the expenditure of funds by the State Highway Commission upon roads within the corporate limits if the county becomes a city.

Since Arlington County withdrew from the provisions of the secondary road law, the question you ask is limited to expenditures by the State Highway Commission on roads in the primary system. While the law provides for the allocation of primary funds to the several construction districts, it does not provide for specific allocations to the various counties within the district, and I understand that the commission does not make specific allocations to the individual counties. The Commission does decide what projects within a district are the most necessary and desirable and then authorizes the expenditure of the funds needed to construct the project.
It is my opinion that, if and when Arlington County becomes a city, the expenditure of funds by the State Highway Commission within the corporate limits of the city would have to be governed by the statutes providing for the expenditures of State funds in cities, unless prior to such a time a contract had already been let under which the State had become obligated to the contractor for the payment for the completed project. If such a contract is let for a project which is not completed when the county becomes a city, the State can, in my opinion, proceed with the completion of the work.

Chapter 367 of the Acts of 1946 provides that the effective date of incorporation of the city of Arlington shall be the second day of the year following the year in which the voters decide that the county shall be incorporated.

It is my opinion, therefore, that, if the voters decide in favor of incorporation, no contract should be let after the election is held unless there is reasonable prospect that the work will be completed before January 2 of the year next following.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

STATE HIGHWAY DEPARTMENT—Procedure for Joint Contractors in Filing Certificates Relative to Workman’s Compensation.

November 1, 1946.

Mr. C. S. Mullen,
Chief Engineer,
Department of Highways,
Richmond, Virginia.

My dear Mr. Mullen:

This is in reply to your letter of October 29, 1946, in regard to the form of certificate concerning Workmen’s Compensation Insurance to be required when two contractors jointly undertake a contract for the State Highway Department.

Under your specifications contractors are required to file a certificate, executed by an approved insurance company, of the Workmen’s Compensation Insurance covering the contract awarded. You ask if two separate certificates, one filed by each of the two joint contractors, showing that their respective employees are covered by Workmen’s Compensation Insurance will be satisfactory.

The object of filing the certificate, I understand, is to give the Highway Department assurance that the employees of the contractor are adequately covered by insurance and that the contractor is adequately insured against losses. When two contractors jointly enter into a contract with the Department, each thus becoming responsible to the Department for the performance of the whole contract, but as between themselves agree that one is to do one phase of the work and the other is to do another phase of the work, I see no reason why two different certificates showing that the employees of each contractor, respectively are covered by Workmen’s Compensation Insurance would not be satisfactory.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
STATE MILK COMMISSION—Exercise of Various Powers Incident to Regulation of Milk Distribution.

Mr. R. W. Dickson, Secretary,
State Milk Commission,
Richmond 19, Virginia.

Dear Mr. Dickson:

This is in reply to your letter of July 30, submitting to me several specific inquiries with respect to the power of the State Milk Commission to control certain phases of the milk industry.

The gist of the first two questions is the power of the Commission through appropriate regulation to require base-holding producers to sell their allotments within the market area and to require distributors to accept this same milk.

Paragraph J of Regulation 3 is as follows:

“A producer having a base on the market, approved by the Commission, shall have the right to continue to ship all of his milk and/or cream to the distributor at whose plant such base is established. The milk delivered by such producer shall not be rejected by the distributor so long as the milk and/or cream is delivered regularly, is merchantable, and meets all requirements of the local and State Health Laws and Regulations.

“Paragraph J of Regulation 3 is as follows:

“A producer having a base on the market, approved by the Commission, shall have the right to continue to ship all of his milk and/or cream to the distributor at whose plant such base is established. The milk delivered by such producer shall not be rejected by the distributor so long as the milk and/or cream is delivered regularly, is merchantable, and meets all requirements of the local and State Health Laws and Regulations.

“Paragraph J of Regulation 3 is as follows:

No producer having a base, established in the market, and assigned to a distributing plant, can transfer his base and deliveries to another distributing plant, without first having obtained the written consent of the local Milk Board. Transfers of bases approved by the local Board, shall be reported immediately to the Commission.”

Before proceeding to answer you, it appears to me worth while to consider some of the economic and legal background of this problem.

Our Milk Control Act is Chapter 357 of the Acts of the General Assembly of 1934, page 558 et seq. Its preamble depicts the then existing chaotic conditions:

"Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political subdivisions thereof; and

"Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

"Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided: ** **

The Milk Commission is created and given broad powers (Section 3):

"(c) To supervise, regulate, and control the production, transportation,
processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

“(g) To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act. * * * * * * *

Two frontal assaults upon the constitutionality of this enactment have been repulsed. Reynolds v. State Milk Commission, 163 Va. 957, and Highland Dairy Farms v. Agnew, 300 U. S. 608, 57 S. Ct. 549 (1937).

To sustain this regulation it is, therefore, essential to show that “it is necessary to carry out the purposes of the Act”, which are to guarantee an adequate and healthful supply of milk and at the same time stabilize the credit status of the industry.

The key to the entire regulatory system is the power given to fix prices. Prices paid by the distributors to producers are fixed on a use basis, that is, the use to which the distributor puts the milk. The highest price category is fluid milk for human consumption, and below that come such uses as buttermilk, skimmed milk, ice cream, cottage cheese and butter. Implicit in this whole problem is the imponderable of surplus milk. Supply and demand fluctuate from day to day and, of necessity, each distributor must contract for a surplus to insure that his daily demands are met. The surplus is then diverted into by-products, as above outlined, which on a use basis have a cheaper price. The Commission in approaching the problem of regulation and control must take into consideration previous practices in the marketing of milk and its by-products, thus necessitating regulation of prices of milk for by-products.

With this background in mind, the Commission has established bases for producers, has licensed distributors, and has assigned producers to a designated distributor. Producers are forbidden to transfer their bases from one distributor to another without the prior assent of the local Board. The purpose of this is to guarantee to each distributor an adequate supply of milk for his consumer demands, and at the same time to prevent each producer from selling more than the proper proportion of his product in the highest use price category, thereby forcing the products of other producers in disproportionate quantities into use as by-products. Milk is a highly perishable commodity and, since it is practically essential that a surplus be maintained which eventually finds its way into the cheaper by-products, it is only fair and equitable that the surplus problem bear equally upon those who compete in the sale of milk. That is what this regulation attempts to do. When a producer makes application for transfer of his base from one distributor to another the local Milk Board cannot and does not exercise an arbitrary discretion in the matter. The Board must, to use legal parlance, exercise a sound judicial discretion. It weighs all the relevant economic and health factors in the matter and, if no dislocation results to them, I understand that it has been the uniform practice of the local Boards to grant these transfers.

The provision requiring distributors to accept milk of producers assigned to them if the milk is delivered regularly and meets health requirements has the same objective in view and is corollary to the other provision. This insures that the surplus market is absorbed on a pro rata basis, so to speak, and, of course, is not enforced so as to work a hardship. If one distributor accepts more milk than is necessary for his demands, then in practice he requests relief from the local Milk Board and producer bases are then transferred to one or more of his competitors. This regulation likewise protects an established market area, as set up by the Commission, by preventing distributors from buying milk at a distance and injuriously affecting the market surrounding his outlet. As long as these safeguards are maintained, I see no constitutional objection to this regulation.

The surplus problem has been attacked in various manners by different jurisdictions. Under a Federal Act, equalization pools have been established, insuring producers an average price return without discrimination. The United States Supreme Court has approved such an arrangement. United States v. Rock Royal Co-op., 307 U. S. 533, 59 S. Ct. 993 (1939). An Oregon statute to the same effect was sustained. Savage v. Martin, 161 Ore. 660, 91 P. 2d. 273 (1939).
In this case, at page 680, the Court lays its hand upon the nub of the surplus problem:

"Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

The method used in the present regulation is an alternative to the equalization pools and to my mind it certainly seems less objectionable.

Your third question is:

"Does the Commission have the power to license base-holding producers supplying marketing areas under the control of the Commission?"

It is not clear to me in just what connection you use the term "license." Section 3(k) of the Act gives the Commission express power to license distributors. I find no such provision with respect to producers. I would rather have some clarification of terminology before answering this inquiry.

Your last inquiry is:

"Do non-baseholding producers whose farms are located outside of a particular controlled market area who sell milk to distributors whose plants are located within controlled areas where milk shortages exist have a right to continue to sell their milk in such markets even though the market later becomes adequately served with milk produced within its local production area?"

Section 3(m) of the Act provides:

"The commission may define what shall constitute a natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; provided, that producers, producer-distributors, or their successors now shipping milk to any market may continue so to do until they voluntarily discontinue shipping to the designated milk market."

It would appear to me that it is within the discretion of the Commission as to whether or not such producers can continue to sell their products within a defined market area.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
STATUTES—Federal Rent Control Law Applicable to State Owned Property.

Dr. H. H. Hibbs, Dean,
Richmond Professional Institute,
901 West Franklin Street,
Richmond 20, Virginia.

My dear Dr. Hibbs:

This is in reply to your letter of May 20, 1947, in which you request my opinion as to whether United States rent control laws apply to property owned by the Commonwealth of Virginia and used exclusively for the education of students at a State college.

The Supreme Court of the United States in Case vs. Bowles, 327 U. S. 92, 90 L. Ed. 552, held that the Emergency Price Control Act was applicable to states and their political subdivisions and agencies. In City of Dallas vs. Bowles, 152 Fed. (2d) 464, the rent control provisions of this statute were held applicable to the City of Dallas.

In view of these decisions, it is my opinion that the United States rent control laws do apply to property owned by the Commonwealth of Virginia.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Fire Occurring During Year Does Not Abate Full Tax On Realty Thus Destroyed.

HONORABLE CECIL C. FROST,
Commissioner of the Revenue,
Hampton, Virginia.

My dear Mr. Frost:

This will acknowledge receipt of your letter of September 25, asking my interpretation of section 263 of the Tax Code. You state further that a bowling alley building in your county was destroyed by fire on February 1, 1945, and the owner of this property has been to see you seeking to have his 1945 taxes prorated due to the loss of the building on the date above indicated.

As your letter indicates, real estate tax liability is determined as of January 1 of each year, although the tax is not due and payable until much later. The statute to which you refer provides for correction of the assessment for the year next succeeding the one in which the fire or loss occurred, that is, you might make an appropriate adjustment for 1946 taxes, but not for taxes for 1945. I have discussed this matter with Honorable C. H. Morrissett, State Tax Commissioner, and he concurs in this view.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.

HONORABLE H. LESTER HOOKER, Commissioner,
State Corporation Commission,
State Office Building,
Richmond 19, Virginia.

My dear Judge Hooker:

I am in receipt of your recent letter in which you ask concerning the disposition of the fund of something over $200,000 which has been accumulated over a period of years from the tax on gasoline sold at the Washington National Airport. This fund has been held in suspense under an opinion of this office to the Division of Motor Vehicles dated September 21, 1941, pending the establishment of a boundary line between the District of Columbia and the Commonwealth of Virginia. That boundary line has now been established by Chapter 26 of the Acts of 1946, in which Act it is provided “that taxes and contributions in connection with operations, sales and property on * * * the Washington National Airport heretofore paid either to the Commonwealth of Virginia or the District of Columbia are hereby declared to be paid to the proper jurisdictions * * *.” In view of the provision I have just quoted, I am of opinion that this fund may now be released and disposed of as indicated below.

By Chapter 368 of the Acts of 1938 there was created a special fund consisting of a tax of three cents per gallon on gasoline sold to certain operators of airplanes, said special fund to be disbursed by the State Corporation Commission in the interest of aviation. This fund was continued by Chapter 71 of the Acts of 1940. However, Chapter 355 of the Acts of 1942 repealed Chapter 368 of the Acts of 1938, including this special fund, it being provided that the unexpended balance of this fund was reappropriated to the Commission. It follows that after April 1, 1942, the effective date of the 1942 Act, there were no more additions to this special fund, and I am, therefore, of opinion that there now may be released to the State Corporation Commission for the promotion of aviation so much of this $200,000 fund as was accumulated prior to April 1, 1942, which has not been previously expended by the Commission.

During the bienniums beginning July 1, 1942, and July 1, 1944, the special aviation gas tax fund having been abolished, the tax on aviation gasoline has been paid into the regular motor fuel tax fund and the appropriations to the State Corporation Commission for these two bienniums for its Division of Aeronautics has been paid out of this fund. See Chapter 206 of the Acts of 1942. Thus the motor fuel tax fund as a practical matter consisted of two parts—one the highway fund, and the other the aviation fund. But it was not intended by the General Assembly that the amount paid to the State Corporation Commission should exceed the amount of the tax collected on aviation gasoline. This is made plain by Items 405 and 78 of the Appropriation Acts of 1942 and 1944 (Acts of 1942 and 1944 at pp. 878 and 674, respectively), each of which reads as follows:

“For the promotion of aviation in the public interest, to be paid only out of the tax on gasoline sold for use and used in flights within the boundaries of the State, exclusive of the refund now and hereafter allowed by law to purchasers of gasoline for use and used in aircraft, and not out of the general fund of the treasury * * *.”

It follows, therefore, if during the two bienniums in question the amounts paid from the motor fuel tax fund to the State Corporation Commission for its Division of Aeronautics has exceeded the amount collected from the tax on aviation gasoline then the Highway Fund should be reimbursed to the extent of such excess and the proper source of such reimbursement would appear to be the $200,000 fund about which you write. After such reimbursement the balance of this fund, if any, or so much thereof as may be necessary may be
REPORT OF THE ATTORNEY GENERAL


Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.


HONORABLE E. T. WHITE,
Clerk of Norfolk County,
Portsmouth, Virginia.

My dear Mr. White:

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

"The Board of Supervisors of Norfolk County has recently, by resolution, released all penalties, interest and costs, accrued on any taxes upon real estate due Norfolk County for the year 1945 and all previous years that were unpaid at the time the resolution was passed, as per Chapter 140 of the 1946 Acts of Assembly.

"I would appreciate your opinion, as soon as possible, as to whether or not the clerk's redemption fee, collectible under section 3484, subdivision 41, of the Code, is included in the word 'costs'. In other words, does the clerk have to perform the duty of collecting and handling the money and making statements for taxes that were delinquent without this compensation? This office has heretofore collected this fee."

The Act to which you refer provides that the Board of Supervisors may "release all penalties, interest and costs accrued on any taxes upon real estate due such county * * * for the year nineteen hundred and forty-five and forty-five and all previous years, that are unpaid at the time the resolution or ordinance of the governing body releasing the same becomes effective." The Act further provides that the release shall be made "upon the condition that the principal amount of such taxes for the year nineteen hundred and forty-five and forty-five and all previous years shall be paid on or before the fifth day of December, nineteen hundred and forty-six."

Obviously the purpose of the Act is to encourage the prompt payment of delinquent taxes on real estate, and it seems to me that the fact that not only the penalties and interests released, but also the "costs," indicates that the clerk's fee to which you refer is included in the "costs." This thought is further supported by the fact that the statute provides that only the "principal amount" of the taxes shall be paid.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Where Last Day for Payment of Taxes Falls on Sunday Taxes Paid on Following Day are Not Delinquent.

MISS ELSA B. ROWE,
Treasurer,
Heathsville, Virginia.

My dear Miss Rowe:

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

"When June 30 falls on Sunday is a county treasurer permitted to omit
from his delinquent lists taxes paid on Monday, the first day of July. An
expression of your opinion in this matter will be appreciated."

I have heretofore expressed the opinion that, when the last day for the
payment of taxes falls on Sunday, such taxes may be paid on the following
day without penalty. Following this precedent, I am of the opinion that when
June 30, the day as of which delinquent lists speak, falls on Sunday it would
be proper to omit from such lists taxes paid on the following Monday.

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

TAXATION—Store Operated by Private School is Subject to merchant’s
License Tax.

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

My dear Mr. Whitehead:

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

"Chatham Hall, a girls’ school located here at Chatham, operates a store
in the school for the convenience of the girls and teachers.

"Please advise whether or not they are required to purchase a license
to operate this store."

I assume the store to which you refer is of the type customarily operated by
educational institutions for the sale of stationery, books and other small supplies
for the students. If the institution is buying and selling merchandise at this type
of store, I know of no escape from the conclusion that it is subject to the
regular State merchant’s tax. I am advised by the State Tax Commissioner that
he has uniformly ruled in cases of similar enterprise operated by other institutions
of learning that they are subject to the State merchant’s license tax. The fact
that the school may not be operating for profit, in my opinion, has no bearing
on the matter.

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

TAXATION—When County to Make General Reassessment of Real Estate.

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

My dear Mr. Burks:

This is in reply to your letter of March 21, 1947, in which you ask for my
opinion as to when Bedford County is required to have a general reassessment
of real estate.

You state that Bedford County had a population of 29,687 according to the
census of 1940. It is, therefore, governed by the provisions of the third para-
graph of Section 242 of the Tax Code of Virginia, which reads as follows:
“There shall be a general reassessment of real estate in the year nineteen hundred forty-seven and every eighth year thereafter in each of the counties of this Commonwealth containing twenty-six thousand or more population according to the United States census of nineteen hundred forty; but if any such county has had a general reassessment of real estate therein in year nineteen hundred forty-four or nineteen hundred forty-five, or has such general reassessment in the year nineteen hundred forty-six, there shall be no general reassessment of real estate in such county in the year nineteen hundred forty-seven, and the next general reassessment of real estate therein shall be in the eighth year after the last general reassessment, and subsequent general reassessments therein shall be in every eighth year thereafter.”

This provision is mandatory, and it is, therefore, my opinion that Bedford County is required to have a general reassessment in 1947. The general provision of paragraph two of Section 242 authorizing a reassessment in any year and prohibiting such reassessment oftener than eight years is not, in my opinion, applicable to Bedford County, since counties in its classification are specifically covered by paragraph three quoted above. Therefore, the fact that Bedford County had a reassessment in 1940 would not prohibit a reassessment in 1947. This conclusion is supported by the fact that in paragraph three an exception is made in cases where the counties there dealt with have had a reassessment in 1944, 1945, or 1946, but no exception is made where the reassessment was earlier but still within eight years of 1947.

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

TAXATION—Property of Municipal Utility Lying Partially in County; When Subject to Taxation.

March 20, 1947.

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

My dear Mr. White:

This is in reply to your letter of March 7, 1947, in which you request my opinion upon whether or not that portion of the water system of the City of Staunton located in Augusta County should be assessed for taxation by the County.

Under section 183 of the Constitution of Virginia buildings or land owned by a municipality, but used as a source of revenue or profit, are liable for taxation. See City of Newport News vs. Warwick County, 159 Va. 571. I, of course, am unable to pass upon the question of whether the water system of the City of Staunton is a source of revenue or profit to the City, and I suggest that in determining this question the facts of the case be considered in the light of the opinion of the Supreme Court in the case of Newport News vs. Warwick County, supra.

If it is determined that the property is such as is subject to taxation, the assessment should be made by the Commissioner of the Revenue rather than through the State Corporation Commission since the jurisdiction of the State Corporation Commission is limited to the assessment of properties of public service corporations and does not extend to the assessment of properties of municipalities. In making the assessment the Commissioner of the Revenue should secure the information required by section 435-a of the Tax Code, as suggested by the Honorable C. H. Morrissett in his letter of February 13, 1947.

Very sincerely yours,
ABRAM P. STAPLES,
Attorney General.
TAXATION—State Institution Not Subject to Special Service Charge by a Municipality. January 30, 1947

HONORABLE GEORGE M. COCHRAN,
City Attorney,
Barristers Row,
Staunton, Virginia

My dear Mr. Cochran:

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

"Sewer service in the City of Staunton is financed by real estate taxes with an additional charge levied for making sewer connections with the City sewer line. It is the desire of the City Council of Staunton to require certain State institutions and colleges which are exempt from real estate taxes to pay sewer service charges based upon their use of the City sewerage facilities."

I assume that you have reference to an institution such as the Western State Hospital, which is wholly owned by the State and operated by it in the exercise of a recognized governmental function. Any tax or charge assessed against this institution therefore would constitute a tax or charge against the State. As I understand the suggestion which your Council is considering it is to impose upon the State, because of the constitutional exemption of its property from taxation, a charge from which other property owners are exempt.

Even though it were to be conceded that the State should pay a charge for the use of facilities furnished by a municipality when the charge is imposed upon all other property owners, it is my opinion that such a charge imposed upon the State alone would be clearly unauthorized and discriminatory, and therefore invalid. I might add that I know of no precedent for such an imposition, and you can readily appreciate the far-reaching results that might follow, such as charges for fire protection, police protection, and for many other governmental services.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TAXATION—Priority of Lien of State for Personal Property Tax in Creditor's Suit; in Mortgage Foreclosure. October 22, 1946

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

My dear Mr. Huber:

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

"I have a 1946 tangible personal property assessment against a person who is being sold out, part of the property being sold by a Trustee under a deed of trust and part of it by Sheriff's sale by reason of execution in the hands of the Sheriff, both sales, as it happens, being held on October 19. I also understand that a bank has an attachment against any remaining personal property after the aforesaid sales. Some of the items of property listed for sale are itemized in the Commissioner of the Revenue's assess-
ment. However, the bulk of it is listed as a whole; for example, all farming implements and machinery are assessed at $10,000.00 as a whole.

"The 1946 tax against this person, of course, will not be past due and subject to the usual distress proceedings for taxes until after December 5. The person who is assessed with the property paid State capitation tax here in 1945, but is not assessed with capitation tax for 1946. He has been in and out of the county during the past several years, but at present his whereabouts is unknown. I believe the Trustee will, or should, pay the 1946 tax, at least on the specific items of property sold, so far as they are determinable.

"I would appreciate it if you would advise me what recourse, if any, I have as Treasurer and the procedure necessary in order to collect this 1946 tax assessment from either or both of the above mentioned Trustee and Sheriff, and what the situation would be as regards the distraint of any remaining property which, as I understand, has been attached."

It was held in *Drewry v. Baugh*, 150 Va. 394, that a county has a lien "on each specific piece of personal property for the taxes and levies due thereon." This ruling was reaffirmed in *United States v. Waddill, Holland and Flinn*, 182 Va. 351. *Drewry v. Baugh* likewise holds that this lien has property over a deed of trust or mortgage upon such personal property. Whether or not any particular taxes are assessed against specific personal property is a question of fact to be determined from the tax return made by the taxpayer.

*Drewry v. Baugh*, supra, also holds that this lien does not come ahead of a prior lien of an execution creditor. I know of no authority for a treasurer to now distraint for 1946 taxes on personal property, the pertinent statutes contemplating, it seems to me, that distraint shall not be made until after December 5, the taxes not becoming delinquent until after that time.

In view of what I have written, the best suggestion I can make as to your procedure for collecting these 1946 taxes is for you to notify the Trustee under the deed of trust of your claim for taxes and call on him for the payment of same out of the proceeds of the sale.

As to the property to be sold at the Sheriff's sale, assuming it to be sold by virtue of a prior lien of an execution creditor, I do not know of any steps you could take to collect the 1946 taxes on such property unless proceeds of the sale are more than sufficient to pay the prior lien plus the costs.

Of course, you realize that what I have written is in no way to construed to relieve the owner of the property from his personal liability for the taxes assessed on such property.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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**TAXATION—Tax Lien on Chattel is Superior to Levy by Execution Creditor.**

May 23, 1947

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

My dear Mr. Huber:

This is in reply to your letter of May 15, 1947, regarding the collecting of taxes on certain tangible property. You ask whether or not a lien for tangible personal property taxes assessed upon a specific piece of property takes precedence over the lien of an execution creditor who levied upon the property before the distress for taxes was levied.
In *Drewry vs. Baugh*, 150 Va. 394, it was held that there is a lien on each specific piece of personal property for the taxes and levies due thereon. This rule was reaffirmed in *Chambers vs. Higgins*, 169 Va. 345, in which the Court said that a tax levied against a specific chattel is a paramount lien thereon, and also in the case of *United States vs. Waddill, Holland and Flinn*, 182 Va. 351.

While in *Drewry vs. Baugh*, supra, it was held that a distress levied upon personal property for general taxes due was inferior to the lien of an execution creditor who had made a prior levy upon the property, the Court pointed out that no part of the taxes were due upon the specific property in controversy. In *United States vs. Waddill, etc.*, supra, it was held that a distress for taxes due upon specific property took precedence over the distress of a landlord which had been made prior to the distress for taxes.

It is my opinion, therefore, that since the Supreme Court has held that there is a paramount lien against each specific chattel for taxes due thereon and since this tax is assessed as of January 1 of each year, this lien for taxes is superior to the lien of an execution creditor even though the creditor levies upon the property prior to the actual distress for taxes.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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**TRADE MARKS—Must be a Mark Used in Connection With a Vendible Commodity to be Registerable.**

*Honorable Jesse W. Dillon,*
Secretary of the Commonwealth,
Richmond, Virginia.

My dear Mr. Dillon:

This is in reply to a letter of June 15, from Mrs. Thelma Y. Gordon, then Acting Secretary of the Commonwealth, with reference to the application for registration of a trade mark. The application is on behalf of Arthur Clarendon Smith, trading as Smith's Transfer & Storage Company, who seeks the registration of these words "DON'T MAKE A MOVE WITHOUT CALLING SMITH'S" as appended to the cards in the application.

Of course, this combination of words cannot be registered as a trade mark with reference to transfer and storage business, inasmuch as it pertains to a service offered the public and not to a vendible commodity. As to its registration with reference to the sale of articles of furniture, I am likewise of the opinion that it is not subject to registration.

The words under consideration are more appropriately a trade slogan and, as such, come within the category of trade names. See 52 Am. Jur. 512. A trade name is subject to protection at common law where its use is attempted by a competitor, but our statute does not provide for the registration of trade names as distinguished from trade marks. See Report of the Attorney General 1941-1942, page 165. I am, therefore, of the opinion that this application for registration should be denied.

Very truly yours,

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

TREASURER OF COUNTY—Deposit of Bond With Treasurer of State.

HONORABLE JOHN LOCKE GREEN,
Treasurer of Arlington County,
Arlington, Virginia.

September 23, 1946

My dear Mr. Green:

This is in reply to your letter of September 16, in which you state that by virtue of Chapter 111 of the Acts of Assembly of 1942 a Pension and Retirement Board has been set up in Arlington County and by virtue of your office you are a member of said Board. The Board has directed you to give bond for the funds coming into your hands and you wish my opinion as to whether or not said bond or securities may be deposited by you with the State Treasurer of Virginia.

In reading Chapter 111 of the Acts of 1942 I find no provision to the effect that the moneys appropriated for the purposes therein set forth shall be treated any differently than any other funds which may pass through your hands as County Treasurer, other than the mere mechanics of bookkeeping.

Chapter 114 of the Acts of 1942, which adds section 350-b to the Tax Code, is as follows:

"Be it enacted by the General Assembly of Virginia, That the Tax Code of Virginia be amended by adding thereto a new section numbered three hundred and fifty-b, as follows:

"Section 350-b. Deposits with Treasurer of Virginia to protect deposits by county treasurers in certain counties; how controversies determined.—In any county of the Commonwealth having a population of one thousand or more per square mile according to the last preceding United States census, and in any county which adjoins a county having a population of one thousand or more per square mile according to such census, a depository of county funds may, in lieu of depositing securities as provided in subsection (e) of section three hundred and fifty hereof, deposit the said securities with the State Treasurer, whereupon the faith and credit of the Commonwealth shall be pledged for their return to the depository in accordance with the provisions of the agreement under which they are deposited. In cases of controversy arising between the parties while the securities are actually in the custody of the State Treasurer, the Commonwealth of Virginia hereby consents to be sued with respect thereto, and where the Commonwealth shall become a party to any such suit, the State Treasurer and the Auditor of Public Accounts shall be named defendants on behalf of the Commonwealth. Any such suit shall be brought in the circuit court of the City of Richmond, and the controversy shall be determined as in other suits at law or in equity, as the case may be."

It is my opinion that this last statute is broad enough to cover bonds given to secure the retirement funds and you may dispose of said securities in accordance with the provisions of section 350-b.

Very truly yours,

ABRAM P. STAPLES,
Attorney General.
TRIAL JUSTICES—Accounting Procedure Where Trial Justice Serves Both County and Town.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

My dear Mr. Bennett:

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

"We have been informed by the Trial Justice Court of Montgomery County that that court, in the very near future, will be charged with responsibility of trying all cases involving violations of ordinances of the Town of Christiansburg in addition to trying other cases involving violations of ordinances of Montgomery County and the laws of the Commonwealth of Virginia. The trial justice wishes advice as to whether section 2550 of the Code of Virginia requires him to include in his report to the clerk of the circuit court, in the manner prescribed by the section, the cases handled by his court as a result of violations of the ordinances of the Town of Christiansburg.

"We shall appreciate it if you will review section 2550 for us and advise us if he should include in his monthly report the cases tried under the ordinances of the Town of Christiansburg."

In my opinion, section 2550 of the Code does not contemplate that a trial justice shall include in the report the cases tried by him involving violations of town ordinances. The sections following 2550 make this plain. Likewise, the trial justice is required by section 2550 to pay to the clerk of the circuit court at the time of making the report the fines and costs collected by him and, if violations of city and town ordinances are to be included in the report, this provision is inconsistent with that contained in section 4987-m of the Code requiring trial justices to promptly pay into the treasury of the city or town fines collected for violations of city or town ordinances.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICES—Bank Service Charge is Legitimate Expense Item of Trial Justice.

HONORABLE J. GORDON BENNETT,
Auditor of Public Accounts,
Richmond 10, Virginia.

My dear Mr. Bennett:

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

"The General Assembly of 1936 passed an act requiring trial justices along with certain other public officials to establish an official bank account and substantially to deposit all monies collected by them in their official capacity to the credit of this account (see Acts of Assembly, 1936, Chapter 288, page 474).

"During the past several years banks throughout the State have generally made a service charge for the bank's activities in connection with
the handling of these accounts because of the increased cost of operations. So far as we have been able to determine there is no provision in law which would permit a trial justice, for example, to deduct from funds which he receives officially for the benefit of the State, county, city, town, or individuals the amount charged to his bank account for services by the bank in which his account is located. We have felt that in view of the provisions of the first paragraph of Section 4987e (Michie's Code of Virginia) the service charges made by banks are a proper expense of a trial justice's office and should be paid by the county as are certain other expenses of the office.

"We should appreciate it very much if you will review this matter for us and give us your opinion as to whether service charges made by banks for the handling of a trial justice's bank account required by law should be paid by the board of supervisors of the trial justice's county."

The Code section 4987e, to which you refer, provides that the expenses for supplies (office), printing, etc., shall be borne by the respective counties. It has become customary throughout the State for banks to make a service charge in connection with handling all accounts of their depositors. In cases where all banks of deposit which are available to a trial justice impose this service charge, it is my opinion that it is an office expense which it is necessary for the trial justice to incur in the discharge of the duty imposed upon him by law to deposit his money in a bank. In this view of the matter, I am of opinion that such service is an expense which should be borne by the county of which the officer is trial justice.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

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TRIAL JUSTICES—Authority to Issue Process by Order of Publication.

November 7, 1946

HONORABLE ALBERT G. PEEY,
Trial Justice of Tazewell County,
Tazewell, Virginia.

My dear Mr. Peery:

I am in receipt of your letter of November 5, from which I quote as follows:

"I would thank you to advise me whether or not in attachment proceedings the Trial Justice, or his Clerk, has the authority to issue an order of publication against a non-resident defendant under sections 6069 and 6070 of the Code of Virginia. Or is it necessary that this order of publication be issued by the Clerk of the Circuit Court? In your ruling of February 1, 1938, in a letter addressed to Honorable Harold F. Snead, Trial Justice of Henrico County, you do not state specifically whether or not the order of publication shall be issued by the Trial Justice or his Clerk, or by the Clerk of the Circuit Court."

Section 4987-e(3) of the Code (Michie 1942) provides that in a case where an attachment is returned executed and the defendant has not been served with a copy thereof "the trial justice, upon affidavit in conformity with sections six thousand and sixty-nine and six thousand and seventy of the Code, shall forthwith cause to be posted at the front door of the courthouse of the county a copy of the said attachment and shall file a certificate of the fact with the papers in the case, and, in addition to the said posting, an order of publication shall be awarded and published in accordance with the provisions of six thousand and sixty-nine and six thousand and seventy of the Code of Virginia; * * *". In my opinion, where the order of publication is awarded from
the Trial Justice Court this may be done by the Trial Justice or his Clerk and not by the Clerk of the Circuit Court. The reference to sections 6069 and 6070 of the Code in the above quotation is made simply for the guidance as is the procedure which the Trial Justice or his Clerk should follow.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.

TRIAL JUSTICE CLERK—May Issue Felony Warrants; May Not Keep Fees Charged for Taking Affidavits and Administering Oaths.

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

My dear Mr. Smith:

This is in reply to your letter of September 13, the first paragraph of which is as follows:

"Will you be so kind as to give me an opinion as to whether or not a duly qualified clerk of the Trial Justice Office may issue criminal warrants for felony and misdemeanors, or for only misdemeanor cases."

Section 4987-g of Michie's Code of 1942 is in part as follows:

"Such clerk shall be a conservator of the peace within the territory for which the trial justice for whom he is clerk was appointed and may within the jurisdiction, territorial and otherwise, of such trial justice, issue warrants and processes original, mesne and final, both civil and criminal, issue abstracts of judgments and subpoenas for witnesses, and grant bail in misdemeanor cases. * * * "

It is my opinion that this language is broad enough to authorize the issuance by such clerk of warrants of arrest in both felony and misdemeanor cases.

You also ask:

"Also will thank you to tell me whether there are any provisions in the law which would prohibit the Trial Justice Clerk from taking signatures to affidavits, not involving work in the Trial Justice Office, and collecting the usual fees for his personal use? In other words, may the clerk in the Trial Justice Court take affidavits for renewal of Virginia operator's license and thereby make a little additional money?"

The statute quoted above continues:

"He shall have authority to take affidavits and administer oaths and affirmations, but shall have no authority to take depositions, or to take acknowledgments to deeds or other writings for purposes of recordation."

The concluding paragraph of section 4987-g is:

"Such clerk, deputy clerk or substitute clerk shall receive no compensation for his services other than the salary above provided. He shall deliver all fees collected by him to the trial justice for distribution in the same manner as provided for other fees collected by the trial justice."

In view of this last provision, it is my opinion that the clerk of the Trial Justice Court has no authority to retain fees collected by him for acts performed within the powers enjoined or allowed to him by general law.

Very truly yours,

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

VIRGINIA MUSEUM OF FINE ARTS—Extent of Authority to Produce Motion Pictures.

Honorable William M. Tuck,
Governor of Virginia,
Richmond, Virginia.

June 11, 1947

Dear Governor Tuck:

In your letter of May 23, you request a written opinion from me upon a question raised in a letter addressed to you by Thomas C. Colt, Jr., Director of the Virginia Museum of Fine Arts. The inquiry arises out of the provisions of Item 1293 1/2 of the general appropriation act of 1946, Acts of 1946, page 820, which is as follows:

"The unexpended balance of the $100,000 appropriated to the State Board of Education by Item 13 of Chapter 78 of the Acts of Assembly of 1945, for the production of motion picture films of historical sites, objects and scenes, and natural resources distinctive to Virginia, is hereby reappropriated to the State Board of Education, to be expended for the same purposes."

The question is whether or not the above quoted provision confers authority upon the State Board of Education to produce motion picture films of the "Virginia Museum of Fine Arts, its collections of original objects of art, representative of all the great ages in man's history, and its work in serving the creative artistry and inspiration of Virginia's people."

Whether or not the above mentioned subjects of the proposed motion picture constitute "sites, objects and scenes * * * distinctive to Virginia," in my opinion, are largely questions of fact and within the general discretion of the State Board of Education to determine. If in the opinion of the State Board of Education this type of motion picture comes within the provisions of the language above quoted, in my opinion it could not be said as a matter of law that this would constitute an abuse of the discretion of the Board.

Sincerely yours,

Abram P. Staples,
Attorney General.

VIRGINIA PROTECTIVE FORCE—County May Not Appropriate Funds to Support of Company Located in a City of the "First Class."

Honorable Charles B. Godwin, Jr.,
Commonwealth's Attorney,
National Bank of Suffolk Building,
Suffolk, Virginia.

July 25, 1946.

My dear Mr. Godwin:

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

"The city of Suffolk is a city of the first class and is situated wholly within Nansemond County.

"The city of Suffolk has at present a Company of the Virginia Protective Force that desires to keep this Company in existence and it will be necessary to do so to make certain appropriations to it. They also desire that the County of Nansemond also make appropriations to this Company, as there are approximately seven thousand people living in the suburbs of the City of Suffolk, which suburbs are in the County."
“I find in reading the Military Code, Section 2673(98) that counties and cities may appropriate if the organizations are maintained within the limits of the counties and cities respectively, and that counties may appropriate for such organizations if they are maintained in any incorporated town or city of the second class located within the county.

“The Statute seemingly does not give the right of the county to appropriate to such an organization maintained within a city of the first class even though the city is located within the county.

“I would like very much your construction of this Act and advice as to whether or not the Board of Supervisors of Nansemond County could appropriate to such an organization maintained in the City of Suffolk.”

I concur in your interpretation of the Code section referred to. In my opinion, the fact that the statute authorizes a county to make appropriations for such organizations as are maintained in an incorporated town, or in any city of the second class located therein, should be construed as impliedly limiting the authority to make such appropriations to the cases specifically designated, and would not include organizations maintained in a city of the first class even though such city is located within the boundaries of a county.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.

VIRGINIA STATE BAR—No Authority to Publish Legal Periodical.

May 29, 1947.

R. E. BOOKER, Esq., Secretary-Treasurer,
Virginia State Bar,
408 Law Building,
Richmond 19, Virginia.

My dear Mr. Booker:

In your letter of May 27, 1947, you state that a committee of the Virginia State Bar is studying the advisability of the Bar’s publishing a monthly bulletin which will carry news of interest to the Bar, an account of the activities of the Bar, and would also make reference to the opinions rendered by the Supreme Court of Appeals, but would not attempt to print any of those opinions in detail. You ask whether under the provisions of chapter 314 of the Acts of Assembly of 1940 the Bar is prohibited from publishing such a monthly bulletin.

I do not find any statute authorizing the Virginia State Bar to expend its funds for such service. Moreover, section 3 of the Acts to which you refer expressly provides that none of the funds appropriated for the administration of that Act shall “be devoted to publishing decisions of the Supreme Court of Appeals of Virginia or to law magazines or to buying any such publication.” In view of that provision it is my opinion that the Virginia State Bar is prohibited from publishing such a monthly bulletin as you mention.

Very sincerely yours,

ABRAM P. STAPLES,
Attorney General.
WITNESSES—Fees to be Paid Commonwealth's Witness Even Though he is Not Used.

HONORABLE O. B. OMOHUNDRO,
Trial Justice,
Orange Court House,
Virginia.

My dear Judge Omohundro:

I have your letter of July 17, which I quote in full as follows:

"Section 3529 of the Code of Virginia (Michie's 1942) provides 'a person attending as a witness under a summons shall have fifty cents for each day's attendance and four cents per mile for each mile beyond ten miles necessarily travelled to the place of attendance and the same for returning'.

"In a recent case before this court, attendance under the above section was claimed by several witnesses. This case was dismissed on motion by the Attorney for the Commonwealth. Therefore, no costs were assessable against the accused. I find no provision under which said witness attendance may be paid from the funds at our disposal. Please advise if the provision is made for such payments from Commonwealth funds, and if so, the proper procedure to follow."

Section 3530 of the Code provides that the sum to which a witness is entitled shall be paid out of the (State) treasury in any case in which the attendance in any court is for the Commonwealth except where it is otherwise specially provided. In all other cases it shall be paid by the party for whom the summons issued.

You do not state whether the witnesses claiming attendance were summoned by the Commonwealth or by the defendant. If they were summoned by the Commonwealth, their costs should be paid out of the criminal expense appropriation to the State Comptroller. In each case the clerk of the court should execute a certificate, as provided in said section 3530, after the entry is made pursuant to the oath of the witness as provided in section 3529. The payment by the Comptroller would be upon the certificate of the clerk, which, as a matter of form, I think should be approved by the Trial Justice.

These two sections of the Code seem to me to cover the case you have in mind.

Sincerely yours,

ABRAM P. STAPLES,
Attorney General.
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Constitution of Virginia

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